Federal Courts in Context

First Edition

2025 Supplement

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Preface

The First Edition of *Federal Courts in Context* was published in early 2023 and included discussion of significant cases decided by the Supreme Court in 2022. This Supplement addresses new developments in federal courts doctrine as well as important developments in closely related fields, such as administrative law. This Supplement covers the cases from October Term 2022, October Term 2023, and October Term 2024. The materials are incorporated by reference to the chapter and page of the casebook so you can decide whether to add them to your coverage, but the supplement can also simply be read as an update in preparation for teaching.

Chapter 2 includes the Court's decision in *Wilkins v. United States*, which addressed the thorny question of when a procedural rule operates as a jurisdictional bar. The Court held that the Quiet Title Act's 12-year statute of limitations was nonjurisdictional in accordance with the rule that Congress must make a clear statement if it intends for a procedural rule to have jurisdictional effect.

Chapter 3 includes several new cases that address standing and mootness, areas in which the Court has been particularly active. These cases include *Food and Drug Administration v. Alliance for Hippocratic Medicine* and *Murthy v. Missouri*, which involve access to abortion medication and online speech on social media platforms, respectively. In both cases, the Court held that the plaintiffs lacked standing to sue, with the Court reasoning in *Alliance for Hippocratic Medicine* that "some issues may be left to the political and democratic processes." Yet in other politically charged cases, including challenges to affirmative action in higher education, the Court held that there was standing to sue. *Students for Fair Admissions v. President and Fellows of Harvard College.* In *Federal Bureau of Investigation v. Fikre*, the Court held that a challenge to enforcement of the federal government's No Fly List was not moot, emphasizing that "virtually unflagging obligation" of the federal courts to decide justiciable cases and controversies. Finally, the supplement includes *Diamond Alternative Energy LLC v. Environmental Protection Agency*, in which the Court concluded that the redressability requirement was about aligning injuries with remedies as it considered whether fuel producers had standing to challenge California climate regulations.

The centerpiece of *Chapter 4* is the Court's major separation-of-powers decision in *SEC v. Jarkesy*, which has implications for the structure of the administrative state. Relying on its decision in *Granfinanciera, S.A. v. Nordberg* (1989), the Court held that the Seventh Amendment guarantees a jury trial in an Article III court for actions brought by the SEC to enforce securities fraud laws that resemble common law fraud actions. In so holding, the Court distinguished a series of earlier cases permitting the government to enforce civil penalties in non-Article III courts where the cause of action had no common law integument (e.g., immigration, tariffs, and OSHA penalties). The decision draws into question the use of non-Article III courts where the remedy sounds at common law (as is the case for civil penalties) and the underlying claim derives from or is otherwise analogous to a common law cause of action. The supplement also summarizes *Bouarfa v. Mayorkas*, which applied the Immigration and Nationality Act's jurisdiction-stripping provision to a case with no constitutional claims, and *Williams v. Reed*, which reaffirmed the rule that states may not unduly obstruct the enforcement of Section 1983 claims.

Chapter 5 presents *Health & Hospital Corporation of Marion County v. Talevski*, which held that a federal statute creating rights for nursing home residents is enforceable through 42 U.S.C. § 1983. *Talevski* reaffirmed that statutes explicitly creating federal rights are enforceable through Section 1983, even when they were enacted under the Spending Clause. It also includes *Medina v. Planned*

Parenthood South Atlantic, which distinguished *Talevski* and evinced the Court's pattern of resistance to enforcing many Spending Clause statutes through Section 1983.

Chapter 6 contains updates on sovereign immunity and the relationship between Section 1983 and the habeas remedy. The Court applied the clear statement rule in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, which held that tribal sovereign immunity is abrogated by a clear statement in the Bankruptcy Code, allowing a debtor to obtain a stay against the Band's enforcement of a high interest, short-term loan, and *Financial Oversight Management Board for Puerto Rico v. Centro de Periodismo Investigativo Inc.*, which held that Puerto Rico's financial management oversight board was entitled to territorial sovereign immunity. With respect to the relationship between Section 1983 and habeas in challenging constitutional errors in the administration of criminal justice, in *Reed v. Goertz* the Court reaffirmed that the former is the vehicle for a due process claim challenging the state's failure to provide an opportunity to forensically test its physical evidence. The Court also clarified when the statute-of-limitations begins to accrue for such claims.

Chapter 7 includes *Department of Agriculture v. Kirtz*, in which the Court held that a federal consumer protection statute unequivocally waived federal sovereign immunity, and *United States v. Miller*, which held that the Bankruptcy Code's waiver of federal sovereign immunity did not authorize state-law claims against the United States in connection with one provision of the Code. It also presents *Axon Enterprises Inc. v. FTC*, which held that specific statutory provisions for challenging agency actions before the FTC itself did not preclude the filing of direct constitutional challenges in federal court. *Chapter 7* contains a discussion of *Trump v. United States*, a decision that expanded presidential immunity by holding that a president is immune from criminal prosecution for official actions. This decision has major consequences for presidential power and the rule of law. It also summarizes *Goldey v. Fields*, which again shows that the Court means to strictly limit *Bivens* causes of action.

Chapter 8 includes new cases on executive detention and collateral attacks on state criminal convictions. The supplement describes how a series of emergency appeals involving the Trump Administration's detention of undocumented immigrants has tested the outer boundaries of executive power and the relationship between habeas, due process, and equity jurisdiction. These include *Trump v. J.G.G.* (which we also note in Chapter 7) and *A.A.R.P. v. Trump*. Chapter 8 also includes *Andrew v. White*, a decision on prejudicial evidence and due process in the habeas context.

Chapter 9 concludes with a new treatment of emergency applications and the Court's "shadow docket" as well as cases on the independent and adequate state ground doctrine. It presents *Trump v. CASA*, a major development that eliminated so-called universal or nationwide injunctions from the Article III remedial toolkit, identifying the issues of the rule of law that the case raises.

As always, we are deeply grateful for your comments and suggestions.

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Chapter 2

Invoking the Authority of the Federal Courts

A. The Subject Matter Jurisdiction of the Federal District Courts

(CB p. 141, after Subsection 6)

With a grasp of basic subject matter principles in hand, consider how courts go about distinguishing subject matter jurisdiction rules from other procedural rules that can affect whether a claim proceeds—so-called "claim processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." Fort Bend County v. Davis (2019). The distinction matters because, as we have seen, subject matter jurisdiction defects are non-waivable, may be raised at any time, and the action of a court without subject matter jurisdiction is void. Mechanically, a subject matter jurisdiction defect is raised by a motion under Rule 12(b)(1), whereas other defects are generally litigated through a motion under Rule 12(b)(6). But sometimes it is not obvious whether Congress intends a procedural rule, particularly one that can lead to dismissal, to operate as a rule of jurisdiction. In following case, a property dispute between private landowners and the federal government, the Supreme Court takes up this problem.

WILKINS V. UNITED STATES
598 U.S. 152 (2023)

Justice Sotomayor delivered the opinion of the Court.

Wilkins and Stanton, the petitioners here, both live alongside Robbins Gulch Road in rural Montana. The United States has an easement, for use of the road, which the Government interprets to include making the road available for public use. Petitioners allege that the road's public use has intruded upon their private lives, with strangers trespassing, stealing, and even shooting Wilkins' cat.

Petitioners sued over the scope of the easement under the Quiet Title Act, which allows challenges to the United States' rights in real property. Invoking the Act's 12-year time limit, 28 U.S.C. § 2409a(g), the Government maintains that the suit is jurisdictionally barred. Petitioners counter, and the Court holds, that § 2409a(g) is a nonjurisdictional claims-processing rule.

II

A

"Jurisdiction, this Court has observed, is a word of many, too many, meanings." Arbaugh v. Y & H Corp. (2006). In particular, this Court has emphasized the distinction between limits on "the

classes of cases a court may entertain (subject-matter jurisdiction)" and "nonjurisdictional claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." Fort Bend County v. Davis (2019). The latter category generally includes a range of "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." Reed Elsevier, Inc. v. Muchnick (2010).

To police this jurisdictional line, this Court will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." Boechler v. Commissioner (2022). This principle of construction is not a burden courts impose on Congress. To the contrary, this principle seeks to avoid judicial interpretations that undermine Congress' judgment.

Procedural rules often "seek to promote the orderly progress of litigation" within our adversarial system. Henderson v. Shinseki (2011). Limits on subject-matter jurisdiction, in contrast, have a unique potential to disrupt the orderly course of litigation. "Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." "For purposes of efficiency and fairness, our legal system is replete with rules" like forfeiture, which require parties to raise arguments themselves and to do so at certain times. Jurisdictional bars, however, "may be raised at any time" and courts have a duty to consider them sua sponte. When such eleventh-hour jurisdictional objections prevail post-trial or on appeal, "many months of work on the part of the attorneys and the court may be wasted." Similarly, doctrines like waiver and estoppel ensure efficiency and fairness by precluding parties from raising arguments they had previously disavowed. Because these doctrines do not apply to jurisdictional objections, parties can disclaim such an objection, only to resurrect it when things go poorly for them on the merits.

Given this risk of disruption and waste that accompanies the jurisdictional label, courts will not lightly apply it to procedures Congress enacted to keep things running smoothly and efficiently. Courts will also not assume that in creating a mundane claims-processing rule, Congress made it "unique in our adversarial system" by allowing parties to raise it at any time and requiring courts to consider it sua sponte. Sebelius v. Auburn Regional Medical Center (2013). Instead, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." United States v. Kwai Fun Wong (2015).

Under this clear statement rule, the analysis of § 2409a(g) is straightforward.[3] "[I]n applying th[e] clear statement rule, we have made plain that most time bars are nonjurisdictional." *Wong*. Nothing about § 2409a(g)'s text or context gives reason to depart from this beaten path. Section 2409a(g) states that an action "shall be barred unless it is commenced within twelve years of the date upon which it accrued." This "text speaks only to a claim's timeliness," and its "mundane statute-of-limitations language say[s] only what every time bar, by definition, must: that after a certain time a

[3] The dissent maintains that this Court's settled clear statement rule does not apply here because § 2409a(g) is a condition on a waiver of sovereign immunity and "as such, this Court should interpret it as a jurisdictional bar to suit." Over three decades ago, this Court in "*Irwin* . . . foreclose[d] th[e] argument" that "time limits" are jurisdictional simply because they "function as conditions on the Government's waiver of sovereign immunity." *Wong* (citing Irwin v. Department of Veterans Affairs (1990)). Contrary to the dissent's suggestion, *Irwin* extends to the "many statutes that create claims for relief against the United States or its agencies [and] apply only to Government defendants." Scarborough v. Principi (2004). Notably, even the dissent in *Wong* did not engage in such an attempt to turn back the clock, instead arguing that the provision in that case was jurisdictional based on its specific text and history.

claim is barred." *Wong*. Further, "[t]his Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." Id. The Quiet Title Act's jurisdictional grant is in 28 U.S.C. § 1346(f), well afield of § 2409a(g). And "[n]othing conditions the jurisdictional grant on the limitations perio[d], or otherwise links those separate provisions." *Wong*. Section 2409a(g) therefore lacks a jurisdictional clear statement.

B

[The Court then addressed the question how it should read prior cases that appeared to treat a statutory requirement as jurisdictional].

To separate the wheat from the chaff, this Court has asked if the prior decision addressed whether a provision is "'technically jurisdictional'"—whether it truly operates as a limit on a court's subject-matter jurisdiction—and whether anything in the decision "turn[ed] on that characterization." *Arbaugh* (quoting Steel Co. v. Citizens for Better Environment (1998)); see also Zipes v. Trans World Airlines, Inc. (1982) (looking to whether "the legal character of the requirement was . . . at issue"). If a decision simply states that "the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established," it is understood as a "drive-by jurisdictional rulin[g]" that receives "no precedential effect." *Arbaugh*.

The Government begins with *Block* [which held that] the Act was "the exclusive procedure" for challenging "the title of the United States to real property," [and that] the 12-year limit applied to States. It was only in the opinion's conclusion that, in remanding, the Court remarked that if the time limit applied, "the courts below had no jurisdiction to inquire into the merits." The opinion contains no discussion of whether the provision was "'technically jurisdictional'" or what in the case would have "turn[ed] on that characterization." *Arbaugh*. There is nothing more than an "unrefined dispositio[n]" stating that a "threshold fact" must "b[e] established" for there to be "jurisdiction." This is a textbook "drive-by jurisdictional rulin[g]."

Block described the Act's time limit as "a condition on the waiver of sovereign immunity." *Block* never stated, however, that the Act's time limit was therefore truly a limit on subject-matter jurisdiction. Yet according to the Government and the dissent, this went without saying because the case law at the time was "unmistakably" clear that conditions on waivers of immunity were subject-matter jurisdictional.

This reading is undermined by the very history on which it draws. In Irwin v. Department of Veterans Affairs (1990), the Court surveyed the case law about whether "time limits in suits against the Government" are subject to "equitable tolling, waiver, and estoppel." If associating time limits with waivers of sovereign immunity clearly made those limits jurisdictional, equitable exceptions would be just as clearly foreclosed. Instead, *Irwin* described the Court's approach to this question as "ad hoc" and "unpredictab[le]," "leaving open" whether equitable exceptions were available in any given case. Accordingly, even if "a statute of limitations [was] a condition on the waiver of sovereign immunity and thus must be strictly construed," this still "d[id] not answer the question whether equitable tolling can be applied to this statute of limitations." Bowen v. City of New York (1986).

Block thus acknowledged nothing more than a general proposition, echoed by *Irwin*, that "a condition to the waiver of sovereign immunity ... must be strictly construed." In *Irwin*, as elsewhere, this did not mean that time limits accompanying such waivers are necessarily jurisdictional.

Next, the Government offers United States v. Mottaz (1986). Once again, the question presented was not whether the Quiet Title Act's 12-year time limit was technically jurisdictional. The Court instead had to decide which of two possible statutory time bars applied. First, the Court asked which of several federal statutes—"the Quiet Title Act; the Allotment Acts; [or] the Tucker Act"—was the "source of . . . jurisdiction" based on the nature of the plaintiff 's claim and the relief sought. The Court explained that the Quiet Title Act applied because it was "'the exclusive means by which adverse claimants could challenge the United States' title to real property,'" and the plaintiff 's claim fell "within the Act's scope." Second, the Court "then determine[d] whether [the] suit was brought within the relevant limitations period." … Neither step in the Court's analysis "turn[ed] on" whether any time limits were "'technically jurisdictional.'"

Finally, there is United States v. Beggerly (1998). The Court in *Beggerly* addressed whether § 2409a(g) could be equitably tolled. Subject-matter jurisdiction, as noted, is never subject to equitable tolling. If *Block* and *Mottaz* had definitely interpreted § 2409a(g) as subject-matter jurisdictional, the Court could have just cited those cases and ended the matter without further discussion. Instead, the Court parsed the provision's text and context, concluding that "by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,'" the law "has already effectively allowed for equitable tolling." *Beggerly*. Also relevant were "the unusually generous" time limit and the importance of clarity when it comes to land rights. This careful analysis of whether the text and context were consistent with equitable tolling would have been wasted words if the Court had already held that § 2409a(g) was jurisdictional. . . .

. . . All told, neither this Court's precedents nor Congress' actions established that § 2409a(g) is jurisdictional.

Chapter 3

Justiciability: Constitutional and Prudential Limits on Federal Judicial Power

B. Standing

1. Injury

(CB, p. 230, after last full paragraph)

The Court returned to the causation and redressability requirements in FDA v. Alliance for Hippocratic Medicine (2024), calling them "flip sides of the same coin." As with many major standing decisions, the case involved healthcare and access to abortion services. After the Court overruled Roe v. Wade (1973) in Dobbs v. Jackson Womens' Health Org. (2022), pro-life medical associations and doctors sued to challenge the Food and Drug Administration's policy on mifepristone prescriptions, a drug used in medication abortions. The lawsuit's aim was to further restrict access to abortion services. The Court held that there was no standing, reasoning that "some issues may be left to the political and democratic processes."

FOOD AND DRUG ADMINISTRATION V. ALLIANCE FOR HIPPOCRATIC MEDICINE
140 S. Ct. 1540 (2024)

Justice Kavanaugh delivered the opinion of the Court.

In 2016 and 2021, the Food and Drug Administration relaxed its regulatory requirements for mifepristone, an abortion drug. Those changes made it easier for doctors to prescribe and pregnant women to obtain mifepristone. Several pro-life doctors and associations sued FDA, arguing that FDA's actions violated the Administrative Procedure Act. But the plaintiffs do not prescribe or use mifepristone. And FDA is not requiring them to do or refrain from doing anything. Rather, the plaintiffs want FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain. Under Article III of the Constitution, a plaintiff 's desire to make a drug less available *for others* does not establish standing to sue. Nor do the plaintiffs' other standing theories suffice. Therefore, the plaintiffs lack standing to challenge FDA's actions.

I

Under federal law, the U. S. Food and Drug Administration ensures that drugs on the market are safe and effective. In 2000, FDA approved a new drug application for mifepristone tablets marketed under the brand name Mifeprex. FDA approved Mifeprex for use to terminate pregnancies, but only up to seven weeks of pregnancy.

To help ensure that Mifeprex would be used safely and effectively, FDA placed further restrictions on the drug's use and distribution. For example, only doctors could prescribe or supervise prescription of Mifeprex. Doctors and patients also had to follow a strict regimen requiring the patient to appear for three in-person visits with the doctor. And FDA directed prescribing doctors to report incidents of hospitalizations, blood transfusions, or other serious adverse events to the drug sponsor (who, in turn, was required to report the events to FDA).

In 2015, Mifeprex's distributor Danco Laboratories submitted a supplemental new drug application seeking to amend Mifeprex's labeling and to relax some of the restrictions that FDA had imposed. In 2016, FDA approved the proposed changes. FDA deemed Mifeprex safe to terminate pregnancies up to 10 weeks rather than 7 weeks. FDA allowed healthcare providers such as nurse practitioners to prescribe Mifeprex. And FDA approved a dosing regimen that reduced the number of required in-person visits from three to one—a single visit to receive Mifeprex. In addition, FDA changed prescribers' adverse event reporting obligations to require prescribers to report only fatalities—a reporting requirement that was still more stringent than the requirements for most other drugs.

In 2019, FDA approved an application for generic mifepristone. FDA established the same conditions of use for generic mifepristone as for Mifeprex. In 2021, FDA again relaxed the requirements for Mifeprex and generic mifepristone. Relying on experience gained during the COVID-19 pandemic about pregnant women using mifepristone without an in-person visit to a healthcare provider, FDA announced that it would no longer enforce the initial in-person visit requirement.

Because mifepristone is used to terminate pregnancies, FDA's approval and regulation of mifepristone have generated substantial controversy from the start. This case began in 2022. Four pro-life medical associations, as well as several individual doctors, sued FDA in the U.S. District Court for the Northern District of Texas. Plaintiffs brought claims under the Administrative Procedure Act. They challenged the lawfulness of FDA's 2000 approval of Mifeprex; FDA's 2019 approval of generic mifepristone; and FDA's 2016 and 2021 actions modifying mifepristone's conditions of use.

The District Court agreed with the plaintiffs and in effect enjoined FDA's approval of mifepristone, thereby ordering mifepristone off the market. The Court of Appeals' partial stay would have left Mifeprex (though not generic mifepristone) on the market, but only under the more stringent requirements imposed when FDA first approved Mifeprex in 2000—available only up to seven weeks of pregnancy, only when prescribed by doctors, and only with three in-person visits, among other requirements.

II

The threshold question is whether the plaintiffs have standing to sue under Article III of the Constitution. Article III standing is a "bedrock constitutional requirement that this Court has applied to all manner of important disputes."

The fundamentals of standing are well-known and firmly rooted in American constitutional law. To establish standing, as this Court has often stated, a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be

caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief.

The second and third standing requirements—causation and redressability—are often "flip sides of the same coin." If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury. So the two key questions in most standing disputes are injury in fact and causation.

Here, the plaintiff doctors and medical associations are unregulated parties who seek to challenge FDA's regulation *of others*. Specifically, FDA's regulations apply to doctors prescribing mifepristone and to pregnant women taking mifepristone. But the plaintiff doctors and medical associations do not prescribe or use mifepristone. And FDA has not required the plaintiffs to do anything or to refrain from doing anything.

The plaintiffs do not allege the kinds of injuries described above that unregulated parties sometimes can assert to demonstrate causation. Because the plaintiffs do not prescribe, manufacture, sell, or advertise mifepristone or sponsor a competing drug, the plaintiffs suffer no direct monetary injuries from FDA's actions relaxing regulation of mifepristone. Nor do they suffer injuries to their property, or to the value of their property, from FDA's actions. Because the plaintiffs do not use mifepristone, they obviously can suffer no physical injuries from FDA's actions relaxing regulation of mifepristone.

Rather, the plaintiffs say that they are pro-life, oppose elective abortion, and have sincere legal, moral, ideological, and policy objections to mifepristone being prescribed and used *by others*. The plaintiffs appear to recognize that those general legal, moral, ideological, and policy concerns do not suffice on their own to confer Article III standing to sue in federal court. So to try to establish standing, the plaintiffs advance several complicated causation theories to connect FDA's actions to the plaintiffs' alleged injuries in fact.

The first set of causation theories contends that FDA's relaxed regulation of mifepristone may cause downstream conscience injuries to the individual doctor plaintiffs and the specified members of the plaintiff medical associations, who are also doctors. (We will refer to them collectively as "the doctors.") The second set of causation theories asserts that FDA's relaxed regulation of mifepristone may cause downstream economic injuries to the doctors. The third set of causation theories maintains that FDA's relaxed regulation of mifepristone causes injuries to the medical associations themselves, who assert their own organizational standing. As we will explain, none of the theories suffices to establish Article III standing.

1

We first address the plaintiffs' claim that FDA's relaxed regulation of mifepristone causes conscience injuries to the doctors. The doctors contend that FDA's 2016 and 2021 actions will cause more pregnant women to suffer complications from mifepristone, and those women in turn will need more emergency abortions by doctors. The plaintiff doctors say that they therefore may be required—against their consciences—to render emergency treatment completing the abortions or providing other abortion-related treatment.

The Government correctly acknowledges that a conscience injury of that kind constitutes a concrete injury in fact for purposes of Article III. So doctors would have standing to challenge a government action that likely would cause them to provide medical treatment against their consciences.

But in this case—even assuming for the sake of argument that FDA's 2016 and 2021 changes to mifepristone's conditions of use 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.

That is because, as the Government explains, federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences. See 42 U.S.C. § 300a-7(c)(1). The Church Amendments speak clearly. They allow doctors and other healthcare personnel to "refus[e] to perform or assist" an abortion without punishment or discrimination from their employers. And the Church Amendments more broadly provide that doctors shall not be required to provide treatment or assistance that would violate the doctors' religious beliefs or moral convictions. Most if not all States have conscience laws to the same effect.

