

145 S.Ct. 797
Supreme Court of the United States.

Salvatore DELLIGATTI, Petitioner

v.

UNITED STATES

No. 23-825

|

Argued November 12, 2024

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Decided March 21, 2025

Synopsis

Background: Following denial, [2018 WL 9539130](#), of defendant's motion to dismiss, defendant was convicted in the United States District Court for the Southern District of New York, [Katherine B. Forrest, J.](#), of violent crime in aid of racketeering (VICAR) and other offenses, with mandatory minimum consecutive sentence of five years for using or carrying firearm during or in relation to crime of violence. Defendant appealed. On panel rehearing, the United States Court of Appeals for the Second Circuit, Sullivan, Circuit Judge, [83 F.4th 113](#), affirmed. Defendant's petition for writ of certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] knowing or intentional causation of injury or death necessarily involves use of physical force against another person, under elements clause of statutory definition of crime of violence, for purposes of mandatory minimum consecutive sentence for using or carrying firearm during or in relation to crime of violence, and

[2] causing bodily injury by omission rather than action can be knowing or intentional causation of injury or death that necessarily involves use of physical force against another person.

Affirmed.

Chief Justice [Roberts](#) and Justices Alito, Sotomayor, Kagan, Kavanaugh, and Barrett joined.

Justice Gorsuch filed a dissenting opinion, in which Justice Jackson joined.

Procedural Posture(s): Petition for Writ of Certiorari; Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (18)

[1] **Weapons** 🔑 Crimes of violence

Courts apply “categorical approach” to determine whether an offense falls within elements clause of statutory definition of crime of violence, as predicate federal felony offense for mandatory minimum consecutive sentence of five years for using or carrying firearm during or in relation to federal felony crime of violence, and under that approach, courts do not examine defendant's actual conduct, and instead they ask whether the offense in question always involves use, attempted use, or threatened use of force, and if offense can be committed without use, attempted use, or threatened use of force, it is not a crime of violence under elements clause. [18 U.S.C.A. § 924\(c\)\(1\)\(A\)\(i\), \(c\)\(1\)\(D\)\(ii\), \(c\)\(3\)\(A\)](#).

2 Cases that cite this headnote

[2] **Homicide** 🔑 Nature of act or omission causing death

Homicide under New York law can be committed by act or by omission, i.e., a failure to perform a legally imposed duty. [N.Y. Penal Law §§ 15.00\(3\), 15.10](#).

[3] **Homicide** 🔑 Nature of act or omission causing death

A parent who intentionally causes his child's death by withholding food or medical care commits second-degree murder under New York law. [N.Y. Penal Law §§ 15.00\(3\), 15.10, 125.25\(1\)](#).

[4] **Weapons** 🔑 Crimes of violence

The principle that the knowing or intentional causation of bodily injury necessarily involves use of physical force against another person applies to the categorical approach for determining whether a federal felony offense satisfies the elements clause of the statutory definition of crime of violence, as predicate offense for mandatory minimum consecutive sentence of five years for using or carrying a firearm during or in relation to a federal felony crime of violence. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

[5] **Weapons** 🔑 Crimes of violence

Causing bodily injury by omission rather than action can be a knowing or intentional causation of bodily injury that necessarily involves use of physical force against another person, under the categorical approach for determining whether a federal felony offense satisfies the elements clause of the statutory definition of crime of violence, as predicate offense for mandatory minimum consecutive sentence of five years for using or carrying a firearm during or in relation to a federal felony crime of violence. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

[6] **Weapons** 🔑 Domestic violence

“Physical force,” within meaning of elements clause of statutory definition of crime of violence, for purposes of statute prohibiting anyone convicted of misdemeanor crime of domestic violence from owning a firearm, as including an offense that has as an element the use of physical force against another, encompasses the kind and degree of force that supports a common-law battery conviction, and such concept of force includes causing bodily harm indirectly, such as by administering a poison or by infecting with a disease, or even by resort to some intangible substance, such as a laser beam. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

