Federal Courts in Context

First Edition

2024 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 Terms 2022 and October Term 2023. 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.* And 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.

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.

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.

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. 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. Finally, *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.

Chapter 8 and *Chapter 9* conclude with note cases on executive detention, collateral attacks on state criminal convictions, and the independent and adequate state ground doctrine.

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 claim is barred." *Wong*. Further, "[t]his Court has often explained that Congress's separation of 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.

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, eds.].

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.

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.]

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, 214 U. S. 320 (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. Id., at 331– 334. 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.

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[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, 430 U. S. 442 (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 (U.S. 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 the citation sentence, 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. Brakeen (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].

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

3. Other Congressional Waivers of Sovereign Immunity

(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).

B. Suits Against Federal Officers

2. Implied Causes of Action

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. 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.

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. 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.