Moreover, as the Government notes, federal conscience protections encompass "the doctor's beliefs rather than particular procedures," meaning that doctors cannot be required to treat mifepristone complications in any way that would violate the doctors' consciences. As the Government points out, that strong protection for conscience remains true even in a so-called healthcare desert, where other doctors are not readily available.

Not only as a matter of law but also as a matter of fact, the federal conscience laws have protected pro-life doctors ever since FDA approved mifepristone in 2000. The plaintiffs have not identified any instances where a doctor was required, notwithstanding conscience objections, to perform an abortion or to provide other abortion-related treatment that violated the doctor's conscience. Nor is there any evidence in the record here of hospitals overriding or failing to accommodate doctors' conscience objections.

In other words, none of the doctors' declarations says anything like the following: "Here is the treatment I provided, here is how it violated my conscience, and here is why the conscience protections were unavailable to me."

In short, given the broad and comprehensive conscience protections guaranteed by federal law, the plaintiffs have not shown—and cannot show—that FDA's actions will cause them to suffer any conscience injury. Federal law fully protects doctors against being required to provide abortions or other medical treatment against their consciences—and therefore breaks any chain of causation between FDA's relaxed regulation of mifepristone and any asserted conscience injuries to the doctors.

2

In addition to alleging conscience injuries, the doctors cite various monetary and related injuries that they allegedly will suffer as a result of FDA's actions—in particular, 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.

Those standing allegations suffer from the same problem—a lack of causation. The causal link between FDA's regulatory actions and those alleged injuries is too speculative or otherwise too attenuated to establish standing.

To begin with, the claim that the doctors will incur those injuries as a result of FDA's 2016 and 2021 relaxed regulations lacks record support and is highly speculative. The doctors have not offered evidence tending to suggest that FDA's deregulatory actions have both caused an increase in the number of pregnant women seeking treatment from the plaintiff doctors *and* caused a resulting diversion of the doctors' time and resources from other patients. Moreover, the doctors have not identified any instances in the past where they have been sued or required to pay higher insurance costs because they have treated pregnant women suffering mifepristone complications. Nor have the plaintiffs offered any persuasive evidence or reason to believe that the future will be different.

In any event, and perhaps more to the point, the law has never permitted doctors to challenge the government's loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctors' offices with follow-on injuries. Stated otherwise, there is no Article III doctrine of "doctor standing" that allows doctors to challenge general government safety regulations.

Consider some examples. EPA rolls back emissions standards for power plants—does a doctor have standing to sue because she may need to spend more time treating asthma patients? A local school district starts a middle school football league—does a pediatrician have standing to challenge its constitutionality because she might need to spend more time treating concussions? A federal agency increases a speed limit from 65 to 80 miles per hour—does an emergency room doctor have standing to sue because he may have to treat more car accident victims? The government repeals certain restrictions on guns—does a surgeon have standing to sue because he might have to operate on more gunshot victims?

The answer is no: The chain of causation is simply too attenuated. Allowing doctors or other healthcare providers to challenge general safety regulations as unlawfully lax would allow doctors to sue in federal court to challenge almost any policy affecting public health.

And in the FDA drug-approval context, virtually all drugs come with complications, risks, and side effects. Some drugs increase the risk of heart attack, some may cause cancer, some may cause birth defects, and some heighten the possibility of stroke. Approval of a new drug may therefore yield more visits to doctors to treat complications or side effects. So the plaintiffs' loose approach to causation would also essentially allow any doctor or healthcare provider to challenge any FDA decision approving a new drug. But doctors have never had standing to challenge FDA's drug approvals simply on the theory that use of the drugs by others may cause more visits to doctors.

And if we were now to invent a new doctrine of doctor standing, there would be no principled way to cabin such a sweeping doctrinal change to doctors or other healthcare providers. Firefighters could sue to object to relaxed building codes that increase fire risks. Police officers

could sue to challenge a government decision to legalize certain activities that are associated with increased crime. Teachers in border states could sue to challenge allegedly lax immigration policies that lead to overcrowded classrooms.

Citizens and doctors who object to what the law allows others to do may always take their concerns to the Executive and Legislative Branches and seek greater regulatory or legislative restrictions on certain activities.

3

That leaves the medical associations' argument that the associations themselves have organizational standing. Under this Court's precedents, organizations may have standing "to sue on their own behalf for injuries they have sustained." In doing so, however, organizations must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals.

According to the medical associations, FDA has "impaired" their "ability to provide services and achieve their organizational missions." That argument does not work to demonstrate standing.

Like an individual, an organization may not establish standing simply based on the "intensity of the litigant's interest" or because of strong opposition to the government's conduct, Valley Forge Christian College v. Am. United (1982), "no matter how longstanding the interest and no matter how qualified the organization." Sierra Club v. Morton (1972). A plaintiff must show "far more than simply a setback to the organization's abstract social interests." Havens Realty Corp. v. Coleman (1982). The plaintiff associations therefore cannot assert standing simply because they object to FDA's actions.

The medical associations say that they have standing not based on their mere disagreement with the FDA's policies, but based on their incurring costs to oppose FDA's actions. But an organization that has not suffered concrete injury cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. *Havens* does not support such an expansive theory of standing. Havens had provided HOME's black employees false information about apartment availability—a practice known as racial steering. Critically, HOME operated a housing counseling service. Haven's actions directly affected and interfered with HOME's core business activities—not dissimilar to a retailer who sues a manufacturer for selling defective goods to the retailer. That is not the kind of injury that the medical associations have alleged here. The associations have not claimed informational injury, and in any event the associations have not suggested that federal law requires FDA to disseminate such information upon request by members of the public.

Finally, it has been suggested that the plaintiffs here must have standing because if these plaintiffs do not have standing, then it may be that no one would have standing to challenge FDA's 2016 and 2021 actions. For starters, it is not clear that no one else would have standing to challenge FDA's relaxed regulation of mifepristone. But even if no one would have standing, this Court has long rejected that kind of "if not us, who?" argument as a basis for standing. The "assumption" that if these plaintiffs lack "standing to sue, no one would have standing, is not a reason to find standing Rather, some issues may be left to the political and democratic processes: The Framers of the Constitution did not "set up something in the nature of an Athenian democracy or a New England

town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." United States v. Richardson (1974).

The plaintiffs have sincere legal, moral, ideological, and policy objections to elective abortion and to FDA's relaxed regulation of mifepristone. But under Article III of the Constitution, those kinds of objections alone do not establish a justiciable case or controversy in federal court. Here, the plaintiffs have failed to demonstrate that FDA's relaxed regulatory requirements likely would cause them to suffer an injury in fact. For that reason, the federal courts are the wrong forum for addressing the plaintiffs' concerns about FDA's actions. The plaintiffs may present their concerns and objections to the President and FDA in the regulatory process, or to Congress and the President in the legislative process. And they may also express their views about abortion and mifepristone to fellow citizens, including in the political and electoral processes.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. Eastern Ky. Welfare Rights Org. (1978).

Justice Thomas, concurring.

I join the Court's opinion in full because it correctly applies our precedents to conclude that the Alliance for Hippocratic Medicine and other plaintiffs lack standing. I write separately to highlight what appear to be similar problems with another theory of standing asserted in this suit. The Alliance and other plaintiff associations claim that they have associational standing to sue for their members' injuries. Under the Court's precedents, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

If an association can satisfy these requirements, we allow the association to pursue its members' claims, without joining those members as parties to the suit. Associational standing, however, is simply another form of third-party standing. And, the Court has never explained or justified either doctrine's expansion of Article III standing.

Our doctrine permits an association to have standing based purely upon a member's injury, not its own. If a single member of an association has suffered an injury, our doctrine permits that association to seek relief for its entire membership—even if the association has tens of millions of other, non-injured members. I thus have serious doubts that an association can have standing to vicariously assert a member's injury.

In an appropriate case, the Court should address whether associational standing can be squared with Article III's requirement that courts respect the bounds of their judicial power.

* * *

The Court considered the redressability requirement again in Diamond Alternative Energy v. LLC v. Environmental Protection Agency, a lawsuit brought by fuel producers to challenge California climate regulations that over time would incentivize car manufacturers to build and sell

more electric-powered vehicles and fewer gasoline-powered ones. The parties argued that this was one of those cases in which causation and redressability were not two sides of the same coin. The Court concluded that the redressability requirement was about aligning injuries with remedies. The dissent argued that the case was moot and that the Court's willingness to use it as a vehicle to announce an industry-friendly standing doctrine threatened to undermine the principle of equal justice under the law.

DIAMOND ALTERNATIVE ENERGY, LLC v. ENVIRONMENTAL PROTECTION AGENCY
145 S. Ct. ___ (2025)

Justice Kavanaugh delivered the opinion of the Court.

Pursuant to the Clean Air Act, the U. S. Environmental Protection Agency approved California regulations requiring automakers to alter their fleets of new vehicles. Under those California regulations, automakers must manufacture more electric vehicles and fewer gasoline-powered vehicles. The goal is to decrease emissions from the use of gasoline and other liquid fuels. Producers of gasoline and other liquid fuels sued EPA, arguing that EPA's approval of the California regulations violated the Clean Air Act.

The sole issue before this Court is whether the fuel producers have standing to maintain their suit. The fuel producers assert that the California regulations reduce the manufacture and sale of cars powered by gasoline and other liquid fuels, thereby causing a decrease in sales of those fuels by the fuel producers. So fuel producers take in less revenue than they would in a free market. Invalidating the regulations, they say, would remove a regulatory impediment to their ability to fully compete in the market. And without California's regulations in effect, manufacturers would likely make more cars powered by gasoline and other liquid fuels, thereby increasing purchases of those fuels and redressing the fuel producers' injury.

EPA and California dispute redressability. They suggest that, even if the regulations are invalidated, car manufacturers nonetheless would not manufacture more gasoline-powered cars. They posit that the California regulations no longer have any impact because, in a free market, consumer demand for and manufacturers' supply of electric vehicles would still supposedly exceed what the California regulations mandate.

Based on this Court's precedents and the evidence in the record, we hold that the fuel producers have standing.

I

As relevant here, the Clean Air Act requires the Environmental Protection Agency, or EPA, to periodically "prescribe . . . standards" that limit emissions of certain air pollutants from new motor vehicles. To promote uniformity in vehicle emissions regulations, the Act also preempts state standards "relating to the control of emissions from new motor vehicles."

But the Act's preemption provision exempts California. Under certain circumstances, California may adopt emissions standards for new motor vehicles that are more stringent than EPA's. California may do so when it concludes that more stringent standards are needed to meet "compelling and extraordinary conditions." Other States may also adopt California's stricter limits

on emissions from new motor vehicles, but may not adopt or enforce state standards that differ from California's.

The upshot of this system is that EPA sets nationwide emissions standards for new motor vehicles; California in limited circumstances may set more stringent emissions standards for vehicles sold in the State; and other States may either follow EPA's standards or adopt California's but may not set their own.

Over the years, California has often requested and received EPA approval for stricter emissions standards to combat local California air-quality problems like smog. Beginning in 2005, California also attempted to use its unique preemption exception as one means to address global climate change. As relevant here, the State asked EPA for approval of regulations that limit greenhouse-gas emissions and force electrification of the new vehicle fleet sold in the State.

This case involves California's 2012 request for EPA approval of new California regulations. As relevant here, those regulations generally require automakers (i) to limit average greenhouse-gas emissions across their fleets of new motor vehicles sold in the State and (ii) to manufacture a certain percentage of electric vehicles as part of their vehicle fleets. The greenhouse-gas emissions limits remain in force indefinitely into the future, and the specific requirements for electric vehicles in new vehicle fleets run through model year 2025.

Under President Obama, EPA reversed its legal position and, in 2013, allowed the California regulations to take effect. Then in 2019, under President Trump, EPA flipped back and rescinded approval of the California regulations. In 2022, under President Biden, EPA again reversed course and reinstated approval of California's regulations. That is where things stand as of now, although President Trump has directed EPA to again reconsider its approval of California's standards. To date, acting pursuant to the Clean Air Act, 17 States and the District of Columbia have copied California's greenhouse-gas emissions standards for new motor vehicles, the electric-vehicle mandate, or both. Together with California, those jurisdictions account for about 40 percent of America's market for new cars and light-duty trucks.

In 2022, after EPA reinstated approval of California's 2012 regulations, several fuel producers sued EPA in the D.C. Circuit. The fuel producers primarily argued that EPA lacked authority under the Clean Air Act to approve the California regulations. They reasoned that the regulations did not target a local California air-quality problem—as they say is required by the Clean Air Act—but instead were designed to address global climate change.

The fuel producers manufacture and sell automobile fuels such as gasoline, diesel, and ethanol. For example, American Fuel & Petrochemical Manufacturers is a national trade association that represents many American fuel companies that produce and sell gasoline and other liquid fuels for automobiles. Diamond Alternative Energy sells renewable diesel, an alternative to traditional petroleum-derived diesel. Valero Renewable Fuels Company manufactures and sells ethanol.

This Court granted certiorari limited to the question of whether the fuel producers have Article III standing.

II

This Court's "cases have established that the irreducible constitutional minimum of standing contains three elements": injury in fact, causation, and redressability. The first requirement, injury in fact, requires the plaintiff to demonstrate an injury that is "concrete," "particularized," and "actual or imminent, not speculative." "Monetary costs are of course an injury."

The second and third requirements, causation and redressability, are usually "flip sides of the same coin. Causation requires the plaintiff to show "that the injury was likely caused by the defendant," and redressability requires the plaintiff to demonstrate "that the injury would likely be redressed by judicial relief." "If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." To be sure, redressability "can still pose an independent bar in some cases," but "the two key questions in most standing disputes are injury in fact and causation." The additional redressability requirement generally serves to ensure that there is a sufficient "relationship between 'the judicial relief requested' and the 'injury' suffered."

Importantly, if a plaintiff is "an object of the action (or forgone action) at issue," then "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." When the plaintiff is not the object of a government regulation, however, causation and redressability often depend on how regulated third parties not before the court will act in response to the government regulation or judicial relief. Courts must distinguish the "predictable" from the "speculative" effects of government action or judicial relief on third parties. With respect to causation (and redressability), a court must conclude that "third parties will likely react" to the government regulation (or judicial relief) "in predictable ways" that will likely cause (or redress) the plaintiff's injury.

Here, the fuel producers say that they suffered injury in fact caused by the California regulations. They point out that the entire purpose of California's fleet-wide emissions standards and electric-vehicle mandate is to reduce the use of gasoline and other liquid fuels in motor vehicles as compared to what otherwise would occur in a free market. The regulations cause automakers to, among other things, produce fewer gasoline-powered vehicles. That in turn causes fewer gasoline sales, leading to a monetary injury in fact for producers of gasoline and other liquid fuels.

As to redressability, the fuel producers say that invalidating the California regulations would likely redress their injury because it would remove a regulatory impediment to the sale and use of their products. They further contend that, absent the regulations, automakers would likely produce fewer electric vehicles and more gasoline-powered vehicles. Production of those vehicles would predictably lead to more purchases of gasoline and other liquid fuels sold by the fuel producers. In short, they argue that when the government tells automakers to make more cars that use less gasoline, there should be little question that the gasoline producers have standing to sue.

In this Court, neither EPA nor California meaningfully disputes injury in fact or causation. But they argue that the fuel producers did not establish redressability. According to EPA and California, even if the California regulations are invalidated, the fuel producers have not shown that vehicle manufacturers would reduce the percentage of their fleets that consist of electric vehicles (or otherwise stated, increase the percentage that consists of gasoline-powered vehicles). EPA and California suggest that the automobile market has changed—apparently permanently in their view—and strong consumer demand for (and manufacturers' supply of) electric vehicles means that

automakers are unlikely to manufacture or sell any additional gasoline-powered cars even if the California regulations are invalidated.

III

We hold that the fuel producers have standing to sue. To begin, the injury in fact and causation elements of the fuel producers' standing, which no party disputes, are straightforward. As for injury in fact, the fuel producers make money by selling fuel. Therefore, the decrease in purchases of gasoline and other liquid fuels resulting from the California regulations hurts their bottom line. Those monetary costs "are of course an injury."

As for causation, EPA's approval authorized California (and ultimately 17 other States) to enforce regulations that require lower fleet-wide greenhouse-gas emissions and the electrification of automakers' vehicle fleets, thereby reducing purchases of liquid fuels such as gasoline. The regulations likely cause fuel producers' monetary injuries because the regulations likely cause a decrease in purchases of gasoline and other liquid fuels for automobiles. Indeed, that is the whole point of the regulations.

As for redressability, invalidating the California regulations would likely redress at least some of the fuel producers' monetary injuries. Even "one dollar" of additional revenue for the fuel producers would satisfy the redressability component of Article III standing. And it is "likely" that invalidating the California regulations would result in more revenue for the fuel producers from additional sales of gasoline and other liquid fuels.

When a plaintiff is the "object" of a government regulation, there should "ordinarily" be "little question" that the regulation causes injury to the plaintiff and that invalidating the regulation would redress the plaintiff's injuries. The fuel producers here might be considered an object of the California regulations because the regulations explicitly seek to restrict the use of gasoline and other liquid fuels in automobiles.

This case presents what the Court has described as the "familiar" circumstance where government regulation of a business "may be likely" to cause injuries to other linked businesses. As the Court has explained, "when the government regulates (or under-regulates) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers."

In cases of that kind, this Court's analysis of causation and redressability has recognized commonsense economic realities. When third party behavior is predictable, commonsense inferences may be drawn. Importantly, EPA agrees that "commonsense economic principles" can be useful when evaluating Article III standing.

In this case, those commonsense economic principles support the fuel producers' standing. The California regulations force automakers to manufacture more electric vehicles and fewer gasoline-powered vehicles. The standards force automakers to produce a fleet of vehicles that, as a whole, uses significantly less gasoline and other liquid fuels. California's regulation of automakers' vehicle fleets in turn will likely "cause downstream or upstream economic injuries to others in the chain," such as producers of gasoline and other liquid fuels.

By the same token, the fuel producers persuasively contend that invalidating California's regulations would likely mean more gasoline-powered automobiles, which would in turn likely mean more sales of gasoline and other liquid fuels by the fuel producers. Because the fuel producers have suffered classic monetary injury caused by a government regulatory action, it would be surprising and unusual if invalidating the regulations did not redress the fuel producers' injuries.

Article III's redressability requirement serves to align injuries and remedies. The primary goals of that requirement are to ensure that plaintiffs do not sue the wrong parties and that courts do not issue advisory opinions. The redressability requirement should not be misused, however, to prevent the targets of government regulations from challenging regulations that threaten their businesses. EPA and California cite no case where Article III's redressability requirement has been applied to prevent challenges to a regulation setting a permanent ceiling on the sale or use of a business's products. Here, the fuel producers have established their standing to challenge EPA's approval of the California regulations.

Justice Jackson, dissenting.

Standing is a constitutional doctrine meant to promote judicial restraint. By design, it "'prevent[s] the judicial process from being used to usurp the powers of the political branches' " and "helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system." But standing doctrine cannot serve that important purpose if the Judiciary fails to apply it evenhandedly. When courts adjust standing requirements to let certain litigants challenge the actions of the political branches but preclude suits by others with similar injuries, standing doctrine cannot perform its constraining function. Over time, such selectivity begets judicial overreach and erodes public trust in the impartiality of judicial decisionmaking.

Today's ruling runs the risk of setting us down that path. The Court shelves its usual case-selection standards to revive a fuel-industry lawsuit that all agree will soon be moot (and is largely moot already). And it rests its decision on a theory of standing that the Court has refused to apply in cases brought by less powerful plaintiffs. This case gives fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens. Because the Court had ample opportunity to avoid that result, I respectfully dissent.

As the majority aptly puts it, [standing] doctrine forces every plaintiff to "answer a basic question—"What's it to you?" The fuel industry's answer to that question here should give us all pause. In their petition for certiorari, the industry members asserted that California's emissions standards harmed them by suppressing the sale of gas-powered cars and thereby driving down demand for fuel. But they later made clear that any such harm would be exceedingly short lived: EPA is presently reviewing California's pre-emption waiver, and as petitioners' counsel told us at oral argument, the agency is likely to withdraw that waiver imminently, which will put an end to California's emissions program for good. In fact, petitioners' counsel was so confident of that outcome that he told us he would bet his "bottom dollar" on it.

His confidence is not overstated. President Trump rescinded this exact same waiver the last time he was in office. And EPA has told us that it is actively reconsidering its decision to grant the waiver. Because a withdrawal of the waiver would moot this case, an obvious question arises: Why would this Court rush to opine on whether the fuel industry's legal challenge raises an Article III

"case" or "controversy" when all involved—including petitioners themselves—believe that any such "case" or "controversy" will soon vanish?

The Court had plenty of other options. For one thing, it could have denied certiorari, recognizing that one of the core components of California's emissions program—the electric-vehicle mandate—is about to sunset. Regardless of what EPA does here, that mandate will terminate in just a few months, when model year 2025 ends. Automakers are already accepting preorders on model-year-2026 vehicles, and, by Thanksgiving, their entire fleets for model year 2026 will be available. This means that even if the electric-vehicle mandate is currently harming the fuel industry—a dubious proposition in itself, that harm will cease before petitioners brief the actual merits of their challenge, let alone before any court rules on it.

Alternatively, this Court could have deferred its decision in this case until after EPA concludes its reassessment of the waiver, as the Government asked us to do. The Government rarely proposes that we withhold judgment after certiorari is granted, and it did so here before any party had filed its brief. In the rare cases where the Government does ask us to defer, we often grant those requests—and we sometimes decide to put cases on hold independently. But, for some reason, in this case, we rejected the Government's request and proceeded to render a decision anyway. A third option, once we granted certiorari, would have been to simply vacate the judgment and remand the case to the D. C. Circuit. The D. C. Circuit's opinion appeared to rest, at least in part, on the erroneous factual assumption that California's entire emissions program—and not just its electric-vehicle mandate—would sunset with model year 2025. Once EPA clarified the regulatory timeline in its certiorari brief, it would have been reasonable for this Court to give the D. C. Circuit an opportunity to reconsider its analysis on a corrected record.

At most, then, the Court's ruling today amounts to little more than error correction in the context of a dispute that all agree will be over soon in any event.

This is not to suggest that no one will benefit from the Court's decision to dabble in error correction in this case. Our ruling will no doubt aid future attempts by the fuel industry to attack the Clean Air Act. But Article III requires a live case or controversy, not merely the potential that a favorable judgment will help the plaintiff in some future lawsuit.

Also, I worry that the fuel industry's gain comes at a reputational cost for this Court, which is already viewed by many as being overly sympathetic to corporate interests.