[7] **Weapons** 🔑 Domestic violence

The knowing or intentional application of force is a “use of force,” within meaning of elements clause of statutory definition of crime of violence, for purposes of statute prohibiting anyone convicted of misdemeanor crime of domestic violence from owning a firearm, as including an offense that has as an element the use of physical force against another. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

[8] **Weapons** 🔑 Domestic violence

A person engages in “use of force,” within meaning of elements clause of statutory definition of crime of violence, for purposes of statute prohibiting anyone convicted of misdemeanor crime of domestic violence from owning a firearm, as including an offense that has as an element the use of physical force against another, if the person makes force his instrument, whether directly or indirectly, and so, for example, when a person sprinkles poison in a victim's drink, he uses force by employing poison knowingly as a device to cause physical harm, even though the act of sprinkling does not itself involve force. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

1 Case that cites this headnote

[9] **Robbery** 🔑 Force

Common-law robbery requires only the force needed to overcome the victim's slightest physical resistance, even if it results in minimal pain or injury.

[10] **Weapons** 🔑 Crimes of violence

Federal offense of violent crime in aid of racketeering (VICAR), with attempted second-degree murder under New York law as predicate violent crime, was “crime of violence” under elements clause of statutory definition of crime of violence, and thus, VICAR conviction was predicate federal felony offense for mandatory minimum consecutive sentence of five years, based on defendant using or carrying firearm during or in relation to federal felony crime of

violence; second-degree murder under New York law required proof that defendant intentionally caused death of another person, and intentionally causing death counted as deliberately causing injury. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A), 1959(a)(5); N.Y. Penal Law § 125.25(1).

1 Case that cites this headnote

[11] **Weapons** 🔑 Crimes of violence

Deliberate inaction or omission can be “use of force,” within meaning of elements clause of statutory definition of crime of violence as including an offense that has as an element the use of physical force against another, for purposes of mandatory minimum consecutive sentence of five years, based on using or carrying firearm during or in relation to federal felony crime of violence; it is perfectly natural to say that a person makes use of something by deliberate inaction. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

1 Case that cites this headnote

[12] **Weapons** 🔑 Crimes of violence

Crimes of omission can be “against another,” within meaning of elements clause of statutory definition of crime of violence as including an offense that has as an element the use of physical force against another, for purposes of mandatory minimum consecutive sentence of five years, based on using or carrying firearm during or in relation to federal felony crime of violence; at most, “against another” requires that another person be the conscious object of the force the offender uses, or put differently, the phrase specifies the required object of the force (another person, rather than, say, an animal), and possibly also the mens rea with which the object must be targeted (knowingly or intentionally, rather than negligently or recklessly). 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

[13] **Statutes** 🔑 Defined terms; definitional provisions

When choosing among interpretations of a statutory definition, the ordinary meaning of the defined term is an important contextual clue.

[14] **Weapons** 🔑 Crimes of violence

Under the principle that when choosing among interpretations of a statutory definition the ordinary meaning of the defined term is an important contextual clue, interpretations of the elements clause of the statutory definition of “crime of violence” that encompass prototypical crimes of violence are preferred over those that do not, for purposes mandatory minimum consecutive sentence of five years for using or carrying a firearm during or in relation to a federal felony crime of violence. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

[15] **Weapons** 🔑 Crimes of violence

Intentional murder is the prototypical “crime of violence,” for purposes of mandatory minimum consecutive sentence of five years for using or carrying a firearm during or in relation to a federal felony crime of violence. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

[16] **Robbery** 🔑 Force

Robbery 🔑 Putting in fear

Common-law robbery is a crime that may be committed indirectly, such as by slipping a sedative into the victim's coffee.

[17] **Weapons** 🔑 Crimes of violence

A violent or extreme physical act is not needed in order to use force, under the elements clause of statutory definition of crime of violence as an offense that has as an element the use of physical force against another, for purposes of mandatory minimum consecutive sentence of five years, based on using or carrying firearm during or in relation to federal felony crime of violence. 18 U.S.C.A. § 924(c)(1)(A)(i), (c)(1)(D)(ii), (c)(3)(A).

1 Case that cites this headnote

[18] Criminal Law 🔑 Construction and Operation in General

There is no clear-statement rule that criminal statutes do not cover omissions absent express language to that effect.