It may be difficult for the public to know exactly what to make of the Court's decision to address the fleeting legal issue presented here. For its part, the Court does not explain why it is so eager to resolve this highly factbound, soon-to-be-moot dispute. For some, this silence will only harden their sense that the Court softens its certiorari standards when evaluating petitions from moneyed interests, looking past the jurisdictional defects or other vehicle problems that would typically doom petitions from other parties. This Court's simultaneous aversion to hearing cases involving the potential vindication of the rights of less powerful litigants—workers, criminal defendants, and the condemned, among others—will further fortify that impression.

In my view, we should have either denied certiorari outright or held this matter in abeyance pending EPA's reconsideration of its waiver grant. Barring that, we should have simply vacated and remanded for the D. C. Circuit to reconsider its ruling on a clarified factual record.

But that's not all. The Court's substantive Article III standing analysis, though not entirely implausible, also invites questions about inconsistent decisionmaking and whether this Court is holding business litigants to the same standards as everyone else. The majority has made nothing short of a herculean effort to justify the conclusion that redressability exists on this record. Its demonstrated concern for ensuring that the fuel industry's ability to sue is recognized on these facts highlights a potential gap in the manner in which the Court treats the claims of plaintiffs pursuing profits versus those seeking to advance other objectives. The Court's remarkably lenient approach to standing in this case contrasts starkly with the stern stance it has taken in cases concerning the rights of ordinary citizens.

I am simply observing that the Court seems inconsistent in its willingness to premise redressability on commonsense inferences about third-party behavior. That inconsistency, which we reinforce with today's holding, tends to redound to the benefit of particular litigants. But nothing in Article III's text or history justifies relying on "commonsense" inferences in one standing context and not another. The Constitution does not distinguish between plaintiffs whose claims are backed by the Chamber of Commerce and those who seek to vindicate their rights to fair housing, desegregated schools, or privacy. But if someone reviewing our case law harbored doubts about that proposition, today's decision will do little to dissuade them.

It is easy to deprecate the single phrase inscribed atop the entrance to our courthouse by conceptualizing it as a mere platitude. But "Equal Justice Under Law" remains this Court's guiding light nearly a century after those words were first engraved there. Striving to embody that particular ideal is what distinguishes our work as judges from that of the well-heeled lawyers and lobbyists who walk into similarly ornate buildings every day to promote the interests of their clients. It may sometimes be difficult to tell one marble façade from another—especially when some of them share a common architect. But those of us who are privileged to work inside the Court must not lose sight of this institution's unique mission and responsibility: to rule without fear or favor. If the Court privileges the interests of one class of litigants over others, even unintentionally, it can damage Americans' faith in an impartial Judiciary and undermine the long-term credibility of its judgments.

Time will tell if today's decision portends a broader shift in the Court's view of Article III standing for all litigants. If it does not, and if the Court is not fastidious in maintaining consistency across its certiorari decisions and substantive rulings, its decisions will come to represent, like so many marble façades, another mere facsimile of justice.

2. Causation and Redressability

(CB, p. 232, last paragraph, after the citation to Grutter v. Bollinger (2003))

In Students for Fair Admissions v. President and Fellows of Harvard College (2023), the Court held that race-based affirmative action programs at two universities were unlawful under Title VII and the Equal Protection Clause. It held that the plaintiff, a 501(c)(3) nonprofit organization with about 50 members which it represents "in good faith," had standing as an organization to challenge the programs.

5. Governmental Standing

(CB, p. 286, at the end of the second full paragraph)

After *Massachusetts v. EPA*, the Court reaffirmed *Mellon*'s bar on state *parens patriae* suits against the federal government. See Haaland v. Brackeen (2023) (Texas "has no equal protection rights of its own" to assert against the family protection provisions of the Indian Child Welfare Act, and a state does not, on behalf of the rights of its citizens, "have standing as *parens patriae* to bring an action against the Federal Government"). This bar on state standing does not extend, however, to a suit in which a state seeks to redress an injury to itself arising from federal agency action. Thus, in Biden v. Nebraska (2023), the Court held that a state had standing to challenge a federal administrative loan-forgiveness program based upon alleged financial injuries to a nonprofit government corporation that provided student loans. The Court rejected the dissenting justices' argument that the state lacked standing to sue based upon injuries to the nonprofit corporation, which had its own legal personality, was financially independence from the state, and was not participating in the suit. The nonprofit corporation was an instrumentality of the state, making an injury to it an injury to the state for standing purposes.

(CB, p. 287, after carryover paragraph)

The Court has continued its pattern of not citing *Massachusetts v. EPA*'s special solicitude principle in its state standing cases. In United States v. Texas (2023), the Court held that two states lacked standing to challenge the Secretary of Homeland Security's guidelines about the enforcement of the federal immigration laws against noncitizens, concluding that they lacked standing because they were not facing an enforcement action or threatened with one. In so doing, the Court reaffirmed the holding of Linda R.S. v. Richard D. (1973) that a plaintiff who "is neither prosecuted nor threatened with prosecution" lacks Article III standing. The Court did not address the special solicitude principle and instead emphasized that the suit raised a rare standing question: whether a federal court may order the federal executive to arrest someone. According to the Court, there was no precedent for such a suit. "In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court," the Court concluded.

The Court illustrated the limits on both state standing and private standing in Murthy v. Missouri (2024), which involved a lawsuit alleging that executive officials and agencies coerced social media companies into censoring speech about the 2020 presidential election and COVID-19. The Court held that none of the plaintiffs had Article III standing to bring this suit. The Court reaffirmed that plaintiffs bringing constitutional claims face significant hurdles when they seek prospective relief to redress an injury that arises from independent action by third parties.

MURTHY V. MISSOURI
144 S. Ct. 1972 (2024)

Justice Barrett delivered the opinion of the Court.

During the 2020 election season and the COVID-19 pandemic, social-media platforms frequently removed, demoted, or fact checked posts containing allegedly false or misleading information. At the same time, federal officials, concerned about the spread of "misinformation" on social media, communicated extensively with the platforms about their content-moderation efforts.

The plaintiffs, two States and five social-media users, sued dozens of Executive Branch officials and agencies, alleging that they pressured the platforms to suppress protected speech in violation of the First Amendment. The Fifth Circuit agreed, concluding that the officials' communications rendered them responsible for the private platforms' moderation decisions. It then affirmed a sweeping preliminary injunction.

The Fifth Circuit was wrong to do so. To establish standing, the plaintiffs must demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek. Because no plaintiff has carried that burden, none has standing to seek a preliminary injunction.

I

With their billions of active users, the world's major social-media companies host a "staggering" amount of content on their platforms. Yet for many of these companies, including Facebook, Twitter, and YouTube, not everything goes. Under their longstanding content-moderation policies, the platforms have taken a range of actions to suppress certain categories of speech. They place warning labels on some posts, while deleting others. They also "demote" content so that it is less visible to other users. And they may suspend or ban users who frequently post content that violates platform policies.

For years, the platforms have targeted speech they judge to be false or misleading. For instance, in 2016, Facebook began fact checking and demoting posts containing misleading claims about elections. Since 2018, Facebook has removed health-related misinformation, including false claims about a measles outbreak in Samoa and the polio vaccine in Pakistan. Likewise, in 2019, YouTube announced that it would "demonetize" channels that promote anti-vaccine messages.

In 2020, with the outbreak of COVID-19, the platforms announced that they would enforce their policies against users who post false or misleading content about the pandemic. As early as January 2020, Facebook deleted posts it deemed false regarding "cures," "treatments," and the effect of "physical distancing." And it demoted posts containing what it described as "conspiracy theories about the origin of the virus." Twitter and YouTube began applying their policies in March and May 2020, respectively. Throughout the pandemic, the platforms removed or reduced posts questioning the efficacy and safety of mask wearing and the COVID-19 vaccine, along with posts on related topics.

The platforms also applied their misinformation policies during the 2020 Presidential election season. Facebook, in late 2019, unveiled measures to counter foreign interference campaigns and voter suppression efforts. One month before the election, multiple platforms suppressed a report about Hunter Biden's laptop, believing that the story originated from a Russian hack-and-leak operation. After the election, the platforms took action against users or posts that questioned the integrity of the election results.

Over the past few years, various federal officials regularly spoke with the platforms about COVID-19 and election-related misinformation. Officials at the White House, the Office of the Surgeon General, and the Centers for Disease Control and Prevention (CDC) focused on COVID-

19 content, while the Federal Bureau of Investigation (FBI) and the Cybersecurity and Infrastructure Security Agency (CISA) concentrated on elections.

White House. In early 2021, and continuing primarily through that year, the Director of Digital Strategy and members of the COVID-19 response team interacted with the platforms about their efforts to suppress vaccine misinformation. They expressed concern that Facebook in particular was "one of the top drivers of vaccine hesitancy," due to the spread of allegedly false or misleading claims on the platform. Thus, the officials peppered Facebook (and to a lesser extent, Twitter and YouTube) with detailed questions about their policies, pushed them to suppress certain content, and sometimes recommended policy changes. Some of these communications were more aggressive than others. Publicly, White House communications officials called on the platforms to do more to address COVID-19 misinformation—and, perhaps as motivation, raised the possibility of reforms aimed at the platforms, including changes to the antitrust laws and 47 U.S.C. § 230.

Surgeon General. In July 2021, Surgeon General Vivek Murthy issued a health advisory on misinformation. The advisory encouraged platforms to "[r]edesign recommendation algorithms to avoid amplifying misinformation," "[i]mpose clear consequences for accounts that repeatedly violate platform policies," and "[p]rovide information from trusted and credible sources to prevent misconceptions from taking hold." At a press conference to announce the advisory, Surgeon General Murthy argued that the platforms should "operate with greater transparency and accountability."

CDC. Like the White House, the CDC frequently communicated with the platforms about COVID-19 misinformation. In early 2020, Facebook reached out to the agency, seeking authoritative information about the virus that it could post on the platform. The following year, the CDC's communications expanded to other platforms, including Twitter and YouTube. The CDC hosted meetings and sent reports to the platforms, alerting them to misinformation trends and flagging example posts. The platforms often asked the agency for fact checks on specific claims.

FBI and CISA. These agencies communicated with the platforms about election-related misinformation. They hosted meetings with several platforms in advance of the 2020 Presidential election and the 2022 midterms. The FBI alerted the platforms to posts containing false information about voting, as well as pernicious foreign influence campaigns that might spread on their sites. Shortly before the 2020 election, the FBI warned the platforms about the potential for a Russian hack-and-leak operation. Some companies then updated their moderation policies to prohibit users from posting hacked materials. Until mid-2022, CISA, through its "switchboarding" operations, forwarded third-party reports of election-related misinformation to the platforms. These communications typically stated that the agency "w[ould] not take any action, favorable or unfavorable, toward social media companies based on decisions about how or whether to use this information."

Respondents are two States and five individual social-media users. The individual plaintiffs—three doctors, the owner of a news website, and a healthcare activist—allege that various platforms removed or demoted their COVID-19 or election-related content between 2020 and 2023. The States, Missouri and Louisiana, claim that the platforms have suppressed the speech of state entities and officials, as well as their citizens' speech.

Though the platforms restricted the plaintiffs' content, the plaintiffs maintain that the Federal Government was behind it. Acting on that belief, the plaintiffs sued dozens of Executive Branch officials and agencies, alleging that they pressured the platforms to censor the plaintiffs' speech in violation of the First Amendment. The States filed their complaint on May 5, 2022. The next month, they moved for a preliminary injunction, seeking to stop the defendants from "taking any steps to demand, urge, encourage, pressure, or otherwise induce" any platform "to censor, suppress, remove, de-platform, suspend, shadow-ban, de-boost, restrict access to content, or take any other adverse action against any speaker, content, or viewpoint expressed on social media.". The individual plaintiffs joined the suit on August 2, 2022.

After granting extensive discovery, the District Court issued a preliminary injunction. The court held that officials at the White House, the Surgeon General's Office, the CDC, the FBI, and CISA likely "coerced" or "significantly encouraged" the platforms "to such extent that the[ir content-moderation] decision[s] should be deemed to be the decisions of the Government." It enjoined those agencies, along with scores of named and unnamed officials and employees, from taking actions "for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-medial platforms."

Following a grant of panel rehearing, the Fifth Circuit first held that the individual plaintiffs had Article III standing to seek injunctive relief, reasoning that the social-media companies had suppressed the plaintiffs' speech in the past and were likely to do so again in the future. The court also concluded that the States had standing, both because the platforms had restricted the posts of individual state officials and because the States have the "right to listen" to their citizens on social media. On the merits, the Fifth Circuit explained that "a private party's conduct may be state action if the government coerced or significantly encouraged it." Applying those tests, the Fifth Circuit determined that White House officials, in conjunction with the Surgeon General's Office, likely both coerced and significantly encouraged the platforms to moderate content.

II

A

The plaintiffs claim standing based on the "direct censorship" of their own speech as well as their "right to listen" to others who faced social-media censorship. Notably, both theories depend on the *platform's* actions—yet the plaintiffs do not seek to enjoin the platforms from restricting any posts or accounts. They seek to enjoin *Government agencies and officials* from pressuring or encouraging the platforms to suppress protected speech in the future.

The one-step-removed, anticipatory nature of their alleged injuries presents the plaintiffs with two particular challenges. *First*, it is a bedrock principle that a federal court cannot redress "injury that results from the independent action of some third party not before the court." Simon v. Eastern Ky. Welfare Rights Org. (1976). In keeping with this principle, we have "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." Clapper v. Amnesty Intl. (2013). Rather than guesswork, the plaintiffs must show that the third-party platforms "will likely react in predictable ways" to the defendants' conduct. Dept. of Comm. v. New York (2019). *Second*, because the plaintiffs request forward-looking relief,

they must face "a real and immediate threat of repeated injury." O'Shea v. Littleton (1974). Putting these requirements together, the plaintiffs must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant. On this record, that is a tall order.

B

The plaintiffs' primary theory of standing involves their "direct censorship injuries." They claim that the restrictions they have experienced in the past on various platforms are traceable to the defendants and that the platforms will continue to censor their speech at the behest of the defendants. So we first consider whether the plaintiffs have demonstrated traceability for their past injuries.

Here, a note of caution: If the plaintiffs were seeking compensatory relief, the traceability of their past injuries would be the whole ball game. But because the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value. If a plaintiff demonstrates that a particular Government defendant was behind her past social-media restriction, it will be easier for her to prove that she faces a continued risk of future restriction that is likely to be traceable to that same defendant. Conversely, if a plaintiff cannot trace her past injury to one of the defendants, it will be much harder for her to make that showing. In the latter situation, the plaintiff would essentially have to build her case from scratch, showing why she has some newfound reason to fear that one of the named defendants will coerce her chosen platform to restrict future speech on a topic about which she plans to post—in this case, either COVID-19 or the upcoming election. Keep in mind, therefore, that the past is relevant only insofar as it is a launching pad for a showing of imminent future injury.

The primary weakness in the record of past restrictions is the lack of specific causation findings with respect to any discrete instance of content moderation. The District Court made none. Nor did the Fifth Circuit, which approached standing at a high level of generality. The platforms, it reasoned, "have engaged in censorship of certain viewpoints on key issues," while "the government has engaged in a years-long pressure campaign" to ensure that the platforms suppress those viewpoints. The platforms' "censorship decisions"—including those affecting the plaintiffs—were thus "likely attributable at least in part to the platforms' reluctance to risk" the consequences of refusing to "adhere to the government's directives."

We reject this overly broad assertion. As already discussed, the platforms moderated similar content long before any of the Government defendants engaged in the challenged conduct. In fact, the platforms, acting independently, had strengthened their pre-existing content-moderation policies before the Government defendants got involved. For instance, Facebook announced an expansion of its COVID-19 misinformation policies in early February 2021, before White House officials began communicating with the platform. And the platforms continued to exercise their independent judgment even after communications with the defendants began. For example, on several occasions, various platforms explained that White House officials had flagged content that did not violate company policy. Moreover, the platforms did not speak only with the defendants about content moderation; they also regularly consulted with outside experts.

This evidence indicates that the platforms had independent incentives to moderate content and often exercised their own judgment. To be sure, the record reflects that the Government defendants played a role in at least some of the platforms' moderation choices. But the Fifth Circuit, by attributing *every* platform decision at least in part to the defendants, glossed over complexities in the evidence.

The Fifth Circuit also erred by treating the defendants, plaintiffs, and platforms each as a unified whole. Our decisions make clear that "standing is not dispensed in gross." TransUnion LLC v. Ramirez (2021). That is, "plaintiffs must demonstrate standing for each claim that they press" against each defendant, "and for each form of relief that they seek." Id. Here, for every defendant, there must be at least one plaintiff with standing to seek an injunction. This requires a certain threshold showing: namely, that a particular defendant pressured a particular platform to censor a particular topic before that platform suppressed a particular plaintiff 's speech on that topic.

Heeding these conditions is critically important in a sprawling suit like this one. The plaintiffs faced speech restrictions on different platforms, about different topics, at different times. Different groups of defendants communicated with different platforms, about different topics, at different times. And even where the plaintiff, platform, time, content, and defendant line up, the links must be evaluated in light of the platform's independent incentives to moderate content. As discussed, the platforms began to suppress the plaintiffs' COVID-19 content before the defendants' challenged communications started, which complicates the plaintiffs' effort to demonstrate that each platform acted due to "government-coerced enforcement" of its policies, rather than in its own judgment as an "'independent acto[r]."

The plaintiffs rely on allegations of past Government censorship as evidence that future censorship is likely. But they fail, by and large, to link their past social-media restrictions to the defendants' communications with the platforms. Thus, the events of the past do little to help any of the plaintiffs establish standing to seek an injunction to prevent future harms.

To obtain forward-looking relief, the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them. To carry that burden, the plaintiffs must proffer evidence that the defendants' "allegedly wrongful behavior w[ould] *likely* occur or continue." Friends of the Earth, Inc. v. Laidlaw Envt. Svc. (2000). At the preliminary injunction stage, the plaintiffs must show that they are likely to succeed in carrying that burden. But without proof of an ongoing pressure campaign, it is entirely speculative that the platforms' future moderation decisions will be attributable, even in part, to the defendants.

The plaintiffs treat the defendants as a monolith, claiming broadly that "the governmen[t]" continues to communicate with the platforms about "content-moderation issues." But we must confirm that *each* Government defendant continues to engage in the challenged conduct, which is "coercion" and "significant encouragement," not mere "communication." Plus, the plaintiffs have only explicitly identified an interest in speaking about COVID-19 or elections—so the defendants' discussions about content-moderation issues must focus on those topics.

The plaintiffs' counterarguments do not persuade. *First*, they argue that they suffer "continuing, present adverse effects" from their past restrictions, as they must now self-censor on

social media. But the plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*. And as we explained, the plaintiffs have not shown that they are likely to face a risk of future censorship traceable to the *defendants*. Indeed, even before the defendants entered the scene, the plaintiffs "had a similar incentive to engage in" self-censorship, given the platforms' independent content moderation. So it is "difficult to see how" the plaintiffs' self-censorship "can be traced to" the defendants.

Second, the plaintiffs and the dissent suggest that the platforms continue to suppress their speech according to policies initially adopted under Government pressure. That may be true. But the plaintiffs have a redressability problem. "To determine whether an injury is redressable," we "consider the relationship between 'the judicial relief requested' and the 'injury' suffered." The plaintiffs assert several injuries—their past social-media restrictions, current self-censorship, and likely social-media restrictions in the future. The requested judicial relief, meanwhile, is an injunction stopping certain Government agencies and employees from coercing or encouraging the platforms to suppress speech. A court *could* prevent these Government defendants from interfering with the platforms' independent application of their policies. But without evidence of continued pressure from the defendants, it appears that the platforms remain free to enforce, or not to enforce, those policies—even those tainted by initial governmental coercion. The platforms are "not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced."

Indeed, the available evidence indicates that the platforms have enforced their policies against COVID-19 misinformation even as the Federal Government has wound down its own pandemic response measures.

We conclude briefly with the plaintiffs' "right to listen" theory. The individual plaintiffs claim an interest in reading and engaging with the content of other speakers on social media. The First Amendment, they argue, protects that interest. Thus, the plaintiffs assert injuries based on the restrictions that countless other social-media users have experienced.

This theory is startlingly broad, as it would grant all social-media users the right to sue over *someone else's* censorship—at least so long as they claim an interest in that person's speech. This Court has "never accepted such a boundless theory of standing." While we have recognized a "First Amendment right to 'receive information and ideas," we have identified a cognizable injury only where the listener has a concrete, specific connection to the speaker. Kleindienst v. Mandel (1972) [(upholding standing of professors based on First Amendment interest in challenging visa denial of a person they had invited to speak at a conference)]; Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council (1976) (prescription drug consumers had an interest in challenging the prohibition on advertising the price of those drugs).

The plaintiffs, without any concrete link between their injuries and the defendants' conduct, ask us to conduct a review of the years-long communications between dozens of federal officials, across different agencies, with different social-media platforms, about different topics. This Court's standing doctrine prevents us from "exercis[ing such] general legal oversight" of the other branches of Government.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, dissenting.

Freedom of speech serves many valuable purposes, but its most important role is protection of speech that is essential to democratic self-government, and speech that advances humanity's store of knowledge, thought, and expression in fields such as science, medicine, history, the social sciences, philosophy, and the arts.

The speech at issue falls squarely into those categories. It concerns the COVID-19 virus, which has killed more than a million Americans. Our country's response to the COVID-19 pandemic was and remains a matter of enormous medical, social, political, geopolitical, and economic importance, and our dedication to a free marketplace of ideas demands that dissenting views on such matters be allowed. I assume that a fair portion of what social media users had to say about COVID-19 and the pandemic was of little lasting value. Some was undoubtedly untrue or misleading, and some may have been downright dangerous. But we now know that valuable speech was also suppressed. That is what inevitably happens when entry to the marketplace of ideas is restricted.

Of course, purely private entities like newspapers are not subject to the First Amendment, and as a result, they may publish or decline to publish whatever they wish. But government officials may not coerce private entities to suppress speech, see National Rifle Association of America v. Vullo, (2024), and that is what happened in this case.

The record before us is vast. It contains evidence of communications between many different government actors and a variety of internet platforms, as well as evidence regarding the effects of those interactions on the seven different plaintiffs.

With the inquiry focused in this way, here is what the record plainly shows. For months in 2021 and 2022, a coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID-19-related speech. Not surprisingly, Facebook repeatedly yielded. These past and threatened future injuries were caused by and traceable to censorship that the officials coerced, and the injunctive relief she sought was an available and suitable remedy. This evidence was more than sufficient to establish standing to sue, and consequently, we are obligated to tackle the free speech issue that the case presents. The Court, however, shirks that duty and thus permits the successful campaign of coercion in this case to stand as an attractive model for future officials who want to control what the people say, hear, and think.

That is regrettable. What the officials did in this case was more subtle than the ham-handed censorship found to be unconstitutional in *Vullo*, but it was no less coercive. And because of the perpetrators' high positions, it was even more dangerous. It was blatantly unconstitutional, and the country may come to regret the Court's failure to say so. Officials who read today's decision together with *Vullo* will get the message. If a coercive campaign is carried out with enough sophistication, it may get by. That is not a message this Court should send.

First, social media have become a leading source of news for many Americans, and with the decline of other media, their importance may grow.

Second, internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources. If a President dislikes a particular newspaper, he (fortunately) lacks the ability to put the paper out of business. But for Facebook and many other social media platforms, the situation is fundamentally different. They are critically dependent on the protection provided by § 230 of the Communications Decency Act of 1996, which shields them from civil liability for content they spread. They are vulnerable to antitrust actions; indeed, Facebook CEO Mark Zuckerberg has described a potential antitrust lawsuit as an "existential" threat to his company. And because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests.

For these and other reasons, internet platforms have a powerful incentive to please important federal officials, and the record in this case shows that high-ranking officials skillfully exploited Facebook's vulnerability. When Facebook did not heed their requests as quickly or as fully as the officials wanted, the platform was publicly accused of "killing people" and subtly threatened with retaliation.

Not surprisingly these efforts bore fruit. Facebook adopted new rules that better conformed to the officials' wishes, and many users who expressed disapproved views about the pandemic or COVID-19 vaccines were "deplatformed" or otherwise injured.

[Justice Alito then discussed the merits and said that the plaintiffs were likely to win on their First Amendment claim of government coercion.]

6. Representational Standing: Organizational Standing and Legislative Standing

(CB, p. 288, after last full paragraph)

In Students for Fair Admissions v. President and Fellows of Harvard College (2023), however, the Court applied the *Hunt* test and held that a 501(c)(3) nonprofit with about 50 members had organizational standing to challenge affirmative action programs at Harvard College and the University of North Carolina. The defendants argued that the nonprofit was not a bona fide association because it lacked sufficient "indicia of membership" under *Hunt*. The Court rejected that argument, stressing that the "indicia of membership" analysis was necessary in *Hunt* because the organization in that case was a state agency that had members "in substance, if not in form." By contrast, the nonprofit in *SFFA* was "indisputably a voluntary membership organization with identifiable members." On the merits, the Court held that race-based affirmative action programs at two universities were unlawful under Title VII and the Equal Protection Clause.

D. Mootness

3. Exceptions to Mootness

c. Voluntary Cessation

(CB, p. 337, after the dinkus at the end of Defunis v. Odegaard (1974))

Generally, neither "voluntary cessation of allegedly illegal conduct" nor a defendant's promise to cease such conduct is sufficient to render a case moot. *See* United States v. W.T. Grant Co. (1953). Voluntary cessation of illegal conduct will only moot a case "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth v. Laidlaw Env't Servs. (2000). The Court recently affirmed these principles in Fed. Bureau of Investigation v. Fikre (2024). In that case, the federal government placed a naturalized American citizen on a "No Fly list," prohibiting him from engaging in air travel. Because the citizen was abroad on a business trip, his placement on the list left him stranded, unable to return back home to the United States. As a result, he sought prospective relief in a federal lawsuit, alleging an absence of procedural due process and discrimination on account of his race, national origin, and religion. The federal government then removed him from the list, and ultimately provided some assurances that it would not place him on the list again. In the case that follows, the Court confronted whether those assurances divested federal courts of continued jurisdiction.

FED. BUREAU OF INVESTIGATION V. FIKRE
601 U.S. 234 (2024)

Justice Gorsuch delivered the opinion of the Court.

Yonas Fikre, a U. S. citizen, brought suit alleging that the government placed him on the No Fly List unlawfully. Later, the government removed him from the list. The only question we are asked to decide is whether the government's action suffices to render Mr. Fikre's claims moot.

I

A

In the aftermath of the September 11, 2001, terrorist attacks, the federal government rapidly expanded its No Fly List. By 2016, the government forbade approximately 81,000 individuals from flying into, out of, within, or over the United States. Many of the details surrounding the No Fly List are not publicly available. Some are classified, and it appears no statute or publicly promulgated regulation describes the standards the government employs when adding individuals to, or removing them from, the list.

In his complaint, Mr. Fikre challenged his placement on the No Fly List. In support of his suit, he pleaded a number of facts:

Mr. Fikre and his family moved [from Eritrea] to Sudan before eventually immigrating to the United States. In time, Mr. Fikre became a U.S. citizen, and as an adult he lived in Portland, Oregon. After working for an American cell phone company, he decided to start his own business involving the distribution and retail sale of consumer electronic products in his native East Africa. In pursuit of this new venture, he traveled to Sudan in late 2009 where some of his extended family still lived.

On arrival, Mr. Fikre informed U. S. officials of his interest in pursuing business opportunities in the country. Eventually, he received an invitation to the U. S. embassy—ostensibly for a luncheon. But, once there, Fikre was whisked instead to a small meeting room with two FBI agents. The agents told him that the government had placed him on the No Fly List, so he "could not return to the United States." The agents then questioned him "extensively about the events,

activities, and leadership" of the Portland mosque he attended. They asked him to serve as an FBI informant and report on other members of his religious community, offering to "take steps to remove [him] from the No Fly List" if he agreed. Mr. Fikre refused and eventually departed. The next day, an agent told him over the phone that, "'[w]henever you want to go home[,] you come to the embassy.'" Mr. Fikre took this to mean that he "would not be removed from the No Fly List and he could not travel to the United States unless he became" an FBI informant.

Several weeks later, Mr. Fikre traveled to the United Arab Emirates to advance his business plans. Eventually, however, authorities there "arrested, imprisoned, and tortured him." They interrogated him, too, about his Portland mosque, its events, leader, and fundraising activities. One interrogator told Mr. Fikre that the FBI had solicited his interrogation and detention. After holding him for 106 days, authorities arranged to have Mr. Fikre flown to Sweden where he had a relative. He remained there until February 2015, when the Swedish government returned him to Portland by private jet.

B

While still in Sweden, Mr. Fikre filed this suit. In his complaint, he alleged that the government had violated his rights to procedural due process by failing to provide any meaningful notice of his addition to the No Fly List, any information about the factual basis for his listing, and any appropriate way to secure redress. Further, he claimed, the government had placed him on the list for constitutionally impermissible reasons, including his race, national origin, and religious beliefs. By way of relief, he sought a declaratory judgment confirming that the government had violated his rights, as well as an injunction prohibiting it from keeping him on the No Fly List.

Eventually, in May 2016, the government notified Mr. Fikre that it had removed him from the No Fly List. No explanation accompanied the decision. But, in court, the government argued that its administrative action rendered his lawsuit moot; even accepting all his allegations as true, the government said, dismissal had to follow as a matter of law. It did not contest the truth of Mr. Fikre's allegations concerning his experiences. But the government relied on a declaration from the Acting Deputy Director for Operations of the Terrorist Screening Center. The declaration represented that Mr. Fikre "will not be placed on the No Fly List in the future based on the currently available information." Persuaded by the government's latest motion, the district court dismissed Mr. Fikre's claims as moot. The Ninth Circuit reversed.

II

The Constitution grants federal courts jurisdiction to decide "Cases" or "Controversies." Art. III, §§ 1, 2. A court with jurisdiction has a "virtually unflagging obligation" to hear and resolve questions properly before it. Colorado River Water Conservation Dist. v. United States (1976). But the converse also holds true. Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it. When that happens, a federal court must dismiss the case as moot. It must because federal judges are not counselors or academics; they are not free to take up hypothetical questions that pique a party's curiosity or their own. The limited authority vested in federal courts to decide cases and controversies means that they may no more pronounce on past actions that do not have any continuing effect in the world than they may shirk decision on those that do.

None of this implies that a defendant may "automatically moot a case" by the simple expedient of suspending its challenged conduct after it is sued. Instead, our precedents hold, a defendant's "'voluntary cessation of a challenged practice'" will moot a case only if the defendant can show that the practice cannot "'reasonably be expected to recur.'" Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. (2000); *see* United States v. W. T. Grant Co. (1953).

We have described this as a "formidable burden." *Friends of the Earth*. And the reason for it is simple: "The Constitution deals with substance," not strategies. Cummings v. Missouri (1867). Were the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat "this cycle" as necessary until it achieves all of its allegedly "unlawful ends." Already, LLC v. Nike (2013). A live case or controversy cannot be so easily disguised, and a federal court's constitutional authority cannot be so readily manipulated. To show that a case is truly moot, a defendant must prove "'no reasonable expectation'" remains that it will "return to [its] old ways." U.S. v. W.T. Grant Co. (1953). That much holds for governmental defendants no less than for private ones.

Viewed in that light, this case is not moot. To appreciate why, it is enough to consider one aspect of Mr. Fikre's complaint. He contends that the government placed him on the No Fly List for constitutionally impermissible reasons, including his religious beliefs. In support of his claim, Mr. Fikre alleges (among other things) that FBI agents interrogated him about a mosque in Portland he once attended and threatened to keep him on the No Fly List unless he agreed to serve as an informant against his co-religionists. Accepting these as-yet uncontested allegations, the government's representation that it will not relist Mr. Fikre based on "currently available information" may mean that his past actions are not enough to warrant his relisting. But, as the court of appeals observed, none of that speaks to whether the government might relist him if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant. Put simply, the government's sparse declaration falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past.

If its declaration alone will not do, the government asks us to consider two further things. First, it points to the fact that it removed Mr. Fikre from the No Fly List in 2016. The government acknowledges that it took this action only after he filed suit. But, it stresses, the parties have now sparred in court for some years since his delisting. Second, the government surmises that, during this period, Mr. Fikre "presumably has joined religious organizations" and interacted freely with his co-religionists. Together, the government submits, these points make it unlikely he will face relisting in the future.

That, too, is insufficient to warrant dismissal. A case does not automatically become moot when a defendant suspends its challenged conduct and then carries on litigating for some specified period. Nor can a defendant's speculation about a plaintiff's actions make up for a lack of assurance about its own. In all cases, it is the defendant's "burden to establish" that it cannot reasonably be expected to resume its challenged conduct—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment. Nothing the government offers here satisfies that formidable standard.

Yes, a party's repudiation of its past conduct may sometimes help demonstrate that conduct is unlikely to recur. But often a case will become moot even when a defendant "vehemently" insists

on the propriety of "the conduct that precipitated the lawsuit." *Already*. What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct. It is on that consideration alone—the potential for a defendant's future conduct—that we rest our judgment.

To be sure, litigating disputes that potentially touch on matters of national security beyond the motion-to-dismiss stage can present evidentiary challenges for parties and courts alike. Careful attention must be paid to the handling of classified or privileged information. For our present purposes, however, it is enough to know both sides agree that adhering to traditional mootness principles is especially important in this national-security context. And adhering to those principles here, "it is impossible to conclude" the government has so far "borne [its] burden" of proving that this dispute is moot. Adarand Constructors Inc. v. Slater (2000).

The judgment of the Court of Appeals for the Ninth Circuit is *affirmed*.

[The concurring opinion of Justice Alito, joined by Justice Kavanaugh, is omitted.]

(CB p. 394, end of third paragraph)

In Bouarfa v. Mayorkas (2024), the Supreme Court unanimously held that revocation of a visa petition based on a sham marriage was a statutorily designated discretionary decision that is not subject to judicial review under the Immigration and Nationality Act's jurisdiction-stripping provision. The Court noted cited Webster v. Doe (1988) for the power of Congress to strip jurisdiction of statutory claims and noted that in "certain contexts, Congress has restored juridical review over "constitutional claims or questions of law" in the INA. In this case, however, the plaintiff raised no constitutional claims.

Chapter 4

Congressional Control of Federal and State Adjudication

B. Congressional Power to Create Legislative Courts and to Authorize Administrative Adjudication

3. Non-Article III Adjudication of Public Rights Cases

(CB, p. 493, after Crowell v. Benson (1932))

In *Crowell*, the Court concluded that Congress may enact a scheme that uses non-Article III adjudicators as adjuncts for Article III courts in private rights matters. The Court contemplated that a reviewing court must allow for the relitigation of constitutional facts and jurisdictional facts de novo and must decide legal questions de novo. However, just four years later, the Court held that agency factfinding, even going to constitutional issues, "will not be disturbed save as in particular instances they are plainly shown to be overborne." St. Joseph Stock Yards Co. v. United States (1936). This applies a kind of clear error standard to federal judicial review of agency fact finding, limiting federal courts, in most cases, to the record established by the agency. In a decision five decades later, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (1984), the Court supplemented this fact deference with a requirement of deference to agencies on questions of law, holding that a court must defer to an agency's "permissible" interpretation of ambiguities in a statute that the agency administers. *Chevron* deference, which was typically justified on the grounds that agencies are policy experts and more politically accountable than courts, was in tension with *Crowell*'s assumption that reviewing courts must decide all questions of law without deferring to agencies.

In Loper Bright Enterprises v. Raimondo (2024), the Court overruled *Chevron* and held that a court must independently interpret statutes, asking whether they "delegate[] discretionary authority to an agency," whether the delegation is constitutional, and whether the agency "has engaged in reasoned decisionmaking within [the] boundaries" of Congress's delegation. It remains to be seen how much *Loper Bright* will change patterns of judicial review of agency policymaking. But in its broad outline, *Loper Bright* is consistent with *Crowell*'s principle of independent judicial determination of legal questions.

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co. (1982), the Court turned its attention from agency adjudication to bankruptcy, another area where Congress has relied heavily on the efficient claims processing power of non-Article III adjudicators.

(CB, p. 529, after the carryover paragraph)

In *SEC v. Jarkesy*, the Court held that the SEC's use of agency adjudicators to decide an enforcement action for civil penalties violated the Seventh Amendment's guarantee of a jury trial. Relying upon Granfinanciera, S.A. v. Nordberg (1989) (fraudulent conveyance actions trigger the Seventh Amendment right to a jury trial and therefore cannot be heard in bankruptcy proceedings), and Tull v. United States (1987) (holding that the Seventh Amendment applies to statutory causes of action analogous to common law claims and remedies, precluding bench trial of government's civil penalty claim under the Clean Water Act), the Court concluded that the enforcement action was unconstitutional even though it involved the government acting in its sovereign capacity to enforce federal law.

Jarkesy is the first Supreme Court decision to hold that a government enforcement action does not necessarily fall within the public rights exception to Article III jurisdiction. As you read the case, focus upon the Court's reasons for first concluding that the Seventh Amendment was implicated and then that the public rights exception did not apply. The Court stressed that the SEC's action resembled one for common law fraud and narrowly construed Atlas Roofing Co. v. Occupational Safety and Health Review Commission (1977), which upheld administrative adjudication of an OSHA civil penalty claim that had no common law analogue. More broadly, notice that, as in *Oil States*, the Court returned to the categorical test and narrowly construed the public rights doctrine, rejecting the more permissive functionalist approach of *Schor*, *Union Carbide*, and *Wellness*.

SEC v. JARKESY
144 S. Ct. 2117 (2024)

Chief Justice Roberts delivered the opinion of the Court.

In 2013, the Securities and Exchange Commission initiated an enforcement action against respondents George Jarkesy, Jr., and Patriot28, LLC, seeking civil penalties for alleged securities fraud. The SEC chose to adjudicate the matter in-house before one of its administrative law judges, rather than in federal court where respondents could have proceeded before a jury. We consider whether the Seventh Amendment permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court.

I

A

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statutes are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Their protections are mutually reinforcing and often overlap. Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions"—target the same basic behavior: misrepresenting or concealing material facts.

The three antifraud provisions are Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act. Section 17(a) prohibits

regulated individuals from "obtain[ing] money or property by means of any untrue statement of a material fact," as well as causing certain omissions of material fact. As implemented by Rule 10b–5, Section 10(b) prohibits using "any device, scheme, or artifice to defraud," making "untrue statement[s] of . . . material fact," causing certain material omissions, and "engag[ing] in any act . . . which operates or would operate as a fraud." And finally, Section 206(b), as implemented by Rule 206(4)–8, prohibits investment advisers from making "any untrue statement of a material fact" or engaging in "fraudulent, deceptive, or manipulative" acts with respect to investors or prospective investors.

To enforce these Acts, Congress created the SEC. The SEC may bring an enforcement action in one of two forums. First, the Commission can adjudicate the matter itself. Alternatively, it can file a suit in federal court. The SEC's choice of forum dictates two aspects of the litigation: The procedural protections enjoyed by the defendant, and the remedies available to the SEC.

Procedurally, these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts. Most pertinently, in federal court a jury finds the facts, depending on the nature of the claim. See U.S. Const., Amdt. 7. In addition, a life-tenured, salary-protected Article III judge presides, see Art. III, § 1, and the litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery.

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts while its Division of Enforcement prosecutes the case. The Commission may also delegate its role as judge and factfinder to one of its members or to an administrative law judge (ALJ) that it employs. In these proceedings, the Commission or its delegee decides discovery disputes, and the SEC's Rules of Practice govern. The Commission or its delegee also determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court.

Judicial review is also available once the proceedings have concluded. But such review is deferential. By law, a reviewing court must treat the agency's factual findings as "conclusive" if sufficiently supported by the record, even when they rest on evidence that could not have been admitted in federal court.

The remedy at issue in this case, civil penalties, also originally depended upon the forum chosen by the SEC. Except in cases against registered entities, the SEC could obtain civil penalties only in federal court. That is no longer so. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). That Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H.R. Rep. No. 111-687, p. 78 (2010). In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings.

Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation. And the SEC may levy these penalties even when no investor has actually suffered financial loss.

B

Shortly after passage of the Dodd-Frank Act, the SEC began investigating Jarkesy and Patriot28 for securities fraud. Between 2007 and 2010, Jarkesy launched two investment funds, raising about $24 million from 120 "accredited" investors—a class of investors that includes, for example, financial institutions, certain investment professionals, and high net worth individuals. Patriot28, which Jarkesy managed, served as the funds' investment adviser. According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees. The SEC initiated an enforcement action, contending that these actions violated the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, and sought civil penalties and other remedies.

Relying on the new authority conferred by the Dodd-Frank Act, the SEC opted to adjudicate the matter itself rather than in federal court. In 2014, the presiding ALJ issued an initial decision. The SEC reviewed the decision and then released its final order in 2020. The final order levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks.

II

This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. Our analysis of this question follows the approach set forth in Granfinanciera[, S.A. v. Nordberg (1989)] and Tull v. United States (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial. The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Seventh Amendment therefore applies and a jury is required. Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.

A

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." Commentators recognized the right as "the glory of the English law," 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778) (Blackstone), and it was prized by the American colonists. When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for "subvert[ing] the rights and liberties of the colonists." Resolutions of the

Stamp Act Congress, Art. VIII (Oct. 19, 1765). Representatives gathered at the First Continental Congress demanded that Parliament respect the "great and inestimable privilege of being tried by their peers of the vicinage, according to the [common] law." 1 Journals of the Continental Congress, 1774–1789, p. 69 (Oct. 14, 1774) (W. Ford ed. 1904). And when the English continued to try Americans without juries, the Founders cited the practice as a justification for severing our ties to England. See Declaration of Independence ¶20.

In the Revolution's aftermath, perhaps the "most success[ful]" critique leveled against the proposed Constitution was its "want of a . . . provision for the trial by jury in civil cases." The Federalist No. 83, p. 495 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they "embedded" the right in the Constitution, securing it "against the passing demands of expediency or convenience." Reid v. Covert (1957) (plurality opinion). Since then, "every encroachment upon it has been watched with great jealousy." Parsons v. Bedford (1830).

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. Curtis v. Loether (1974). As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons*. The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume."

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." *Granfinanciera*. As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. In that case, the Government sued a real estate developer for civil penalties in federal court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by the Government to recover civil penalties under statutory provisions," we explained, "historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." Austin v. United States (1993). And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." *Tull*. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." The same is true here.

Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, [the statutory factors for setting a civil penalty] are legal rather than equitable. Since nothing in this analysis turns on "restoring the status quo," *Tull*, these factors show that these civil penalties are designed to be punitive. The final proof that this remedy is punitive is that the SEC is not obliged to return any money to the victims. [T]he civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." *Tull*. That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.

The close relationship between the causes of action in this case and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. That is no accident. Congress deliberately used "fraud" and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. The SEC has followed suit in rulemakings. Rule 10b–5, for example, prohibits "any device, scheme, or artifice to defraud," and "engag[ing] in any act . . . which operates or would operate as a fraud."

That is not to say that federal securities fraud and common law fraud are identical. Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature." *Granfinanciera*.

B

1

Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal.

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." Murray's Lessee v. Hoboken Land & Improvement Co. (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. Stern v. Marshall (2011). These propositions are critical to maintaining the proper role of the Judiciary in the Constitution: "Under 'the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government' adopted in the Constitution, 'the judicial Power of the United States'" cannot be shared with the other branches. Or, as Alexander Hamilton wrote in The Federalist Papers, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. *Murray's Lessee*; *Granfinanciera*; *Stern*. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Stern* (quoting

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co. (1982) (Rehnquist, J., concurring in judgment)). If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.

At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," *Stern*, even when they were "presented in such form that the judicial power [wa]s capable of acting on them," *Murray's Lessee*. In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. Plaintiffs later attacked the purchaser's title, arguing that the initial seizure was void because the Government had audited the collector's account and issued the warrant itself without judicial involvement.

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to "enforce payment of balances due from receivers of the revenue." In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. The challenge to the sale thus lacked merit.

This principle extends beyond cases involving the collection of revenue. In Oceanic Steam Navigation Co. v. Stranahan (1909), we considered the imposition of a monetary penalty on a steamship company. Pursuant to its plenary power over immigration, Congress had excluded immigration by aliens afflicted with "loathsome or dangerous contagious diseases," and it authorized customs collectors to enforce the prohibition with fines. When a steamship company challenged the penalty under Article III, we upheld it.

In Ex parte Bakelite Corp. (1929), we upheld a law authorizing the President to impose tariffs on goods imported by "unfair methods of competition." The law permitted him to set whatever tariff was necessary, subject to a statutory cap, to produce fair competition. If the President was "satisfied the unfairness [was] extreme," the law even authorized him to "exclude[ ]" foreign goods entirely. Because the political branches had traditionally held exclusive power over this field and had exercised it, we explained that the assessment of tariffs did not implicate Article III.

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, see United States v. Jicarilla Apache Nation (2011), the administration of public lands, Crowell v. Benson (1932), and the granting of public benefits such as payments to veterans, pensions, and patent rights, United States v. Duell (1899).