West Codenotes**Recognized as Unconstitutional**

18 U.S.C.A. § 924(c)(3)(B)

800 Syllabus

Title 18 U.S.C. § 924(c) subjects a person who uses or carries a firearm during a “crime of violence” to a mandatory minimum sentence of five years. §§ 924(c)(1)(A)(i) and (D)(ii). Section 924(c)(3)(A) defines a “crime of violence” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” To determine whether an offense falls within § 924(c)(3)(A)’s “elements clause,” the Court applies the categorical approach, asking whether the offense in question *always* involves the use, attempted use, or threatened use of force. Here, Salvatore Delligatti was convicted of violating § 924(c) after he recruited gang members to kill a suspected police informant and gave them a loaded revolver to carry out the job.

Before trial, Delligatti moved to dismiss his § 924(c) charge on the ground that the charge lacked the required predicate crime of violence, but the District Court denied his motion. Delligatti’s indictment charged him with attempted murder under the violent-crimes-in-aid-of-racketeering (VICAR) statute, § 1959(a)(5), which required proof that Delligatti had attempted second-degree murder under New York law. Delligatti argued that a VICAR offense predicated on New York second-degree murder is not a crime of violence under § 924(c)’s elements clause because homicide under New York law can be committed by omission, defined as the failure to perform a legal duty. The Second Circuit affirmed the District Court’s conclusion that New York attempted second-degree murder is a crime of violence for purposes of § 924(c)(3)(A).

Held: The knowing or intentional causation of injury or death, whether by act or omission, necessarily involves the “use” of “physical force” against another person within the meaning of § 924(c)(3)(A). Pp. 804 - 810.

(a) It is impossible to deliberately cause physical harm without the use of physical force under § 924(c). In *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426, this Court held that under § 922(g)(9)—which prohibits anyone convicted of “a misdemeanor crime of domestic violence” from owning a firearm—“the knowing or intentional causation of bodily injury necessarily involves the use of physical force,” *id.*, at 169, 134 S.Ct. 1405. The Court’s reasoning proceeded in two steps. First, the Court found it “impossible to cause bodily injury without applying [the] force” needed to commit common-law battery. *Id.*, at 170, 134 S.Ct. 1405 (emphasis added). Second, the Court held that “the knowing or intentional application of force is a ‘use’ of force” in that sense. *Ibid.* (emphasis added).

The logic of *Castleman* extends to § 924(c). Although the parties stipulate that § 922(g)(9) and § 924(c) require different levels of force—battery-level force versus violent force—that difference is immaterial here. As the Court held in *Stokeling v. United States*, 586 U.S. 73, 80, 139 S.Ct. 544, 202 L.Ed.2d 512, violent force encompasses “the ‘force’ required for common-law robbery.” Although a mere touch is not sufficient force for common-law robbery, any force that actually causes injury or death is. *Id.*, at 83, 139 S.Ct. 544. Further, common-law robbery, like battery, can be committed through the indirect use of force. Thus, the “knowing or intentional causation of bodily injury necessarily involves the use of physical force” under § 924(c) just as it does under § 922(g)(9). *Castleman*, 572 U.S. at 169, 134 S.Ct. 1405. Pp. 804 - 807.

(b) *Castleman*’s logic forecloses Delligatti’s challenge. Because New York second-degree murder requires proof that the defendant intentionally caused the death of another person, it necessarily involves the use of physical force under § 924(c).

Delligatti contends that an offender can commit New York second-degree murder without being the *actual* cause of the victim’s death because the offender can do so through omission of a legal duty. But the test for “actual causality” is whether the victim’s death “would not have occurred in the absence of—that is, but for—the defendant’s conduct.” *Burrage v. United States*, 571 U.S. 204, 211, 134 S.Ct. 881,

187 L.Ed.2d 715 (internal quotation marks omitted). When a child starves to death after the parents refuse to provide food, the parents' conduct is no less a cause of death than if the parents had poisoned the child.