Our opinions governing the public rights exception have not always spoken in precise terms. This is an "area of frequently arcane distinctions and confusing precedents." Thomas v. Union Carbide Agricultural Products Co. (1985). The Court "has not 'definitively explained' the distinction

between public and private rights," and we do not claim to do so today. Oil States Energy Services, LLC v. Greene's Energy Group, LCC (2018).

Nevertheless, since *Murray's Lessee*, this Court has typically evaluated the legal basis for the assertion of the doctrine with care. The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles. *Murray's Lessee* itself, for example, took pains to justify the application of the exception in that particular instance by explaining that it flowed from centuries-old rules concerning revenue collection by a sovereign. Without such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule.[3]

From the beginning we have emphasized one point: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can . . .withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee*. We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. *Stern*. "[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Northern Pipeline Constr. Co.* (plurality opinion). And for good reason: "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern*.

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

Granfinanciera involved a statutory action for fraudulent conveyance. As codified in the Bankruptcy Code, the claim permitted a trustee to void a transfer or obligation made by the debtor before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." Actions for fraudulent conveyance were well known at common law. Even when Congress added these claims to the Bankruptcy Code in 1978, it preserved parties' rights to a trial by jury. In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries.

[3] The dissent would brush away these careful distinctions and unfurl a new rule: that whenever Congress passes a statute "entitl[ing] the Government to civil penalties," the defendant's right to a jury and a neutral Article III adjudicator disappears. the dissent extrapolates from the outcomes in cases concerning unrelated applications of the public rights exception and from one opinion, Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n (1977). The result is to blur the distinctions our cases have drawn in favor of the legally unsound principle that just because the Government may extract civil penalties in administrative tribunals in some contexts, it must always be able to do so in all contexts. The dissent also appeals to practice, ignoring that the statute Jarkesy and Patriot28 have been prosecuted under is barely over a decade old.

The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. We explained that it was not. Although Congress had assigned fraudulent conveyance claims to bankruptcy courts, that assignment was not dispositive. What mattered, we explained, was the substance of the suit. "[T]raditional legal claims" must be decided by courts, "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull*. We examined whether the matter was "from [its] nature subject to 'a suit at common law.'" A survey of English cases showed that "actions to recover . . . fraudulent transfers were often brought at law in late 18th-century England." The remedy the trustee sought was also one "traditionally provided by law courts." Fraudulent conveyance actions were thus "quintessentially suits at common law."

We also considered whether these actions were "closely intertwined" with the bankruptcy regime. Some bankruptcy claims, such as "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," are highly interdependent and require coordination. Resolving such claims fairly is only possible if they are all submitted at once to a single adjudicator. Otherwise, parties with lower priority claims can rush to the courthouse to seek payment before higher priority claims exhaust the estate, and an orderly disposition of a bankruptcy is impossible. Other claims, though, can be brought in standalone suits, because they are neither prioritized nor subordinated to related claims. Since fraudulent conveyance actions fall into that latter category, we concluded that these actions were not "closely intertwined" with the bankruptcy process. We also noted that Congress had already authorized jury trials for certain bankruptcy matters, demonstrating that jury trials were not generally "incompatible" with the overall regime.

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. The public rights exception therefore did not apply, and a jury was required.

3

Granfinanciera effectively decides this case. Even when an action "originate[s] in a newly fashioned regulatory scheme," what matters is the substance of the action, not where Congress has assigned it. And in this case, the substance points in only one direction. According to the SEC, these are actions under the "antifraud provisions of the federal securities laws" for "fraudulent conduct." They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. In short, this action involves a "matter[ ] of private rather than public right." *Granfinancieria*. Therefore, "Congress may not 'withdraw'" it "'from judicial cognizance.'"

4

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. But we have never held that "the presence of the United States as a proper party to the proceeding is . . . sufficient" by itself to trigger the exception. *Northern Pipeline Constr. Co.* (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts.

5

The principal case on which the SEC and the dissent rely is Atlas Roofing Co. v. Occupational Safety and Health Review Commission (1977). The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. If a party violated the regulations, the agency could impose civil penalties.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter." Rather than reiterate common law terms of art, [these standards] instead resembled a detailed building code. For example, the OSH Act regulations directed that a ground trench wall of "Solid Rock, Shale, or Cemented Sand and Gravels" could be constructed at a 90 degree angle to the ground. But a wall of "Compacted Angular Gravels" needed to be sloped at 63 degrees, and a wall of "Well Rounded Loose Sand" at 26 degrees. The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to "develop[ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems." In both concept and execution, the Act was self-consciously novel.

Facing enforcement actions, two employers alleged that the adjudicatory authority of the OSHRC violated the Seventh Amendment. The Court rejected the challenge, concluding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[ ]." *Atlas Roofing*. As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." The Seventh Amendment, the Court concluded, was accordingly "no bar to . . . enforcement outside the regular courts of law."

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." The case therefore does not control here, where the statutory claim is "'in the nature of'" a common law suit. As we have explained, Jarkesy and Patriot28 were prosecuted for "fraudulent conduct," and the pertinent statutory provisions derive from, and are interpreted in light of, their common law counterparts.

The reasoning of *Atlas Roofing* cannot support any broader rule. The dissent chants "*Atlas Roofing*" like a mantra, but no matter how many times it repeats those words, it cannot give *Atlas Roofing* substance that it lacks. Even as *Atlas Roofing* invoked the public rights exception, the definition it offered of the exception was circular. The exception applied, the Court said, "in cases in which 'public rights' are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes."

After *Atlas Roofing*, this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims. In addition, we have

explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. *Granfinanciera*.

For its part, the dissent also seems to suggest that *Atlas Roofing* establishes that the public rights exception applies whenever a statute increases governmental efficiency. Again, our precedents foreclose this argument. As *Stern* explained, effects like increasing efficiency and reducing public costs are not enough to trigger the exception.

The novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today. Given the judiciary's long history of handling fraud claims, it cannot be argued that the courts lack the capacity needed to adjudicate such actions.

* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands.

Justice Gorsuch, with whom Justice Thomas joins, concurring.

I write separately to highlight that other constitutional provisions reinforce the correctness of the Court's course. The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." In re Murchison (1955) . . . .

[P]ublic rights are a narrow class defined and limited by history. As the Court explains, that class had traditionally included the collection of revenue, customs enforcement, immigration, and the grant of public benefits. Whatever their [practical and theoretical] roots, traditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree. We [therefore] look for some deeply rooted tradition of nonjudicial adjudication before permitting a case to be tried in a different forum under different procedures.

People like Mr. Jarkesy may be unpopular. Perhaps even rightly so: The acts he allegedly committed may warrant serious sanctions. But that should not obscure what is at stake in his case or others like it. While incursions on old rights may begin in cases against the unpopular, they rarely end there. The authority the government seeks (and the dissent would award) in this case—to penalize citizens without a jury, without an independent judge, and under procedures foreign to our courts—certainly contains no such limits. That is why the Constitution built "high walls and clear distinctions" to safeguard individual liberty. Ones that ensure even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum. In reaffirming all this today, the Court hardly leaves the SEC without ample

powers and recourse. The agency is free to pursue all of its charges against Mr. Jarkesy. And it is free to pursue them exactly as it had always done until 2010: In a court, before a judge, and with a jury. With these observations, I am pleased to concur.

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

[I]n every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.

A unanimous Court made this exact point nearly half a century ago in [Atlas Roofing Co. v. Occupational Safety and Health Review Commission (1977)]. That was the last time this Court considered a public-rights case where the constitutionality of an in-house adjudication of statutory claims brought by the Government was at issue. That case presented the same question as this one: Whether the Seventh Amendment permits Congress to commit the adjudication of a new cause of action for civil penalties to an administrative agency. The Court said it did.

In *Atlas Roofing*, the Court explained how Congress identified a national problem, concluded that existing legal remedies were inadequate to address it, and then created a new statutory scheme that endorsed Executive in-house enforcement as a solution. This Court upheld OSHA's statutory scheme. It relied on the long history of public-rights cases endorsing Congress's now-settled practice of assigning the Government's rights to civil penalties for violations of a statutory obligation to in-house adjudication in the first instance. In light of this "history and our cases," the Court concluded that, where Congress "create[s] a new cause of action, and remedies therefor, unknown to the common law," it is free to "plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." "That is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law."

This case may involve a different statute from *Atlas Roofing*, but the schemes are remarkably similar. Here, just as in *Atlas Roofing*, Congress identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution. The problem was a lack of transparency and accountability in the securities market that contributed to the Great Depression of the 1930s. The inadequate remedies were the then-existing state statutory and common-law fraud causes of action.

The prophylactic nature of the statutory regime also is virtually indistinguishable from the OSHA scheme at issue in *Atlas Roofing*. Among other things, these securities laws prohibit the misrepresentation or concealment of various material facts through the imposition of federal registration and disclosure requirements. Critically, federal-securities laws do not require proof of actual reliance on an investor's misrepresentations or that an "investor has actually suffered financial loss." OSHA too prohibits conduct that could, but does not necessarily, injure a private person. The employer's failure to maintain safe and healthy working conditions violates OSHA even if there is no actionable harm to an employee, just as a misrepresentation to investors in connection with the buying or selling of securities violates federal-securities law even if there is no actual injury to the investors.

Moreover, both here and in *Atlas Roofing*, Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all while making the final agency decision subject to judicial review. Put differently, the SEC seeks to "'remedy harm to the public at large'" for violation of the Government's rights. The Government likewise seeks to remedy a public harm when it enforces OSHA's prohibition of unsafe working conditions.

Ultimately, both cases arise between the Government and others in connection with the performance of the Government's constitutional functions, and involve the Government acting in its sovereign capacity to bring a statutory claim on behalf of the United States in order to vindicate the public interest. They both involve, as *Atlas Roofing* put it, "new cause[s] of action, and remedies therefor, unknown to the common law." In a world where precedent means something, this should end the case. Yet here it does not.

[I]t is almost impossible to discern how the majority defines a public right and whether its view of the doctrine is consistent with this Court's public-rights cases. The majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law, and that *Atlas Roofing* involved OSHA and not "civil penalty suits for fraud." Other times, the majority highlights a particular practice predating the founding, such as the "unbroken tradition" in *Murray's Lessee* of executive officials issuing warrants of distress to collect revenue. Needless to say, none of these explanations for the doctrine is satisfactory. What is the legal principle behind saying only these areas and no further?

B

Rather than relying on *Atlas Roofing* or the relevant public-rights cases, the majority instead purports to follow *Tull* and *Granfinanciera*. The former involved a suit in federal court and the latter involved a dispute between private parties. So, just like that, the majority ventures off on the wrong path. [B]oth the majority and the concurrence miss the critical distinction drawn in this Court's precedents between the non-Article III adjudication of public-rights matters involving the liability of one individual to another and those involving claims belonging to the Government in its sovereign capacity.

It would have been quite remarkable for *Tull*, which involved a claim in federal court, to overrule silently more than a century of caselaw involving non-Article III adjudications of the Government's rights to civil penalties for statutory violations. Of course, *Tull* did no such thing. *Tull*

even reaffirmed *Atlas Roofing* by emphasizing that the Seventh Amendment depends on the forum, not just the remedy, because it "is not applicable to administrative proceedings." For the majority to pretend otherwise is wishful thinking at best.

Granfinanciera, on which the majority relies to make its cause-of-action argument, set forth the public-rights analysis only for "disputes to which the Federal Government is not a party in its sovereign capacity." For cases that, as here, involve the Government in its sovereign capacity, the *Granfinanciera* Court plainly stated that "Congress may fashion causes of action that are closely *analogous* to common-law claims and [still] place them beyond the ambit of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable."

The majority pulls a rug out from under Congress without even acknowledging that its decision upends over two centuries of settled Government practice.

Following this Court's precedents and the recommendation of the Administrative Conference of the United States, Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. These statutes are sometimes enacted in addition to, but often instead of, "the traditional civil enforcement statutes that permitted agencies to collect civil penalties only after federal district court trials." "By 1986, there were over 200 such statutes" and "[t]he trend has, if anything, accelerated" since then.

Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings. Some agencies, like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the SEC, can pursue civil penalties in both administrative proceedings and federal court. Others do not have that choice. As the above-cited statutes confirm, the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others, can pursue civil penalties only in agency enforcement proceedings. For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.

Against this backdrop, our coequal branches will be surprised to learn that the rule they thought long settled, and which remained unchallenged for half a century, is one that, according to the majority and the concurrence, my dissent just announced today. Unfortunately, that mistaken view means that the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress. Rather than acknowledge the earthshattering nature of its holding, the majority has tried to disguise it. The majority claims that its ruling is limited to "civil penalty suits for fraud" pursuant to a statute that is "barely over a decade old," an assurance that is in significant tension with other parts of its reasoning. That incredible assertion should fool no one. Today's decision is a massive sea change. Litigants seeking further dismantling of the "administrative state" have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate.

C. Congressional Power to Have State Courts Decide Federal Law Matters

1. Discrimination Against Federal Claims

(CB, p. 546, at end of first full paragraph following the dinkus)

The Court reaffirmed the rule that states may not unduly obstruct the enforcement of Section 1983 claims in Williams v. Reed (2025). In that case, twenty-one unemployed Alabama workers alleged that the Alabama Department of Labor unlawfully delayed processing their unemployment claims. Relying on Section 1983, they sued the Secretary of Labor in state court, seeking injunctive relief to expedite the administrative process. Alabama law, however, requires strict administrative exhaustion before any court review of benefits decisions. The state trial court dismissed the case for failure to exhaust administrative remedies, and the Alabama Supreme Court affirmed, holding that § 1983 did not preempt the state's exhaustion requirement.

In an opinion by Justice Kavanaugh, the Court reversed, holding that Alabama's exhaustion requirement, as applied to § 1983 claims challenging delays in the administrative process, effectively immunizes state officials from federal civil rights suits in violation of established precedent. The Court's reasoning centered on the "catch-22" created by Alabama's rule:

> Alabama has said that to challenge delays in the administrative process under § 1983, you first have to exhaust the administrative process. Of course, that means that you can never challenge delays in the administrative process. That catch-22 prevents the claimants here from obtaining a merits resolution of their § 1983 claims in state court and in effect immunizes state officials from those kinds of § 1983 suits for injunctive relief.

The majority applied the established principle from *Felder v. Casey*: "[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court."

The Court distinguished this narrow holding from broader questions about exhaustion requirements generally, emphasizing that the decision applied only to the specific circumstances where state exhaustion requirements would completely bar § 1983 claims challenging administrative delays.

In dissent, Justice Thomas observed that states possess "plenary authority to decide whether their local courts will have subject-matter jurisdiction over federal causes of action" and concluded that Alabama's neutral exhaustion requirement did not embody any impermissible "policy disagreement" with federal law.

(CB, p. 546, at end of the citation sentence in the penultimate paragraph, after the citation to New York v. United States (1992))

Murphy v. NAACP (2018) (Congress cannot compel a state legislature to enact a law or make it unlawful for a state legislature to enact a law and therefore a federal statute banning states from authorizing sports betting unconstitutionally commandeered state legislative powers); cf. Haaland v. Brackeen (2023) (Congress may enact a federal law that provides rules of decision that apply in cases adjudicated under state law causes of action and therefore the Indian Child Welfare Act's provisions imposing obligations to protect integrity of Indian families on state child welfare agencies did not violate the anti-commandeering rule).

Chapter 5

Federal Common Law

C. The Development of Federal Common Law to Effectuate Congressional Intent

1. Express Versus Implied Private Causes of Action

(CB, p. 614, after first full paragraph)

Section 1983 creates an express cause of action against state and local officials who violate federal rights "secured by the Constitution *and laws*." (emphasis added). This means a party can sue under Section 1983 not only for violations of the Constitution, but also for violations of federal statutes. Maine v. Thiboutot (1980). In *Thiboutot*, for example, the Court held that individuals could use Section 1983 to challenge state agencies' wrongful denial of benefits mandated by the federal Social Security Act:

> The question before us is whether the phrase 'and laws,' as used in section 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.

The Court has imposed two important restrictions on the use of Section 1983 to enforce federal statutes. First, Section 1983 is not available if the underlying statute does not create enforceable rights. Second, even if a statute does create rights, Section 1983 is not available if Congress has foreclosed a broad, unrestricted private cause of action. For example, the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq., (IDEA), creates enforceable rights for students with disabilities, but many circuits have held that the IDEA is equipped with its own "comprehensive enforcement scheme" that "provides the sole remedy for statutory violations." K.A. v. Fulton County Sch. Dist. (11th Cir. 2013) (documenting a circuit split on the question).

How does a Court determine whether a statute creates enforceable rights? Three factors guide this analysis. First, "Congress must have intended that the provision in question benefit the plaintiff." Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial resources." Third, "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." Blessing v. Firestone (1997). By way of illustration, in Wright v. Roanoke Redevelopment and Housing Authority (1987), the Court permitted tenants to rely on Section 1983 to recover for overcharges under the Public Housing Act. The Court reasoned that the statute unambiguously conferred "a mandatory [benefit] focusing on the individual family and its income." According to the Court, the terms of the statute "could not be clearer" and conferred entitlements "sufficiently

specific and definite to qualify as enforceable rights." Relying on similar reasoning, in Wilder v. Virginia Hospital Assn. (1990), the Court authorized healthcare providers to rely on Section 1983 to enforce a reimbursement provision in the Medicaid Act. Likewise, a private cause of action is available under Section 1983 to enforce Title IX's bar against sex-discrimination by federally funded educational facilities. Fitzgerald v. Barnstable (2009).

More recently, in Health & Hospital Corporation of Marion County v. Talevski (2023), the Supreme Court ruled that the Federal Nursing Home Reform Act (FNHRA) grants nursing home residents an enforceable right under Section 1983. This right protects them from "any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms" (§ 1396r(c)(1)(A)(ii)). The Court's decision hinged on two key points. First, the FNHRA uses "clear rights-creating language" that explicitly benefits residents. Second, the Court found that allowing private lawsuits under Section 1983 does not conflict with the FNHRA's existing enforcement mechanisms, which involve inspections and sanctions for non-compliant facilities.

Even as the Court held in *Talevski* that the Federal Nursing Home Reform Act created enforceable rights, it simultaneously emphasized that a showing of enforceable rights requires clearing a "demanding bar." This concept is illustrated by *Gonzaga v. Doe* (2002), an important case in which Court held that the Family Educational Rights and Privacy Act (FERPA) did not create enforceable rights. That law instructs federally funded educational facilities to create policies and procedures to protect students' private information. Failure to comply can result in the withdrawal of funds. The Court explained in *Gonzaga*:

> [T]here is no question that FERPA's nondisclosure provisions fail to confer enforceable rights. To begin with, the provisions entirely lack the sort of "rights-creating" language critical to showing the requisite congressional intent to create new rights. Unlike the individually focused terminology of [the Civil Rights Act of 1964] ("no person shall be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "no funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice." This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of "individual entitlement" that is enforceable under § 1983.
>
> [FERPA's] nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. See 1232g(b)(1)–(2) (prohibiting the funding of "any educational agency or institution which has a policy or practice of permitting the release of education records" Therefore, [they] have an "aggregate" focus, they are not concerned with "whether the needs of any particular person have been satisfied," and they cannot "give rise to in-dividual rights." Recipient institutions can further avoid termination of funding so long as they "comply substantially" with the Act's [requirements].

The Court returned to the question of Section 1983 enforcement in Medina v. Planned Parenthood South Atlantic (2025), which held that Planned Parenthood and one of its patients could not sue a South Carolina official to enforce Medicaid's requirement of coverage for any qualified provider. The Court reasoned that the relevant Medicaid provision did not clearly and unambiguously create an enforceable individual right. Generally, the Court opined, Spending Clause statutes like Medicaid do not create judicially enforceable individual rights because they are contracts between the states and the federal government. The typical remedy therefore should be funding cutoffs or other actions by the federal government. Unlike the provision at issue in *Talevski*, the any-qualified-provider Medicaid provision did not have "rights-creating language." It imposed an obligation but did not create a right when it stated that Medicaid plans must "provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any . . . qualified" provider. Justice Jackson's dissent argued that the majority had clearly misinterpreted the statute, which plainly referred to "any individual" and thus created an individual right enforceable against a state official through a Section 1983 suit. In her dissent, Justice Jackson emphasized the history and importance of Section 1983 as a means to hold state officials accountable to federal law and warned that the Court was continuing to cut back on the practical effectiveness of this landmark civil rights statute.

Chapter 6

Suits Against State and Local Governments, Native Nations, Foreign Governments, and Their Officers

A. Suits Against State Governments: The Eleventh Amendment and Sovereign Immunity

3. Suits Against State Officers for Prospective Relief, Waiver, and Abrogation of State Sovereign Immunity

a. Suits Against State Officers for Prospective Relief

(CB p. 682, end of last full paragraph)

See also Puerto Rico Ports Authority v. Fed. Maritime Com'n (D.C. Cir. 2008) (whether an arm of the state enjoys state sovereign immunity turns on three factors: "(1) the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury"), followed in Kohn v. State Bar of Cal. (9th Cir. 2023) (the California state bar performs government functions, is controlled by the state supreme court and the state legislature, and therefore is a state agency entitled to sovereign immunity in disability discrimination suit regarding bar exam test accommodations even though the state treasury would not be responsible for money damages sought by the plaintiff; noting that since *Seminole Tribe* other circuits have "moved away from an excessive emphasis on the treasury factor").

c. Abrogation of Immunity by Congress

(CB p. 700, end of first paragraph of section c)

See Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc. (2023) (Congress "must make its intent to abrogate sovereign immunity unmistakably clear in the language of the statute. . . . The Court has found that standard met in only two situations. The first is when the statute says in so many words that it is stripping immunity from a sovereign entity. . . . The second is when a statute creates a cause of action and authorizes suit against a government on that claim."; statute creating entity of government of Puerto Rico does not waive sovereign immunity by providing that litigation shall occur in federal district court under other laws that do waive the entity's immunity such as Title VII of the Civil Rights Act: "providing for a judicial forum does not make the requisite clear statement"); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin (2023) (holding that the Bankruptcy Code, which expressly abrogates the sovereign immunity of all "governmental units," including "a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state'; or other foreign or domestic government … unambiguously abrogates the sovereign immunity of federally recognized tribes"; debtor who files

for bankruptcy may seek enforcement of automatic stay of collection efforts of business owned by the Lac du Flambeau Band).

B. Federal Court Relief Against Local Governments and Local Government Officers

4. Section 1983 v. Collateral Habeas Proceedings

(CB p. 782, after the second full paragraph)

Thus, courts have grappled, for example, with which cause of action is appropriate when an inmate challenges the legality of a method of execution; a condition of probation or parole; or a scheme that criminalizes poverty. The key question is whether a plaintiff's success would necessarily result in an earlier release. See, e.g., Wilkinson v. Dotson (2005) (holding that prisoners could rely on Section 1983 to challenge administrative procedures governing parole eligibility); Wolff v. McDonnell (1974) (holding that prisoners could rely on Section 1983 to challenge the retroactivity of new procedural rules concerning prison discipline).

Recently, the Court also reaffirmed that Section 1983, not habeas, is the appropriate cause of action when a litigant alleges that, in violation of the Fourteenth Amendment's Due Process Clause, a state has failed to provide an adequate avenue to seek DNA testing of evidence. Reed v. Goertz (2023). In *Reed*, the Court clarified the reach of a rule first announced in Skinner v. Switzer (2011), which held:

> Habeas is the exclusive remedy… for the prisoner who seeks "immediate or speedier release" from confinement. Where the prisoner's claim would not "necessarily spell speedier release," however, suit may be brought under §1983. We hold that a postconviction claim for DNA testing is properly pursued in a §1983 action. Success in the suit gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive. In no event will a judgment that simply orders DNA tests "necessarily impl[y] the unlawfulness of the State's custody."

Expounding upon that ruling, in *Reed*, the Court held that the statute of limitations begins to run at the end of the state court litigation that denies the inmate's request for DNA testing.

C. Federal Court Relief Against Tribal Governments and Tribal Government Officers

2. Tribal Sovereign Immunity

(CB, p. 861, at the end of the page after the dinkus)

In Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin (2023), the Court held that Congress does not need to use the words "Indian tribe" in order to unequivocally abrogate tribal sovereign immunity. The Bankruptcy Code has an unusually broadly worded provision abrogating the sovereign immunity of all "governmental unit[s]," which the Code defines to include the United States, the several States, territories, municipalities, foreign states, as well as "other foreign or domestic government[s]." In *Lac du Flambeau*, the Court concluded that this sweeping

provision abrogated the sovereign immunity of a tribal nation from a customer's suit for money damages against a tribal payday lending company. The Band argued that the Code's abrogation provision was not unequivocal because it did not mention "Indian tribes" by name and could plausibly be read not to encompass tribes because they are domestic dependent nations, neither "foreign governments" nor "domestic governments," but instead a sui generis sovereign entity. The Court rejected these arguments, reasoning that Congress does not need to use "magic words" to abrogate tribal sovereignty immunity and that the catchall term "other foreign or domestic government[s]" unequivocally showed that Congress intended to abrogate the immunity of all types of governments. Justice Gorsuch was the lone dissenter and emphasized that the Court had never before held that a statute abrogated tribal sovereign immunity without mentioning "Indian tribes" by name. In his view, the unequivocal expression requirement, which all nine Justices accepted as governing law, was important to maintain the separation of powers in federal Indian law and ensure that Congress had deliberately decided to abrogate tribal nations' immunity from suit.

The Court has applied the unequivocal expression rule to territorial sovereign immunity as well. The First Circuit has held that the Commonwealth of Puerto Rico has sovereign immunity from suit in federal court. In litigation, the United States executive branch has taken the same position based upon Supreme Court precedent. In Financial Oversight Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc. (2023), the Court assumed without deciding that Puerto Rico has immunity from being sued in a federal court and that this immunity extended to a government board created by Congress to approve and implement budgets for Puerto Rico in the wake of a fiscal emergency. It then held that Congress had not abrogated that sovereign immunity. It explained that the unequivocal expression requirement is satisfied "when a statute says in so many words that it is stripping immunity from a sovereign entity" and "when a statute creates a cause of action and authorizes suit against a government on that claim." Because the statute at issue "fit[] neither of those two molds," the Court concluded that it did not abrogate Puerto Rico's sovereign immunity. Critics of the decision argued that it "illustrates the Court's ongoing unwillingness to confront the present-day colonial relationship between the United States and Puerto Rico, perpetuated further [by Congress's legislation] and the Board's very existence."[1]

D. Federal Court Relief Against Foreign Governments

(CB, p. 863, after the first sentence of the first full paragraph that follows the block quotation of the Foreign Sovereign Immunities Act)

The Court has, however, identified limits to foreign sovereign immunity under FSIA. See Turkiye Halk Bankasi A.S. v. United States (2023) (holding that the FSIA "does not provide foreign states and their instrumentalities with immunity from *criminal* proceedings" and remanding for further proceedings to determine if common-law sovereign immunity bars a federal criminal prosecution of a bank owned by a foreign state).

[1] Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc., 137 HARV. L. REV. 460, 461 (2023) (citing James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories,"* 131 YALE L.J. 2542, 2546 (2022) (arguing that the Board is "a novel, quasi-governmental entity chartered to wrest control over Puerto Rico's financial affairs from the island's elected government")).

Chapter 7

Federal Court Relief Against the Federal Government and Federal Officers

A. Suits Against the Federal Government

2. Injunctive Relief Against the United States

(CB, p. 875, after the second full paragraph)

In Trump v. J.G.G. (2025), discussed further in Chapter 8, the Court held that habeas was the only vehicle for raising a due process challenge to the executive branch's detention and removal of Venezuelan nationals based upon President Trump's proclamation invoking the Enemy Aliens Act, a very rarely used federal law. While all nine justices agreed that due process requires notice and an opportunity to be heard, a majority of the Court held that a suit seeking injunctive relief in the District of Columbia could not proceed.

3. Other Congressional Waivers of Sovereign Immunity

b. The Tucker Act

(CB, p. 882, after the dinkus)

The Little Tucker Act waives the federal government's sovereign immunity. (casebook p. 879). In United States v. Bormes (2012) plaintiffs attempted to rely on the Little Tucker Act in order to vindicate their rights under the Fair Credit Reporting Act. The Court found that in light of the FCRA's detailed remedial scheme, aggrieved litigants could not rely on the Little Tucker Act's cause of action to vindicate the federal government's violations of that law. The practical impact of this holding was recently tempered, however, in Department of Agriculture v. Kirtz (2022). There, the Court held that the FCRA's remedial scheme waives sovereign immunity, thereby allowing suits against the federal government.

In *Kirtz,* the Court articulated "only two situations" in which a statute constitutes a clear waiver of federal sovereign immunity. "The first is when a statute says . . . that it is stripping immunity from a sovereign entity. The second 'is when a statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" While laws "in the second category may not directly address sovereign immunity," to dismiss such a claim "would negate a claim specifically authorized by Congress." The FTCA falls into the second category by creating a cause of action against "[a]ny person" who violates the law, and by defining "person" to include "any . . . government . . . agency." 15 U.S.C. §1681a(b).

c. The Bankruptcy Code

(CB, p. 882, after material on the Tucker Act)

The Bankruptcy Code abrogates the federal government's sovereign immunity. Section 106(a)(1) provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" specific Code provisions and defines "governmental unit" to include the "United States" and its "department[s], agenc[ies], [and] instrumentalit[ies]." In United States v. Miller (2025), the Court held that Section 106(a) did not authorize state-law claims against the United States in connection with a suit under Section 544(b) of the Code. Section 544(b) creates a cause of action to allow a bankruptcy trustee to "avoid any transfer of an interest of the debtor . . . that is voidable under applicable law by a creditor holding an unsecured claim." In *Miller*, the trustee sued under Section 544(b) and argued that Utah's fraudulent-transfer statute was "applicable law" and that it operated in tandem with Section 544(b) to afford him the right to sue for an invalidation of some transfers. Although Section 106(a) did waive sovereign immunity for Section 544(b) suits, the Court held that it did not allow a trustee to rely upon state law causes of action as the "applicable law." The problem, the Court reasoned, was that the trustee's theory would alter the liabilities of the United States, which Section 106(a)(1) was not designed to do. Instead, Section 106(a)(1) was, like other sovereign immunity provisions, a "jurisdiction-creating provision," not a "liability-creating provision." In the Court's view, the trustee was misreading Section 106(a)(1) to be a liability-creating provision that created a new liability of the federal government to a state law claim. Justice Gorsuch dissented, arguing that the majority's distinction did not make sense. In his view, the Court had confused the distinction between whether a plaintiff has a cause of action and whether the defendant has sovereign immunity. No one disputed that the plaintiff had a cause of action, and the only question was whether the United States could interpose sovereign immunity as a defense. In Justice Gorsuch's view, Congress had decided to waive the sovereign immunity defense to the trustee's cause of action. The majority stressed, however, the idea that waivers of sovereign immunity should be interpreted narrowly, with any ambiguities in the "language" of the statute construed in favor of the United States.

B. Suits Against Federal Officers

2. Implied Causes of Action

a. For Constitutional Claims

(CB, p. 924, before the dinkus)

The Court made short work of a *Bivens* question with its per curiam opinion in Goldey v. Fields (2025), which held that a federal inmate did not have a *Bivens* cause of action to bring an Eighth Amendment excessive-force claim. The per curiam opinion stressed that "[f]or the past 45 years, this Court has consistently declined to extend *Bivens* to new contexts." The Court apparently agreed with the district court's conclusion that the case was a new context because the Court had never implied a *Bivens* remedy for Eighth Amendment excessive force claims. In this new context, an implied *Bivens* remedy was inappropriate because Congress had legislated about prison condition litigation and had not expressly authorized suits for money damages. Allowing such a suit would interfere with prison operations, which were "'inordinately difficult.'" There were alternative

mechanisms for prisoners to challenge prison conditions, which obviated the need for a *Bivens* remedy.

b. The Availability of Injunctive Relief to Enforce Federal Law

(CB, p. 927, after final paragraph)

Congress may also limit the authority of federal courts to issue injunctive relief against federal agencies by enacting a specific statutory review scheme and thus precluding ordinary federal question jurisdiction. The question is whether Congress intended the statutory review scheme to divest a court of ordinary federal question jurisdiction.

In Axon Enterprise, Inc. v. FTC (2023), the Court held that the exclusive review provision of the Securities Exchange Act and the Federal Trade Commission Act did not bar a federal district court from adjudicating constitutional separation of powers challenges to the structure of the SEC's and the FTC's systems for administrative adjudication. The challengers were facing administrative enforcement actions within the SEC and the FTC, respectively. They could have raised their constitutional arguments in the agency proceedings, from which they had a statutory right to appeal to a federal court of appeals. Instead, they sued the agencies in federal district court under the general federal question statute. On the merits, they argued that the agencies could not fairly proceed against them because the SEC's use of administrative law violated Article II and the FTC's combination of prosecutorial and judicial functions was unconstitutional. The Court held that raising the constitutional challenges directly in federal court rather than in the agency enforcement actions was permissible notwithstanding the explicit statutory review schemes that Congress enacted for SEC and FTC proceedings. Because Congress had not explicitly stated that it intended to divest the federal courts of ordinary federal question jurisdiction, the issue was whether it had done so implicitly. Applying factors articulated in Thunder Basin Coal Co. v. Reich (1994), the Court held that Congress never intended for structural constitutional challenges to the SEC and FTC systems to be limited to the statutory review scheme. Those schemes would not provide an adequate remedy, the Court reasoned, because the challengers faced an immediate injury from the ongoing and allegedly unconstitutional enforcement action. If their constitutional arguments were meritorious, then the agency proceedings would be illegitimate and impose an unwarranted expense and burden upon them. Moreover, the constitutional challenges were collateral to the substance of the administrative charges against them and outside the agencies' policy expertise. Agency adjudication would not adequately address the structural constitutional challenge or aid the court in resolving those challenges.

(CB, p. 941, after final paragraph)

4. Immunity from Criminal Liability

In *Nixon v. Fitzgerald*, the Court held that presidents receive absolute immunity from civil monetary suits for their presidential acts. However, the case did not define what constitutes a presidential act or address the extent of presidential immunity from other federal judicial forms of accountability, including criminal charges.

In Trump v. United States (2024), the Court broadly defined presidential acts for the purposes of criminal liability and granted presidents sweeping protection for such acts. The case

concerned a federal indictment against former President Trump, alleging that after losing the 2020 presidential election, he illegally attempted to block a peaceful transfer of power. The allegations included conspiring to manufacture fake slates of electors, attempting to persuade a state attorney general to "find" additional votes or face prosecution, and inciting a violent mob to halt an official congressional vote necessary for the election victor to take office. Following the grand jury's indictment, a special prosecutor attempted to bring the case to trial. The D.C. Circuit Court of Appeals ruled that the former president lacked immunity for these acts. The Supreme Court vacated that ruling.

The Court categorized presidential acts into three categories: core, official but not core, and unofficial. First, presidents possess absolute immunity for exercising their core constitutional powers, such as issuing pardons, vetoing legislation, recognizing ambassadors, and making appointments. According to the ruling, this immunity is necessary to ensure the effective functioning of the executive branch, allowing presidents to execute their constitutional duties without fear of legal repercussions.

Second, for acts outside this "core" category, the Court held that other official acts of the president are entitled to "presumptive" immunity. On the one hand, subjecting former presidents to criminal charges for their official acts might influence their decision-making while in office, the Court reasoned. A president, wary of potential criminal consequences post-tenure, might avoid certain actions in the public interest. On the other hand, the public interest in the "fair and effective" enforcement of criminal laws is also important. Weighing these interests, the Court concluded that presidents should generally be immune from criminal prosecution for official acts unless prosecutors can unequivocally demonstrate that such charges would not undermine the executive branch's functions.

Third, presidents do not receive immunity for their unofficial acts. The Court acknowledged, however, that distinguishing between official and unofficial acts is itself a challenge:

> 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. 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* (2018)—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.

> 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, "[i]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "[i]n 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." *Nixon v. Fitzgerald* (1982). We thus rejected such inquiries in Fitzgerald.
>
> Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. Otherwise, Presidents would be subject to trial on "every allegation that an action was unlawful," depriving immunity of its intended effect.

Addressing specific allegations against former President Trump, the majority ruled that Trump cannot be prosecuted for allegedly using the Justice Department's power to persuade states to replace legitimate electors with fraudulent ones. Similarly, the Court deemed Trump "presumptively immune" regarding his alleged attempts to pressure Vice President Mike Pence to reject electoral votes or return them to state legislatures, reasoning that these discussions fell within their official duties. However, the Court acknowledged that the vice president's role as president of the Senate is a legislative function, not an executive one, leaving the district court to decide if prosecuting Trump for this conduct would intrude upon executive powers.

The Court took a similar stance on allegations involving Trump's interactions with private individuals and state officials to alter electoral votes, his tweets leading up to the January 6 attacks, and a speech he gave just before his supporters violently broke into the United States capitol. The Court emphasized that determining the immunity for these actions requires a thorough analysis of the indictment's detailed and interconnected allegations.

Moreover, the Court held that prosecutors cannot use evidence of Trump's official acts to prove his knowledge of the falsehood of his election-fraud claims. Using official acts as evidence of could undermine the established immunity by indirectly scrutinizing acts for which a president is immune, thus inviting juries to evaluate these actions in the context of unrelated charges.

Justice Thomas concurred with the majority's ruling on immunity but raised concerns about the constitutionality of Special Counsel Jack Smith's appointment. Thomas pointed out the historical rarity of prosecuting former presidents for their official acts and stressed that any unprecedented prosecution must be carried out by an authority duly appointed by the American people. He urged the lower courts to resolve questions about the Special Counsel's appointment before proceeding further.

Justice Sotomayor authored the lead dissent, in an opinion joined by Justices Jackson and Kagan. In their view, there was very little support in text, history, precedent, or reason for the

majority's opinion. The dissent marshaled Founding Era evidence of prominent voices that believed that presidents could be criminally prosecuted. Further, the dissent contended that in creating a new immunity, the Court paid insufficient attention to the absence of accountability for bribes or coups or assassinations political rivals:

> 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 "endeavor[ing] 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, p. 507 (J. Harvard Library ed. 2009). 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.

Chapter 8

The Writ of Habeas Corpus: Relief Against a State or Federal Officer Responsible for Unlawful Detention

A. Introduction to the Writ of Habeas Corpus

3. Executive Detention

(CB p. 987, after reference to *Al-Hela*)

Al-Hela v. Biden (D.C. Cir. 2023) (en banc) (petit) (assuming without deciding that even if Guantanamo detainees have procedural and substantive due process rights, procedures used to adjudicate petitioner's habeas petition before the district court satisfy due process; neither length of petitioner's detention since 2004, nor evidentiary foundation for conclusion that he was an enemy combatant, violate substantive due process; remanding for determination of eligibility for transfer and statutory power to continue to detain in light of Periodic Review Board's finding that his detention is "no longer necessary to protect against a continuing significant threat to the security of the United States").

(CB p. 1008, end of last full paragraph)

The outer boundaries of executive power and the relationship between habeas, due process, and equity jurisdiction have been tested in a series of emergency appeals to the Supreme Court. In March 2025, the White House released a presidential proclamation invoking the Enemy Aliens Act as authority to detain and remove Venezuelan nationals "who are members of Tren de Aragua" (TdA)—an organization that "the State Department has designated as a foreign terrorist organization." Trump v. J.G.G. (2025). Prior to publishing the proclamation, the government began removing Venezuelan immigrants detained in the United States to a maximum-security foreign prison in El Salvador without notice or an opportunity to be heard. Historically and by its text, the Enemy Aliens Act empowers detention and removal of foreign citizens of "a hostile nation or government" during "a declared war" or when a "foreign nation" threatens "invasion or predatory incursion" of the territory of the United States. The only times it has previously been invoked were the War of 1812, World War I, and World War II. The presidential proclamation in 2025, by contrast, asserts that Tren de Aragua is "conducting irregular warfare . . . at the direction of the Maduro regime in Venezuela."

On March 14, 2025, suspected members of TdA who deny any affiliation with the gang were seized for removal within 24 hours. Their lawyers filed a class action seeking injunctive relief in the District of Columbia challenging the president's statutory authority under the Enemy Aliens Act and the failure to provide constitutionally mandatory notice and a meaningful opportunity to be heard under the Due Process Clause. When the government learned of the suit, it accelerated its

removal process, "usher[ing] the named plaintiffs onto planes along with dozens of other detainees." Plaintiff J.G.G. "had no chance to tell a court that the tattoos causing DHS to suspect him of gang membership were unrelated to a gang"—he is a tattoo artist and decided to get the tattoo after seeing and image of it on Google; another named plaintiff was apparently seized on the basis of attending a party hosted by people he did not know on the invitation of a friend. The government asserted that no U.S. court has jurisdiction to order relief for plaintiffs already sent to another country.

The district court granted a temporary restraining order prohibiting the removal of the five named plaintiffs. One plaintiff was then allowed off a plane. However, despite the hearing scheduled to determine the extension of the TRO to putative class members, "DHS continued to load up planes with detainees," and the White House for the first time published its proclamation invoking the Enemy Aliens Act. The court not only extended its TRO to the putative class, it further ordered that any plane "that is going to take off or is in the air needs to be returned to the United States." After learning that the government may not have complied with these orders, the district court issued an order to show cause which could lead to a finding of contempt.

In the meantime, the government sought an emergency stay of the injunctions. The D.C. Circuit denied that request, but the Supreme Court reversed, vacating the injunctions. The Court held that "Challenges to removal under the AEA, a statute which largely 'precludes judicial review,' Ludecke v. Watkins (1948), must be brought in habeas . . . regardless of whether the detainees formally request relief from confinement, because their claims necessarily imply the invalidity of their confinement and removal." Such claims fall within the "'core' of the writ of habeas corpus" even if the petitions would not lead to immediate release: grant of "'immediate physical release is not the only remedy under the federal writ of habeas corpus'" Peyton v. Rowe (1968); Nance v. Ward (2022) (explaining that a capital prisoner may seek 'to overturn his death sentence' in a habeas 'by analogy' to seeking release)." However, for 'core' habeas petitions, the Court concluded, "jurisdiction lies in only one district: the district of confinement." Since the plaintiffs are "confined in Texas," venue "is improper in the District of Columbia."

The court added, however, that "the detainees are entitled to notice and opportunity to be heard 'appropriate to the nature of the case.' Mullane v. Central Hanover Bank (1950)." The notice constitutionally required under the circumstances of Enemy Aliens Act removal, "must be … within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs."

The plaintiffs accordingly refiled a class action habeas petition in federal court in Texas seeking injunctive relief against summary removal. A.A.R.P. v. Trump (2025). When the district court denied the TRO, the government informed plaintiffs they could be removed as early as the next day. Plaintiffs then filed a new request for an "emergency TRO" at 12:30 am in the morning. Hearing nothing from the court for twelve hours, they moved for a ruling or status hearing by 1:30 pm and roughly 90 minutes later they appealed the court's "constructive denial" of the emergency TRO to the Fifth Circuit and to the Supreme Court.

To preserve the status quo, the Supreme Court immediately ordered the government "not to remove any member of the putative class of detainees" from the United States. The Fifth Circuit then denied the TRO and dismissed their appeal for lack of jurisdiction.

The Supreme Court reversed. It held that the appellate courts have jurisdiction "to review interlocutory orders that have the practical effect of refusing an injunction," emphasizing that "a district court's inaction in the face of extreme urgency and a high risk of serious, perhaps irreparable, consequences may have the effect of refusing an injunction." Here, the district court did nothing for "14 hours and 28 minutes" and that effectively "refused an injunction" despite the "imminent threat of severe, irreparable harm." Citing Trump v. J.G.G., the Court reasserted that due process applies to removal proceedings conducted pursuant to the Enemy Aliens Act, noting that the Court has "long held that no person shall be removed from the United States without opportunity, at some time, to be heard. The Japanese Immigrant Case (1903). Due process requires notice that is 'reasonably calculated, under all the circumstances, to apprise the interested parties' and that 'affords a reasonable time to make an appearance.' Mullane." The government's notice "roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster." The Court remanded the case to the Fifth Circuit to consider what kind of process would be fundamentally fair.

All nine justices agreed in *J.G.G.* that due process requires notice and an opportunity to be heard for Enemy Alien Act removals. But four justices (Justice Sotomayor, joined by Justice Kagan, Jackson, and Barrett) dissented from the Court's conclusion that the suit in the District of Columbia was improper and that habeas was the only vehicle for raising the due process claim. In *A.A.R.P.*, Justices Alito and Thomas dissented, arguing that the plaintiffs failed to establish that they were in imminent danger of removal and that the record shows the district court was simply waiting for a government response rather than ignoring the emergency circumstances.

J.G.G. and *A.A.R.P.* directly connect habeas and due process—habeas is the jurisdictional vehicle for ensuring procedural due process in these removal cases. Neither case cites *Thuraissigiam*. Can that case's claim that the core remedy for habeas is release, not additional procedural protection, be reconciled with *J.G.G.* and *A.A.R.P.*? Perhaps one way to do so is to read *Thuraissigiam*'s habeas and due process analysis as limited to its facts—i.e., detentions "at the border" and subject to the INA's expedited removal proceedings. On the other hand, it is remarkable, in light of *Thuraissigiam*, to read the Court describe due process prior to removal as "core" to the writ. Indeed, in a separate concurring opinion in *J.G.G.*, Justice Kavanaugh stresses the historical pedigree of habeas as check on improper extra-territorial "transfers" of detainees: "going back to the English Habeas Corpus Act of 1769, if not early, habeas has been the proper vehicle for detainees to bring claims seeking to bar their transfers."