Delligatti also argues that an offender who causes harm by omission does not make “use” of physical force “against the person ... of another.” § 924(c)(3)(A). But it is natural to say that a person makes “use” of something by deliberate inaction. A mother who purposely kills her child by declining to intervene when the child drinks bleach makes “use” of the bleach's poisonous properties.

Similarly, the phrase “against the person or property of another” in § 924(c)(3)(A) does not exclude crimes of omission. That phrase at most requires that another person be “the conscious object” of the force. *Borden v. United States*, 593 U.S. 420, 430, 141 S.Ct. 1817, 210 L.Ed.2d 63 (plurality opinion). Whenever an offender deliberately causes bodily harm by omission, another person is necessarily the conscious object of physical force.

The ordinary meaning of the term “crime of violence” confirms that Congress meant for the elements clause to cover crimes of omission. Intentional murder is the prototypical “crime of violence,” and it has long been understood to incorporate liability for both act and omission. In 1986, when the elements clause was enacted, at least 33 States generally defined criminally culpable acts to include omission of a legal duty, and leading criminal-law treatises equated act and omission. If the elements clause is to have a reasonable relationship to the term it defines, it must encompass cases where the offender makes use of physical force by deliberate inaction. Pp. 806 - 810.

83 F.4th 113, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which JACKSON, J., joined.

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Opinion

Justice THOMAS delivered the opinion of the Court.

*803 Title 18 U.S.C. § 924(c)(3)(A) defines a “crime of violence” to include a felony that involves the “use of physical force” against another person. In the context of a closely related statute, we have held that “the knowing or intentional causation of bodily injury necessarily involves the use of physical force.” *United States v. Castleman*, 572 U.S. 157, 169, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014). This case asks whether that principle extends to § 924(c)(3)(A) and, if so, whether the principle holds in cases where an offender causes bodily injury by omission rather than action. We answer both questions in the affirmative.

I

A

Section 924(c) subjects any person who uses or carries a firearm during or in relation to a “crime of violence” to a mandatory minimum sentence of five years, to be served consecutively with any other term of imprisonment. §§ 924(c)(1)(A)(i) and (D)(ii). By the terms of the statute, a federal felony qualifies as a predicate crime of violence if it falls within either of two provisions. Under the first provision, known as the elements clause, an offense qualifies if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A). Under the second provision, known as the residual clause, an offense qualifies if it, “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of

committing the offense.” § 924(c)(3)(B). In *United States v. Davis*, 588 U.S. 445, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), this Court held that the residual clause is unconstitutionally vague. *Id.*, at 470, 139 S.Ct. 2319.

[1] This Court applies a “categorical approach” to determine whether an offense falls within the elements clause. *United States v. Taylor*, 596 U.S. 845, 850, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). Under that approach, we do not examine the defendant’s actual conduct. Instead, we ask whether the offense in question “always” involves the use, attempted use, or threatened use of force. *Ibid.* If the offense can be committed without the use, attempted use, or threatened use of force, it is not a crime of violence under the elements clause.

B

Salvatore Delligatti is an associate of the Genovese crime family, one of the New York Mafia’s so-called Five Families. In 2014, a local gas station owner hired Delligatti to kill Joseph Bonelli, a “neighborhood bully” and suspected police informant. *United States v. Pastore*, 83 F.4th 113, 117 (C.A.2 2023). Delligatti recruited several members of a street gang to carry out the job and provided them with a car and a loaded revolver. The gang members drove to Bonelli’s house while he was out, intending to shoot him when he returned. They abandoned this plan, however, after seeing too many potential witnesses. At Delligatti’s urging, the gang members returned the following day to try again. But, by this time, the police had discovered the plot and arrested the gang members on their way to carry out the hit.

*804 The Government charged Delligatti with several offenses, including one count of using or carrying a firearm during or in relation to a “crime of violence” under § 924(c). The indictment charged as a predicate crime of violence attempted murder under the violent-crimes-in-aid-of-racketeering (VICAR) statute, 18 U.S.C. § 1959(a) (5). VICAR attempted murder requires proof that the defendant committed an underlying state or federal offense that constitutes attempted “murder.” *Ibid.* The Government alleged that Delligatti met this requirement by attempting second-degree murder under New York law. A person commits second-degree murder when, “[w]ith intent to cause the death of another person, he causes the death of such person or of a third person.” N. Y. Penal Law Ann. § 125.25(1) (West 2009).

Before trial, Delligatti moved to dismiss his § 924(c) charge on the ground that the Government had not alleged a valid predicate crime of violence. The District Court denied the motion, holding that there “can be no serious argument” that VICAR attempted murder is not a crime of violence. App. to Pet. for Cert. 40a–41a. A jury convicted Delligatti on all counts, and the District Court sentenced him to 25 years’ imprisonment.

[2] [3] On appeal to the U. S. Court of Appeals for the Second Circuit, Delligatti argued that a VICAR offense predicated on New York second-degree murder falls outside § 924(c)’s elements clause. Homicide under New York law can be committed by act *or* omission, with the latter defined as a failure to perform a legally imposed duty. N. Y. Penal Law Ann. §§ 15.00(3), 15.10 (West 2009); *People v. Steinberg*, 79 N.Y.2d 673, 680, 584 N.Y.S.2d 770, 595 N.E.2d 845, 847 (1992). Thus, for example, a parent who intentionally causes his child’s death by withholding food or medical care commits second-degree murder under New York law. See *People v. Best*, 202 App.Div.2d 1015, 1015–1016, 609 N.Y.S.2d 478, 479 (1994). Delligatti argued that omission-based crimes like these do not involve the “use of force.”

While Delligatti’s appeal was pending, the Second Circuit rejected his position in a different case. Relying on our decision in *Castleman*, it held that the “ ‘knowing or intentional causation of bodily injury necessarily involves the use of physical force,’ ” even when the defendant causes harm “by omission.” *United States v. Scott*, 990 F.3d 94, 111, 114 (2021) (en banc) (quoting 572 U.S., at 169, 134 S.Ct. 1405, and adding emphasis). Applying *Scott*, the Second Circuit held in Delligatti’s case that New York attempted second-degree murder—and, by extension, a VICAR offense predicated on it—is a crime of violence because it necessarily involves at least the attempted use of force. 83 F.4th, at 121–122.¹

We granted certiorari to decide whether an individual who knowingly or intentionally causes bodily injury or death by failing to take action uses physical force within the meaning of the elements clause. 602 U. S. —, 144 S.Ct. 2603, — L.Ed.2d — (2024).²

*805 II

[4] [5] The Second Circuit correctly held that causing bodily harm by omission requires the use of force. As in *Castleman*, the “use” of “physical force” in § 924(c) encompasses the knowing or intentional causation of bodily injury. There is no exception to this principle when an offender causes bodily injury by omission rather than affirmative act. Delligatti’s § 924(c) challenge therefore fails.

A

Castleman establishes that under statutes like the one at issue here it is impossible to deliberately cause physical harm without the use of physical force. Although *Castleman* addressed a different statute, we conclude that its holding extends to § 924(c).

1

Section 922(g)(9), the statute at issue in *Castleman*, prohibits anyone convicted of “a misdemeanor crime of domestic violence” from owning a firearm. As under § 924(c)’s elements clause, an offense qualifies under this provision if, along with other criteria, it “has, as an element, the use ... of physical force.” § 921(a)(33)(A). The question presented in *Castleman* was whether an offense for “‘intentionally or knowingly caus[ing] bodily injury’” met that description. 572 U.S., at 161, 134 S.Ct. 1405. The District Court had held that it was possible to commit the offense without the use of force, because the offense encompassed deceiving someone “‘into drinking a poisoned beverage.’” *Id.*, at 170, 134 S.Ct. 1405. We disagreed. Our reasoning proceeded in two steps.

[6] First, we found it “impossible to cause bodily injury without applying *force*” in the sense relevant here. *Ibid.* (emphasis added). Section 922(g)(9), we held, encompasses the kind and “degree of force that supports a common-law battery conviction.” *Id.*, at 168, 134 S.Ct. 1405. That “concept of ‘force’” includes causing bodily harm indirectly, such as “‘by administering a poison or by infecting with a disease, or even by resort to some intangible substance,’ such as a laser beam.” *Id.*, at 170, 134 S.Ct. 1405 (quoting 2 W. LaFave, *Substantive Criminal Law* § 16.2(b) (2d ed. 2003)).