(CB p. 1009, after end of section A)

Although federal prisoners may also invoke § 2241, their access to it is limited by 28 U.S.C. § 2255(e). In Jones v. Hendrix (2023), as in *Thuraissigiam*, the Court underscored that Suspension Clause claims that § 2241 jurisdiction is constitutionally mandatory are to be judged by the scope of the writ "when the Constitution was drafted and ratified." Jones sought to use § 2241 for a successive habeas petition raising a claim that his conviction under a federal firearm statute did not include a finding of scienter that the Supreme Court held was required. He could not raise that statutory claim under § 2255 because AEDPA amendments barred § 2255 successive petitions unless they rest on new evidence of innocence or a new *constitutional* rule.

Relying on *Ex parte Watkins* for the view that early American habeas practice was limited to challenges to jurisdiction, not review "for substantive errors of law" by a court of competent

jurisdiction, the Court found no Suspension Clause violation in § 2255(h)'s prohibition on a successive petition that raise statutory flaws in a petitioner's conviction. "Jones fails to identify a single clear case of habeas being used to relitigate a conviction after trial by a court of general criminal jurisdiction. Rather, the cases he cites mostly involve commitments by justices of the peace," courts that "were not courts of record…. As such … the fact that superior courts sometimes used habeas to examine commitments by such inferior magistrates furnishes no authority for inquiring in the judgments of a court of general jurisdiction." Notice the similar narrowing and exaction of the historical question the Court made in *Thuraissigiam*: the Court moved from the question whether habeas involved review of matters other than jurisdictional competence to the much more specific question whether habeas involved broader review where the court that entered the judgment was a "court of general criminal jurisdiction."

Justices Jackson, Sotomayor, and Kagan dissented, arguing that Congress could not have intended, and the Suspension Clause does not tolerate, barring a prisoner from raising the claim that he is innocent (because the government never proved an element of the offence the Court has deemed essential) just because he filed a previous habeas petition. It must be possible, they argued, to raise an intervening Supreme Court decision of statutory construction that demonstrates an essential element of the offense was not proved. Justice Jackson emphasized that the Court's account of the jurisdictional error-only history tied to *In re Watkins* is, according to professional legal historians "narrative and myth but not history."

B. Collateral Attack on State Criminal Convictions

1. Procedural Prerequisites to Collateral Attack on State Court Judgments

e. Successive Petitions

(CB p. 1051, after Felker v. Turpin, Warden (1996))

In Jones v. Hendrix (2023) the Court held that where a *federal* prisoner's successive petition rests on a new rule grounded in the statute under which he was convicted, rather than a new constitutional rule, see 28 U.S.C. § 2255(h), he cannot use § 2241 to argue that the government failed to prove an element of his offence. Although 28 U.S.C. § 2255(e) states that § 2241 petition may be filed where the § 2255 "remedy by motion is inadequate or ineffective to test the legality of his detention," the Court held that this provision applies exclusively to habeas petitions challenging detention (not the sentence) and "unusual circumstances in which it is impossible or impracticable for a prisoner to seek relief from the sentencing court" (e.g., the court has been dissolved, or a hearing is required and the petitioner cannot travel to the sentencing court). What § 2255(e) does not do, the Court held, is create an "end-run" around the limitations on successive petitions prohibited § 2255(h) by opening § 2241.

(CB p. 1053, end of note)

The Supreme Court has held that the All Writs Act cannot be invoked to transfer a prisoner to a medical facility for neurological testing for evidence of a childhood head trauma not brought out at trial in order to build a record in support of a habeas claim of ineffective assistance of counsel. Shoop v. Twyford (2022). Pinholster holds that the record in a § 2254(d) petition is restricted to the evidence presented to the state court, and § 2254(e) sets strict limits on the admission of new

evidence before the federal habeas court. *Shinn* further limits a federal habeas court's power to take new evidence that would "needlessly prolong" habeas determinations.

(CB p. 1132, above section (i))

In Andrew v. White (2025) the Court considered whether the "general rule that the erroneous admission of prejudicial evidence could violate due process" was clearly established for purposes of a federal habeas petition challenging a state court capital murder conviction where the prosecution repeatedly introduced irrelevant evidence regarding the attire and sex life of a female defendant accused of killing her husband. The defendant argued that the legal standard was clearly established, pointing to Payne v. Tennessee (1991), which overturned a per se bar on victim impact statements under the Eighth Amendment on the ground that due process provides adequate protection against the admission of prejudicial evidence. The Tenth Circuit, however, held that Payne's due process analysis was merely a "pronouncement," not a "holding."

The Supreme Court reversed, emphasizing that Payne's due process analysis rested on a line of cases in which the Court had repeatedly held "that prosecutor's prejudicial or misleading statements violate due process if they render a trial or capital sentencing fundamentally unfair." Not all irrelevant statements introduced at trial are prejudicial enough to violate due process, as the Court held in Estelle v. McGuire (1991), but Estelle did not render either Payne or the earlier cases on which it relied unclear and in subsequent cases the Court has repeatedly relied on Payne's due process standard, including Romano v. Oklahoma (1994) and Kansas v. Carr (2016). As the Court concluded "general legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court" and it was a mistake for the Tenth Circuit to "limit Payne to it facts." The reason is that some principles "are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." The majority supported this proposition by reference to a qualified immunity exception recognized in Taylor v. Riojas (2020) and Hope v. Pelzer (2002), for law that applies "with obvious clarity to the specific conduct in question."

Justice Thomas and Gorsuch dissented on the ground that the Court had declared clearly established law "the broadest possible interpretation of a one-sentence aside in Payne," and diminished Estelle.

Chapter 9

Supreme Court Review

C. Appellate Review of State Courts

3. The Independent and Adequate State Ground Doctrine

c. When is There an "Independent" and "Adequate" State Ground?

(CB p. 1213, after end of fifth full paragraph)

The Court also confronted the meaning of "independence" in Glossip v. Oklahoma (2025). In that capital case, Oklahoma's Attorney General conceded that the petitioner's trial was undermined by a federal constitutional error—specifically, that prosecutors knowingly failed to correct false testimony in violation of Napue v. Illinois (1959)—but the Oklahoma Court of Criminal Appeals denied relief on procedural grounds. The state court held that the attorney general's concession could not "overcome the limitations on successive post-conviction review" under the state's Post-Conviction Procedures Act because it was "not based in law or fact."

The Supreme Court, per Justice Sotomayor, held that the adequate and independent state grounds doctrine did not prevent it from reviewing Richard Glossip's constitutional claim. The Court explained that the state procedural ruling was not truly independent of federal law. In concluding that the attorney general's confession of error was "not based in law or fact," the state appellate court necessarily made an antecedent determination that no federal constitutional violation had occurred. As such, the state court's application of its procedural bar depended on its assessment of the federal *Napue* question. The Court went on to find a *Napue* violation and ordered a new trial. Justice Thomas, joined by Justice Alito, dissented, arguing that the state court had clearly relied on state procedural requirements that were independent of any federal determination, and that the majority's approach improperly allowed federal courts to override legitimate state procedural bars whenever state executives confess federal error.

(CB p. 1214, after first paragraph)

In Cruz v. Arizona (2023), the defendant in a capital case repeatedly raised the failure of Arizona courts to apply Simmons v. South Carolina (1994), which recognized the due process right of a defendant in a capital case to inform jury that he is ineligible for parole if convicted and sentenced to life in prison. After the jury imposed the death penalty, several jurors issued a press release emphasizing that "they would rather have voted for life without the possibility of parole, but that they were not given that option," having been incorrectly instructed by the judge that even a life sentence would carry the possibility of parole. Cruz lost his direct appeal. Invoking a state

procedural rule limiting successive habeas petitions to "significant changes in the law," the Arizona Supreme Court dismissed his petition without considering the *Simmons* claim even though Cruz cited a recent U.S. Supreme Court case reaffirming *Simmons*, summarily reversing an Arizona conviction in a factually similar Arizona case, and overruling prior Arizona cases that attempted to render *Simmons* inapplicable to capital cases in the state. The U.S. Supreme Court held that a state court rule must be "firmly established and regularly followed" to be "adequate to foreclose review of a federal claim." The Arizona Supreme Court had previously held that the "archetype" of a change in the law that is "significant" is "when an appellate court overrules previously binding case law," thus creating "a clear break from the past." In view of this state precedent interpreting the state's successive petition procedure, the U.S. Supreme Court concluded "it is hard to imagine a clearer break from the past" than a U.S. Supreme Court decision overruling Arizona cases denying the applicability of *Simmons*. The different construction of the successive petition rule given in Cruz's case (denying that reversal of Arizona's *Simmons* jurisprudence made a clear break from the past), "is entirely new . . . in conflict with prior Arizona case law" on the rule, and therefore cannot constitute an adequate state procedural ground. The Court vacated the state court judgment and remanded the case for the state courts to reconsider Cruz's petition on the merits.

(CB p. 1224, after fourth full paragraph)

The Rising Role of the Emergency Docket

The Supreme Court long has had an emergency docket. These are matters where a party comes to the court for an order on an emergency basis, generally without full briefing and oral argument. For example, those facing the death penalty often have gone to the court seeking a last-minute, emergency stay of execution. But as Stephen Vladeck documented in his excellent book, *The Shadow Docket*, over the past decade there was a notable growth in matters decided by the court on its emergency docket.

Since Professor Vladeck's book was published in 2023, the emergency docket has taken on even greater significance. In the 2023-24 term, there were 44 matters on the emergency docket. In the 2024-25 term, through June 27 (the last day decisions were released), there were 113 matters on the emergency docket.

The court has issued a number of important rulings on its emergency docket concerning the legality of actions by President Donald Trump. Virtually all have been 6-3 rulings, with Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson dissenting.

- **May 22, Trump v. Wilcox**: The court overturned a preliminary injunction by a district court that prevented Trump from removing Gwynne Wilcox from serving as a commissioner on the National Labor Relations Board and Cathy Harris from the Merit Systems Protection Board. Long-standing Supreme Court precedents allow Congress to limit the firing of heads of federal agencies. Federal laws prohibited them from being fired without "cause," and there was no claim that standard was met. Nonetheless, the court allowed their removals while their cases are litigated.

- **June 6, Social Security Administration v. American Federation of State, County, and Municipal Employees**: The Supreme Court paused the district court's preliminary

injunction blocking Department of Government Efficiency team members and affiliates from accessing Social Security Administration record systems.

- **June 23, Department of Homeland Security v. D.V.D.**: The court lifted a district court order that prevented immigrants from being deported to countries not listed on their removal orders. The district court had found that the individuals were not given due process. Specifically, they were not given sufficient notice or a meaningful opportunity to challenge their deportation based on their fears for their safety, and the judge was concerned the individuals could be subjected to torture or death upon arrival. Without explanation, the Supreme Court allowed the deportations to go forward while the case winds its way through the justice system, which could take years. On July 3, the court reaffirmed this, allowing the individuals to be sent to South Sudan even though they had no contact with this country.

Several recent Supreme Court orders have lifted decisions limiting firings:

- **July 8, Trump v. American Federation of Government Employees**: The court issued a stay of a district court's preliminary injunction preventing firings of government employees in many federal agencies.

- **July 14, McMahon v. New York**: The court lifted a district court's preliminary injunction against mass firings at the Department of Education with the stated goal of eliminating that department.

- **July 23, Trump v. Boyle**: The Supreme Court overturned a preliminary injunction preventing the firing of three members of the Consumer Product Safety Commission who were protected from removal except when there was "cause" for firing.

Process Questions

When the court issues emergency rulings in a case is an interlocutory posture, it often decides major decisions without the benefit of full briefing, oral argument, and deliberation among the justices. The briefs in cases on the emergency docket are less developed as those in cases on the merits, and there often is no oral argument. Nor do the justices even meet to discuss these cases before issuing rulings on them. If one believes that briefing, arguing, and deliberating matters are essential to a system of law, the absence of these elements when the court issues major rulings is concerning. In recent years, the Court has responded to this concern by granting oral argument in some significant cases including in Trump v. CASA (2025). But in many more it does not.

A related process question is whether the Supreme Court should issue rulings on significant issues without a substantial written opinion. In many cases—such as Department of Homeland Security v. D.V.D. (2025), and McMahon v. New York (2025)—the court offered no explanation for its rulings. These are enormously consequential decisions: They allow people to be deported to countries where they have no connection and could face torture and death, and they permit Trump to effectively eliminate an agency created by Congress.

The question of whether the Justices should write more reasoned opinions on the emergency-docket invites competing considerations. On the one hand, the public's acceptance of

the Supreme Court's power comes, in part, from the view that the Court is applying legal principles in a reasoned way. When justices do not show their work, it is more difficult to discern the degree to which they are doing so. Moreover, the explanations are important for the parties in the litigation, as well as to lower courts looking for guidance. On the other hand, issuing opinions at an emergency posture could theoretically have the effect of locking justices into legal positions before those issues have yet had a full airing.

Precedent

Questions around the relationship between the emergency docket and precedent take two forms. First, should the shadow docket be used to overturn longstanding precedent? Second, should orders from the emergency docket themselves be taken as precedential? There is sound reason to believe that the Court's current answer to both questions is "yes."

On the first point, the emergency docket has played a major role recently in winnowing, if not overruling, Humphrey's Executor v. United States (1935). In that case, decided in 1935, the Court unanimously upheld the ability of Congress to limit the removal of members of federal agencies. Under the Federal Trade Commission Act, the president could fire a commissioner only for "inefficiency, neglect of duty, or malfeasance in office." The court explained that Congress, pursuant to its powers under Article I, could create independent agencies and insulate their members from presidential removal unless good cause for firing existed. The court declared: "The authority of Congress . . . includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime."

Several of the recent rulings by the Supreme Court have involved Trump firing individuals—members of the National Labor Relations Board, the Merit Systems Protection Board, and the Consumer Product Safety Commission—who enjoy similar protections from removal as in Humphrey's Executor. Nonetheless, the Supreme Court has allowed these individuals to be fired, concluding that the Trump administration had a substantial likelihood of prevailing on the merits.

Justice Kagan wrote a dissent in Trump v. Wilcox (2025), joined by Justices Sotomayor and Jackson, lamenting that "[o]ur emergency docket, while fit for some things, should not be used to overrule or revise existing law." She explained that the court's ruling "allows the President to overrule *Humphrey's* by fiat."

The use of the emergency docket to effectively overrule long-standing precedent represents a significant departure from traditional judicial practice.

Second, and relatedly, the Court's actions have sometimes strongly suggested that rulings from the emergency docket have precedential weight. As noted by the Brennan Center, "The Court has sent mixed signals, suggesting that such decisions are of little precedential value, while also rebuking the Ninth Circuit Court of Appeals for not following four prior Supreme Court rulings involving California Covid-19 restrictions—all of which were shadow docket orders."

More recently, the Court's decision in Trump v. Boyle (2025) exemplifies this precedential treatment of emergency docket rulings. In *Boyle*, the majority's entire analysis consisted of declaring that "[t]he application is squarely controlled by *Trump v. Wilcox*," treating the earlier emergency order

as binding precedent. The Court stated that *Wilcox*, "reflected 'our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty,'" and found "the case does not otherwise differ from Wilcox in any pertinent respect." As Justice Kagan observed in her *Boyle* dissent, the majority built its reasoning on "only another under-reasoned emergency order," warning that "[n]ext time, though, the majority will have two (if still under-reasoned) orders to cite. 'Truly, this is 'turtles all the way down.'" This pattern suggests the Court is constructing a body of precedent through successive emergency orders, with each citing the previous one as authority, all without the benefit of full briefing, oral argument, or reasoned opinions that typically accompany precedential decisions.

(CB p. 1229, after final paragraph)

The Court confronted the question of universal injunctions when the federal government filed emergency applications in suits challenging President Trump's birthright-citizenship executive order that flew in the face of the Fourteenth Amendment's Citizenship Clause and the Nationality Act of 1940. Without reaching the merits of the birthright citizenship question, the Court used the case as an opportunity to hold that federal courts do not have general authority to issue nationwide injunctions.

TRUMP V. CASA
144 S. Ct. ____ (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. We therefore grant the Government's applications to partially stay the injunctions entered below.

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. 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 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." The trend has continued: During the first 100 days of the second Trump administration, district courts issued approximately 25 universal injunctions.

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.

The Judiciary Act of 1789 endowed federal courts with jurisdiction over "all suits . . . in equity," 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. 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."

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." This "judicial prerogative of the King" thus extended to "those causes which the ordinary judges were incapable of determining." 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." Injunctions were no exception; there were "sometimes suits to restrain the actions of particular officers against particular plaintiffs." And in certain cases, the "Attorney General could be a defendant." The Chancellor's remedies were also typically party specific. "As a general rule, an injunction" could not bind one who was not a "party to the cause." Suffice it to say, then, 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. If anything, the approach traditionally taken by federal courts cuts against the existence of such a sweeping remedy. In the ensuing decades, we consistently rebuffed requests for relief that extended beyond the parties.

Our early refusals to grant relief to nonparties are consistent with the party-specific principles that permeate our understanding of equity. "[N]either declaratory nor injunctive relief," we have said, "can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."

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. 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. 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*, 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. Because the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act.

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 [the] 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."

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." 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, "[t]he domesticated animal known as a bill of peace looks nothing like the dragon of nationwide injunctions."

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. Yet by forging a shortcut to relief that benefits parties and nonparties alike, universal injunctions circumvent Rule 23's procedural protections and allow "courts to "create de facto class actions at will." Why bother with a Rule 23 class action when the quick fix of a universal injunction is on the table?

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 "advantag[e] nonparties," they do so only incidentally.

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 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. 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. So, they insist, universal injunctions must be permitted for the good of the system.

The Government advances policy arguments running the other way. Echoing Chief Judge Sutton, 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" decisionmaking. 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. 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.

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. In her law-declaring vision of the judicial function, a district court's opinion is not just persuasive, but has the legal force of a judgment.

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. 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: "[E]veryone, from the President on down, is bound by law." That goes for judges too.

IV

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 "improper[ly] intru[des]" 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 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.

Some say that the universal injunction "give[s] 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.

Justice Thomas, with whom Justice Gorsuch joins, concurring.

The Court today holds that federal courts may not issue so-called universal injunctions. I agree and join in full. As the Court explains, the Judiciary Act of 1789—the statute that "authorizes the federal courts to issue equitable remedies"—does not permit universal injunctions. It authorizes only those remedies traditionally available in equity, and there is no historical tradition allowing courts to provide "relief that extend[s] beyond the parties." That conclusion is dispositive: As I have previously explained, "[i]f district courts have any authority to issue universal injunctions," it must come from some specific statutory or constitutional grant. But, the Judiciary Act is the only real possibility, and serious constitutional questions would arise even if Congress purported to one day allow universal injunctions.

I write separately to emphasize the majority's guidance regarding how courts should tailor remedies specific to the parties. Courts must not distort "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Otherwise, they risk replicating the problems of universal injunctions under the guise of granting complete relief.

As the Court recognizes, the complete-relief principle operates as a ceiling: In no circumstance can a court award relief beyond that necessary to redress the plaintiffs' injuries. This limitation follows from both Article III and traditional equitable practice. Because Article III limits courts to resolving specific "Cases" and "Controversies," it requires that any remedy "be tailored to

redress the plaintiff 's particular injury." And, equitable remedies historically operated on a plaintiff-specific basis. Accordingly, any "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established

Courts therefore err insofar as they treat complete relief as a mandate. But "to say that a court can award complete relief is not to say that it should do so." And, in some circumstances, a court cannot award complete relief.

For good reason, the Court today puts an end to the "increasingly common" practice of federal courts issuing universal injunctions. 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. 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 of the Federal Rules of Civil Procedure can have drastic consequences, creating "potential unfairness" for absent class members and confusion (and pressure to settle) for defendants. Recognizing these effects, Congress took the exceptional step of authorizing interlocutory review of class certification.

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.

The Court's decision today focuses on the "interim before the interim"—the preliminary relief that district courts can award (and courts of appeals can approve) for the generally weeks-long interim before this Court can assess and settle the matter for the often years-long interim 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.

Often, it is not especially workable or sustainable or desirable to have a patchwork scheme, potentially for several years, in which a major new federal statute or executive action of that kind applies to some people or organizations in certain States or regions, but not to others. The national reach of many businesses and government programs, as well as the regular movement of the

American people into and out of different States and regions, would make it difficult to sensibly maintain such a scattershot system of federal law.

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.

The decision today will not alter this Court's traditional role in those matters. Going forward, in the wake of a major new federal statute or executive action, different district courts may enter a slew of preliminary rulings on the legality of that statute or executive action. Or alternatively, perhaps a district court (or courts) will grant or deny the functional equivalent of a universal injunction—for example, by granting or denying a preliminary injunction to a putative nationwide class under Rule 23(b)(2), or by preliminarily setting aside or declining to set aside an agency rule under the APA.

No matter how the preliminary-injunction litigation on those kinds of significant matters transpires in the district courts, the courts of appeals in turn will undoubtedly be called upon to promptly grant or deny temporary stays or temporary injunctions in many cases.

And regardless of whether the district courts have issued a series of individual preliminary rulings, or instead have issued one or more broader classwide or set-aside preliminary rulings, the losing parties in the courts of appeals will regularly come to this Court in matters involving major new federal statutes and executive actions.

If there is no classwide or set-aside relief in those kinds of nationally significant matters, then one would expect a flood of decisions from lower courts, after which the losing parties on both sides will probably inundate this Court with applications for stays or injunctions. And in cases where classwide or set-aside relief has been awarded, the losing side in the lower courts will likewise regularly come to this Court if the matter is sufficiently important.

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 object that this Court is not well equipped to make those significant decisions—namely, decisions about the interim status of a major new federal statute or executive action—on an expedited basis. But district courts and courts of appeals are likewise not perfectly equipped to make expedited preliminary judgments on important matters of this kind. Yet they have to do so, and so do we. By law, federal courts are open and can receive and review applications for relief 24/7/365. And this Court has procedural tools that can help us make the best possible interim decision in the limited time available—administrative stays, additional briefing, amicus briefs, oral argument, certiorari before judgment, and the like. On top of that, this Court has nine Justices, each of whom can (and does) consult and deliberate with the other eight to help the Court determine the best answer, unlike a smaller three-judge court of appeals panel or one-judge district court. And this Court also will have the benefit of the prior decisions in the case at hand from the court of appeals and the district court.