[7] [8] Second, we held that “the knowing or intentional application of force is a ‘use’ of force” under the provision in question. 572 U.S., at 170, 134 S.Ct. 1405 (emphasis added). A person uses force in that sense when he makes force

his “instrument,” whether directly or indirectly. *Id.*, at 170–171, 134 S.Ct. 1405 (internal quotation marks omitted). So, for example, when a person “sprinkles poison in a victim’s drink,” he uses force by “employing poison knowingly as a device to cause physical harm,” even though “the act of sprinkling” does not itself involve force. *Id.*, at 171, 134 S.Ct. 1405 (alteration and internal quotation marks omitted). Thus, whenever someone knowingly causes physical harm, he uses force within the meaning of § 922(g)(9).

2

The logic of *Castleman* extends to § 924(c). Both § 922(g)(9) and § 924(c) cover offenses involving the “use” of “physical force.” To be sure, these two provisions arguably use the term “physical force” to require different levels of force—battery-level force for § 922(g)(9) and violent force for § 924(c).³ But, because both *806 battery-level force and violent force may be applied indirectly, that difference is immaterial here.

In *Castleman*, Justice Scalia wrote an opinion concurring in the judgment observing that deliberately causing injury necessarily involves the use of both battery-level and violent force. The *Castleman* majority held that because of § 922(g)(9)’s particular focus on *misdemeanor* crimes of *domestic* violence, the phrase “use of physical force” in that statute requires only battery-level force, which can be satisfied by “‘even the slightest offensive touching.’” *Id.*, at 160–168, 134 S.Ct. 1405. The majority thereby distinguished *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), where this Court had held that the same phrase in the elements clause of the Armed Career Criminal Act (ACCA) required a higher showing of “*violent* force—that is, the force capable of causing physical pain or injury to another person.” *Id.*, at 140, 130 S.Ct. 1265; see 18 U.S.C. § 924(e)(2)(B)(i). Justice Scalia disagreed, concluding that § 922(g)(9) requires violent force. *Castleman*, 572 U.S., at 175, 134 S.Ct. 1405 (opinion concurring in part and concurring in judgment). But, he made clear that this point of disagreement did not affect the outcome of that case. He explained that intentionally or knowingly causing bodily injury “categorically involves the use of ‘force capable of causing physical pain or injury to another person.’” *Ibid.* (quoting *Johnson*, 559 U.S., at 140, 130 S.Ct. 1265). And, “for the reasons given by the Court,” that is so even when the defendant “cause[s] bodily injury through deceit or other nonviolent means.” 572 U.S., at 175, n. 1, 134 S.Ct. 1405 (opinion of Scalia, J.).⁴

[9] Justice Scalia's view of violent force eventually garnered a majority. In *Stokeling v. United States*, 586 U.S. 73, 139 S.Ct. 544, 202 L.Ed.2d 512 (2019), we held that violent force encompasses “the ‘force’ required for common-law robbery,” which is “the quintessential ACCA-predicate crime.” *Id.*, at 80, 139 S.Ct. 544. Common-law robbery requires only the force needed to overcome the victim's slightest physical resistance, even if it results in “minimal pain or injury.” *Id.*, at 78, 83–84, 139 S.Ct. 544. Thus, although “ ‘the merest touching’ ” is not violent force, any force that actually causes injury or death is. *Id.*, at 83, 139 S.Ct. 544 (quoting *Johnson*, 559 U.S., at 139, 130 S.Ct. 1265). We therefore concluded in *Stokeling* that Justice Scalia's “understanding of ‘physical force’ ” in *Castleman* was “consistent with our holding.” 586 U.S., at 85, 139 S.Ct. 544.