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.

Some might also worry that an early or rushed decision on an application could "lock in" the Court's assessment of the merits and subtly deter the Court from later making a different final decision. But in deciding applications for interim relief involving major new statutes or executive actions, we often have no choice but to make a preliminary assessment of likelihood of success on the merits; after all, in cases of that sort, the other relevant factors (irreparable harm and the equities) are often very weighty on both sides. Moreover, judges strive to make the correct decision based on current information notwithstanding any previous assessment of the merits earlier in the litigation. It is not uncommon to think and decide differently when one knows more.

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. ide all concurrence and dissent visual indicators.

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.

I

The majority ignores entirely whether the President's Executive Order is constitutional, instead focusing only on the question whether federal courts have the equitable authority to issue universal injunctions. Yet the Order's patent unlawfulness reveals the gravity of the majority's error and underscores why equity supports universal injunctions as appropriate remedies in this kind of case. As every conceivable source of law confirms, birthright citizenship is the law of the land. The Citizenship Clause provides that "[a]ll 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." That means what it says.

Besides birth, there is only one condition: that one be "subject to the jurisdiction" of the United States. Yet that condition too leaves no room for ambiguity. To be "subject to the jurisdiction" of the United States means simply to be bound to its authority and its laws.

Few constitutional questions can be answered by resort to the text of the Constitution alone, but this is one. The Fourteenth Amendment guarantees birthright citizenship.

Unsurprisingly given the clarity of the Citizenship Clause's text, every other source of interpretation confirms this conclusion. The lawmakers who ratified the Fourteenth Amendment understood that it would extend citizenship to all children born here, regardless of parental citizenship. Indeed, some objected to its passage on those grounds, complaining that it would permanently extend citizenship to immigrants who "invade [state] borders" and "settle as trespassers." Following the ratification of the Fourteenth Amendment, this Court confirmed the Amendment's plain meaning in United States v. Wong Kim Ark (1898).

Some decades ago, the Office of Legal Counsel was asked to respond to a House bill that would have denied birthright citizenship to "children born in the United States to parents who are not citizens or permanent resident aliens." The answer well summed up the state of the law: This "office grapples with many difficult and close issues of constitutional law. The lawfulness of this bill is not among them. This legislation is unquestionably unconstitutional."

II

Undeterred by the Constitution, history, Supreme Court precedent, federal law, and longstanding Executive Branch practice, President Donald J. Trump issued Executive Order No. 14160 on the day of his inauguration that purported to redefine American citizenship.

Shortly after the President issued the Citizenship Order, several groups of plaintiffs (together, respondents) challenged the Order in Federal District Courts in Maryland, Massachusetts, and Washington. Respondents include: a group of pregnant women whose children will not be United States citizens under the terms of the Citizenship Order; two immigrants-rights organizations with thousands of members across the country who are likely to give birth to children who would also be denied citizenship under the Order; and 22 States, the District of Columbia, and the city of San Francisco. In their respective suits, respondents asserted that the Citizenship Order violates the Fourteenth Amendment and § 1401(a).

Respondents also sought a preliminary injunction barring enforcement of the Citizenship Order during the pendency of the litigation. If allowed to go into effect, they said, the policy would inflict irreparable harm on their children (and their members' children) by denying them "enjoyment of the full privileges, rights, and benefits that come with U.S. citizenship," and rendering them vulnerable to unlawful deportation before the Courts could adjudicate their constitutional claim. As for the States, they attested that enforcement of the Citizenship Order would cost them millions of dollars in federal funding and impose significant administrative burdens. The States "administer numerous programs for the benefit of their residents, including for newborns and young children, some of whom are wards of the plaintiff States who are entitled to care by statute."

All three District Courts preliminarily enjoined enforcement of the Citizenship Order. The District Courts further determined that only injunctions blocking the Citizenship Order's enforcement nationwide would completely redress respondents' injuries. All three appellate courts denied the Government's request and left the preliminary injunctions intact.

III

In partially granting the Government's remarkable request, the Court distorts well-established equitable principles several times over. A stay, this Court has said, "is not a matter of

right," but rather "an exercise of judicial discretion." For centuries, courts have "close[d] the doors" of equity to those "tainted with inequitableness or bad faith relative to the matter in which [they] seek relief." Yet the majority throws the doors of equity open to the Government in a case where it seeks to undo a fundamental and clearly established constitutional right. The Citizenship Order's patent unlawfulness is reason enough to deny the Government's applications.

The Government also falls well short of satisfying its burden to show that it will likely suffer irreparable harm absent a stay and that it will likely succeed on the merits of its challenge to the scope of the injunctions. The Executive Branch has respected birthright citizenship for well over a century, and it advances no plausible reason why maintaining the status quo while the litigation proceeds would cause it irrevocable harm. Nor could it, for the Constitution and federal law prohibit the enforcement of the Citizenship Order.

For all that, moreover, the Government is not even correct on the merits of universal injunctions. To the contrary, universal injunctions are consistent with long-established principles of equity, once respected by this Court. What is more, these cases do not even squarely present the legality of universal injunctions. That is because, even if the majority were right that injunctions can only offer "complete relief to the plaintiffs before the court," each of the lower courts here correctly determined that the nationwide relief they issued was necessary to remedy respondents' injuries completely. So even ignoring the traditional stay factors and accepting the majority's view of the merits, there is no reason to grant relief in these cases.

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. Nothing in this Court's precedents supports that result. Simply put, it strains credulity to treat the Executive Branch as irreparably harmed by injunctions that direct it to continue following settled law.

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.

Federal courts have also exercised equitable authority to enjoin universally federal and state laws for more than a century. Throughout the early 20th century, federal courts granted universal injunctions even when a narrower remedy would have sufficed to redress the parties' injuries.

It is certainly true that federal courts have granted more universal injunctions of federal laws in recent decades. But the issuance of broad equitable relief intended to benefit parties and nonparties has deep roots in equity's history and in this Court's precedents.

The universal injunctions of the Citizenship Order fit firmly within that tradition.

There may be good reasons not to issue universal injunctions in the typical case, when the merits are open to reasonable disagreement and there is no claim of extraordinary and imminent irreparable harm. The universal injunctions in these cases, however, are more than appropriate. These injunctions, after all, protect newborns from the exceptional, irreparable harm associated with losing a foundational constitutional right and its immediate benefits. They thus honor the most basic value of our constitutional system: They keep the Government within the bounds of law. Marbury v. Madison (1803).

The majority's contrary reasoning falls flat. The majority starts with the Judiciary Act of 1789, which gives federal courts jurisdiction over "all suits . . . in equity." The majority's argument stumbles out the gate. As the majority must itself concede, injunctions issued by English courts of equity were "typically," but not always, party specific. After all, bills of peace, for centuries, allowed English courts to adjudicate the rights of parties not before it, and to award remedies intended to benefit entire affected communities. Taxpayer suits, too, could lead to a complete injunction of a tax, even when only a single plaintiff filed suit.

The majority next insists that the practice of "founding-era courts of equity in the United States" cuts against universal injunctions, and that this Court "consistently rebuffed requests for relief that extended beyond the parties." The majority's account is irreconcilable with early American bills of peace and the history of taxpayer suits. It further contradicts this Court's practice, in cases like *Lewis*, *Pierce*, and *Barnette*, of affirming and granting universal injunctions even when narrower, plaintiff-focused injunctions would have offered complete relief to the parties.

Most critically, the majority fundamentally misunderstands the nature of equity by freezing in amber the precise remedies available at the time of the Judiciary Act. Even as it declares that "[e]quity is flexible," the majority ignores the very flexibility that historically allowed equity to secure complete justice where the rigid forms of common law proved inadequate.

Even the majority's view of the law cannot justify issuance of emergency relief to the Government in these cases, for the majority leaves open whether these particular injunctions may pass muster under its ruling. Indeed, the lower courts issued the challenged injunctions consistent with an equitable principle that even the majority embraces: Courts may award an equitable remedy when it is "necessary to provide complete relief to the plaintiffs."

The majority does not identify a narrower alternative that is both practical and mitigates that risk. At the very least, there is no reason to think that the District Court abused its discretion in deciding that only a nationwide injunction could protect the plaintiffs' fundamental rights.

Meanwhile, newborns subject to the Citizenship Order will face the gravest harms imaginable. If the Order does in fact go into effect without further intervention by the District Courts, children will lose, at least for the time being, "a most precious right," and "cherished status" that "carries with it the privilege of full participation in the affairs of our society." Affected children also risk losing the chance to participate in American society altogether, unless their parents have sufficient resources to file individual suits or successfully challenge the Citizenship Order in removal proceedings. Indeed, the Order risks the "creation of a substantial 'shadow population'" for covered children born in the United States who remain here. Without Social Security numbers and other documentation, these children will be denied critical public services, like SNAP and Medicaid, and

lose the ability to engage fully in civic life by being born in States that have not filed a lawsuit. Worse yet, the Order threatens to render American-born children stateless, a status "deplored in the international community" for causing "the total destruction of the individual's status in organized society." That threat hangs like a guillotine over this litigation.

The Order will cause chaos for the families of all affected children too, as expecting parents scramble to understand whether the Order will apply to them and what ramifications it will have. If allowed to take effect, the Order may even wrench newborns from the arms of parents lawfully in the United States, for it purports to strip citizenship from the children of parents legally present on a temporary basis. Those newborns could face deportation, even as their parents remain lawfully in the country. In light of all these consequences, there can be no serious question over where the equities lie in these cases.

IV

The Court's decision is nothing less than an open invitation for the Government to bypass the Constitution. The Executive Branch can now enforce policies that flout settled law and violate countless individuals' constitutional rights, and the federal courts will be hamstrung to stop its actions fully. Until the day that every affected person manages to become party to a lawsuit and secures for himself injunctive relief, the Government may act lawlessly indefinitely.

Not even a decision from this Court would necessarily bind the Government to stop, completely and permanently, its commission of unquestionably unconstitutional conduct. The majority interprets the Judiciary Act, which defines the equity jurisdiction for all federal courts, this Court included, as prohibiting the issuance of universal injunctions (unless necessary for complete relief). What, besides equity, enables this Court to order the Government to cease completely the enforcement of illegal policies? The majority does not say. So even if this Court later rules that the Citizenship Order is unlawful, we may nevertheless lack the power to enjoin enforcement as to anyone not formally a party before the Court. In a case where the Government is acting in open defiance of the Constitution, federal law, and this Court's holdings, it is naive to believe the Government will treat this Court's opinions on those policies as "de facto" universal injunctions absent an express order directing total nonenforcement.

Indeed, at oral argument, the Government refused to commit to obeying any court order issued by a Federal Court of Appeals holding the Citizenship Order unlawful (except with respect to the plaintiffs in the suit), even within the relevant Circuit. To the extent the Government cannot commit to compliance with Court of Appeals decisions in those Circuits, it offers no principled reason why it would treat the opinions of this Court any differently nationwide. Thus, by stripping even itself of the ability to issue universal injunctions, the Court diminishes its role as "the ultimate decider of the interim [and permanent] legal status of major new federal statutes and executive actions." There is a serious question, moreover, whether this Court will ever get the chance to rule on the constitutionality of a policy like the Citizenship Order. In the ordinary course, parties who prevail in the lower courts generally cannot seek review from this Court, likely leaving it up to the Government's discretion whether a petition will be filed here. These cases prove the point: Every court to consider the Citizenship Order's merits has found that it is unconstitutional in preliminary rulings. Because respondents prevailed on the merits and received universal injunctions, they have no reason to file an appeal. The Government has no incentive to file a petition here either, because

the outcome of such an appeal would be preordained. The Government recognizes as much, which is why its emergency applications challenged only the scope of the preliminary injunctions.

Even accepting that this Court will get the opportunity to "ac[t] as the ultimate decider" of patently unlawful policies, and that the Executive Branch will treat this Court's opinions as de facto universal injunctions, it is still necessary for the lower courts to have the equitable authority to issue universal injunctions, too. As Justice Kavanaugh notes, it can take, at a minimum, "weeks" for an application concerning a major new policy to reach this Court. In the interim, the Government may feel free to execute illegal policies against nonparties and cause immeasurable harm that this Court may never be able to remedy. Indeed, in these cases, there is a serious risk the Government will seek to deport newborns whose parents have not filed suit if all the injunctions are narrowed on remand. That unconscionable result only underscores why it is necessary, in some cases, for lower courts to issue universal injunctions.

Fortunately, in the rubble of its assault on equity jurisdiction, the majority leaves untouched one important tool to provide broad relief to individuals subject to lawless Government conduct: Rule 23(b)(2) class actions for injunctive relief. That mechanism may provide some relief, but it is not a perfect substitute for a universal injunction. [A] named plaintiff must incur the higher cost of pursuing class relief, which will involve, at a minimum, overcoming the hurdle of class certification. "[D]emonstrating th[e] prerequisites" of numerosity, commonality and typicality and the adequacy of the named plaintiff to represent the class "is difficult and time consuming and has been getting harder as a result of recent court decisions and federal legislation." Indeed, at oral argument, the Government refused to concede that a class could be certified to challenge the Citizenship Order and promised to invoke Rule 23's barriers to stop it.

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. 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 agree with every word of Justice Sotomayor's dissent. 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.

The majority cannot deny that our Constitution was designed to split the powers of a monarch between the governing branches to protect the People. Nor is it debatable that the role of the Judiciary in our constitutional scheme is to ensure fidelity to law. But these core values are strangely absent from today's decision. Focusing on inapt comparisons to impotent English tribunals, the majority ignores the Judiciary's foundational duty to uphold the Constitution and laws of the United States. The majority's ruling thus not only diverges from first principles, it is also profoundly dangerous, since it gives the Executive the go-ahead to sometimes wield the kind of unchecked, arbitrary power the Founders crafted our Constitution to eradicate. The very institution our founding charter charges with the duty to ensure universal adherence to the law now requires judges to shrug and turn their backs to intermittent lawlessness. With deep disillusionment, I dissent. The Founders of the United States of America squarely rejected a governing system in which the King ruled all, and all others, including the courts, were his subordinates. In our Constitution-centered system, the People are the rulers and we have the rule of law. So, it makes little sense to look to the relationship between English courts and the King for guidance on the power of our Nation's Judiciary vis-à-vis its Executive. Indeed, it is precisely because the law constrains the Government in our system that the Judiciary's assignment is so broad, per the Constitution. Federal courts entertain suits against the Government claiming constitutional violations. Thus, the function of the courts—both in theory and in practice—necessarily includes announcing what the law requires in such suits for the benefit of all who are protected by the Constitution, not merely doling out relief to injured private parties.

What I mean by this is that our rights-based legal system can only function properly if the Executive, and everyone else, is always bound by law. Today's decision is a seismic shock to that foundational norm. Allowing the Executive to violate the law at its prerogative with respect to anyone who has not yet sued carves out a huge exception—a gash in the basic tenets of our founding charter that could turn out to be a mortal wound. What is more, to me, requiring courts themselves to provide the dagger (by giving their imprimatur to the Executive Branch's intermittent lawlessness) makes a mockery of the Judiciary's solemn duty to safeguard the rule of law.

When a court is prevented from enjoining the Executive universally after the Executive establishes a universal practice of stripping people's constitutional rights, anyone who is entitled to the Constitution's protection but will instead be subjected to the Executive's whims is improperly divested of their inheritance. The Constitution is flipped on its head, for its promises are essentially nullified. So, rather than having a governing system characterized by protected rights, the default becomes an Executive that can do whatever it wants to whomever it wants, unless and until each affected individual affirmatively invokes the law's protection.

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.

Today's ruling thus surreptitiously stymies the Judiciary's core duty to protect and defend constitutional rights. It does this indirectly, by preventing lower courts from telling the Executive that it has to stop engaging in conduct that violates the Constitution. Instead, now, a court's power to prevent constitutional violations comes with an asterisk—a court can make the Executive cease its unconstitutional conduct *but only with respect to the particular plaintiffs named in the lawsuit before them, leaving the Executive free to violate the constitutional rights of anyone and everyone else.

Make no mistake: Today's ruling allows the Executive to deny people rights that the Founders plainly wrote into our Constitution, so long as those individuals have not found a lawyer or asked a court in a particular manner to have their rights protected. This perverse burden shifting cannot coexist with the rule of law. In essence, the Court has now shoved lower court judges out of the way in cases where executive action is challenged, and has gifted the Executive with the prerogative of sometimes disregarding the law. As a result, the Judiciary—the one institution that is solely responsible for ensuring our Republic endures as a Nation of laws—has put both our legal system, and our system of government, in grave jeopardy.

"The accretion of dangerous power does not come in a day." But "[i]t does come," "from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." By needlessly granting the Government's emergency application to prohibit universal injunctions, the Court has cleared a path for the Executive to choose law-free action at this perilous moment for our Constitution—right when the Judiciary should be hunkering down to do all it can to preserve the law's constraints. I have no doubt that, if judges must allow the Executive to act unlawfully in some circumstances, as the Court concludes today, executive lawlessness will flourish, and from there, it is not difficult to predict how this all ends. Eventually, executive power will become completely uncontainable, and our beloved constitutional Republic will be no more.

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 "[w]ith 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." Tragically, the majority also shuns this prescient warning: Even if "[s]uch institutions may be destined to pass away," "it is the duty of the Court to be last, not first, to give them up."

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The Fourteenth Amendment's Citizenship Clause establishes that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." This provision overturned the Supreme Court's pronouncement that Black individuals could not be citizens given that, at the Founding, "the African race . . . had no rights which the white man was bound to respect." *Dred Scott v. Sandford* (1857).

The Supreme Court interpreted this provision in United States v. Wong Kim Ark (1898), where it addressed the citizenship status of a California resident born in San Francisco to Chinese immigrant parents. When Wong was denied reentry to the United States after traveling to China, customs officials argued he was not a citizen because his parents remained subjects of the Chinese emperor, making him likewise subject to foreign sovereignty rather than U.S. jurisdiction.

The Court rejected this narrow interpretation of the jurisdictional requirement, holding that the Fourteenth Amendment "affirms the ancient and fundamental rule of citizenship by birth within the territory." The jurisdictional qualifier, the Court explained, excludes only children born of alien enemies during hostile occupation, children of diplomatic representatives, and children of tribal Indians owing direct allegiance to their tribes. This interpretation established the fundamental principle that birth within U.S. territory, rather than parental citizenship status, determines citizenship under the Fourteenth Amendment.

Subsequent Supreme Court decisions have reaffirmed *Wong Kim Ark*'s holding across varied historical contexts. During the era of Asian exclusion laws, the Court held in Morrison v. California (1934) that a child born to Japanese parents ineligible for citizenship was nonetheless an American citizen if born within the United States. Moreover, during World War II's heightened scrutiny of Japanese Americans, the Court maintained this principle in Hirabayashi v. United States (1943). The Court has similarly recognized citizenship for children of parents unlawfully present in the United States and those who gained admission through unlawful means, as demonstrated in cases like United States ex rel. Hintopoulos v. Shaughnessy (1957), INS v. Errico (1966), and INS v. Rios-Pineda (1985).

Congressional action has reinforced these constitutional principles through statutory codification. The Nationality Act of 1940 provides that all persons "born in the United States, and subject to the jurisdiction thereof" are "nationals and citizens of the United States at birth." This statutory language directly tracks the Fourteenth Amendment's text and, under established interpretive principles, carries forward the constitutional provision's historical meaning and judicial construction.

This constitutional and legislative consensus was challenged by Executive Order No. 14160, issued in January 2025. The order purports to deny citizenship to persons born in the United States whose mothers are unlawfully present or present on a temporary basis, and whose fathers are neither citizens nor lawful permanent residents. The order prohibits federal agencies from issuing citizenship documentation to such persons and directs officials to conform agency regulations accordingly, applying to births occurring thirty days after the order's issuance.

Three lower courts—located in the states of Maryland, Massachusetts, and Washington—enjoined the order on a nationwide basis.

At issue in *Trump v. CASA* was the question a question of remedy. When may federal district court issue relief that protects non-parties from the enforcement of a law, order, or regulation on a nationwide basis? In common parlance, such injunctions have sometimes been called "nationwide injunctions." That term, however, is misleading. Many injunctions have nationwide effect. A defendant who has been enjoined by a federal district court from violating a plaintiff's patent could not avoid the order by violating the patent in another district or another state. The controversial

question, then, is not about how far a federal district court's order may reach in geographic terms, but rather, when the district court can prevent an illegal law from being enforced against individuals who are not parties to that litigation. *Trump v. CASA* limits federal district courts' ability to do so.

The full practical import of the decision is not yet known. Important questions remain:

First, the majority did not foreclose the possibility that a federal district court may issue a preliminary injunction in a putative class action. On a range of matters for which federal district courts issued nationwide injunctions in the early months of 2025, litigants have subsequently brought litigation on behalf of a class that, if recognized, would have the same practical import as the nationwide injunctions. On the matter of birthright citizenship itself, a putative class action was filed after *CASA*, and relief was granted to a class. The impact of *CASA* will depend, in part, on the extent to which the Supreme Court places strictures on the class action device in public law litigation.

Second, the majority made clear that in some instances, relief that protects non-parties might be necessary in order to grant the plaintiff full relief. In *CASA* itself, States like New Jersey contended that nothing short of universal relief will prevent the financial and administrative burdens associated with people in the United States being non-citizens in one state, and citizens in another. The impact of *CASA* is linked to the size of this category of cases.

Third, the majority said nothing about whether federal district courts may universally vacate or set aside federal regulations under the Administrative Procedure Act, thereby preventing enforcement of the regulation against non-parties. This category often invites as much public scrutiny as cases in which federal courts issued injunctions. A prominent example is Judge Kacsmaryk's ruling in the mifepristone case (FDA v. Alliance for Hippocratic Medicine (2024)), where he initially suspended the FDA's decades-old approval of the abortion medication. Though the Supreme Court ultimately reversed the decision on standing grounds in June 2024, finding that the Alliance for Hippocratic Medicine lacked Article III standing to challenge the FDA's approval, the case highlighted how district courts might attempt to use their authority to effectively ban drugs nationwide. As is often the case in cases seeking to halt enforcement of a national policy, the case also exemplified concerns about forum shopping, as the plaintiffs filed in Amarillo, Texas, where they were virtually guaranteed to have Kacsmaryk hear their case. It remains unknown whether rulings that universally vacate federal regulations would be impacted by the courts' reining in of nationwide injunctive relief under the *Trump v. CASA* framework.

Fourth, a major concern about nationwide injunctions—from both the left and the right—is that it promotes forum shopping, or even judges hopping. Litigants seek binding nationwide relief in districts or circuits with a significant percentage of the judges appointed by the president's opposing party. An unknown is whether *Trump v. CASA* will meaningfully curb this practice.