By pegging “physical force” to robbery, *Stokeling* makes clear that even the indirect causation of bodily harm requires the use of violent force. This principle was well established when Congress enacted § 924(c)'s elements clause in 1986. 100 Stat. 456–457. As one contemporaneous treatise put it, “[j]ust as battery may be committed by the administration of poison, *807 so the force used to obtain property from a person against his will may be applied internally.” R. Perkins & R. Boyce, *Criminal Law* 348 (3d ed. 1982) (footnote deleted); see also *People v. Dreas*, 153 Cal.App.3d 623, 627–629, 200 Cal.Rptr. 586, 589 (1984); *Carroll v. State*, 440 So.2d 343, 344–345 (Ala. Crim. App. 1983); *People v. Berryman*, 43 Mich.App. 366, 367–368, 204 N.W.2d 238, 239 (1972); *State v. Skillings*, 98 N.H. 203, 207, 97 A.2d 202, 205 (1953); *State v. Snyder*, 41 Nev. 453, 456–459, 172 P. 364, 364–365 (1918); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.11(d) (1), p. 447 (1986) (LaFave & Scott); 4 C. Torcia, *Wharton's Criminal Law* § 479, p. 67 (14th ed. 1981) (Wharton).

Delligatti resists extending *Castleman*'s logic to § 924(c). He argues there cannot be an “automatic connection” between injury and the violent force § 924(c) requires because even a small degree of force might injure an “eggshell” victim. Brief for Petitioner 37–38. But, as we held in *Stokeling*, the minimal force needed to overcome the resistance of “a feeble or weak-willed victim” still qualifies as sufficiently “violent” to fall within the statute's ambit. 586 U.S., at 83, 139 S.Ct. 544. Delligatti also concedes that it is possible to use violent force “indirectly,” Brief for Petitioner 7, as when a person tricks another into eating food that has aged to the point of becoming toxic, Tr. of Oral Arg. 17. Thus, the “knowing or intentional causation of bodily injury necessarily involves the

use of physical force” under § 924(c) just as it does under § 922(g)(9). *Castleman*, 572 U.S., at 169, 134 S.Ct. 1405.

B

[10] *Castleman*'s logic forecloses Delligatti's challenge. Deliberately causing injury necessarily involves the use of force in the sense relevant here. Under New York law, second-degree murder requires proof that the defendant intentionally “cause[d] the death of another person.” N. Y. Penal Law Ann. § 125.25(1). And, it should go without saying, intentionally causing death counts as deliberately causing injury. Thus, second-degree murder in New York—and, by extension, Delligatti's VICAR offense premised on it—is a crime of violence under § 924(c)'s elements clause.

Delligatti disagrees. He insists that New York second-degree murder falls outside *Castleman*'s rule because a person can commit the offense through omission of a legal duty. *Steinberg*, 79 N.Y.2d at 680, 584 N.Y.S.2d 770, 595 N.E.2d at 847; *supra*, at 803 – 804. In such cases, Delligatti contends, the law may deem the offender the cause of the victim's death through “legal fiction,” but that fiction is not enough to make the person the “actual cause.” Reply Brief 7. That is incorrect. We have explained that the test for “actual causality” is whether the victim's death “would not have occurred in the absence of—that is, but for—the defendant's conduct.” *Burrage v. United States*, 571 U.S. 204, 211, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014) (internal quotation marks omitted). When a young child starves to death after his parents refuse to give him food, that harm would not have occurred but for the parents' choice. Both in the eyes of the law and as a practical matter, the parents' conduct is no less a cause of the child's death than if the parents had poisoned him.

Unable to escape *Castleman*'s reach, Delligatti argues in the alternative that its rule is unsound as applied to omissions. An offender who causes harm by omission, the theory goes, does not make “use” of physical force “against the person ... of another.” § 924(c)(3)(A). Again, we disagree.

[11] It is perfectly natural to say that a person makes “use” of something by deliberate *808 inaction. A car owner, for example, can “use” the rain to wash his vehicle simply by leaving it parked on the street. And, a fugitive can “use” the cover of darkness to hide by lying still at night. In the same way, a mother who purposely kills her child by declining to intervene when the child finds bleach and

starts drinking it makes “use” of the bleach's poisonous properties to accomplish her unlawful end. And, a husband who deliberately abandons his wife to die in the cold “use[s] th[e] forces” of “the elements” to cause her death. *Territory v. Manton*, 7 Mont. 162, 168, 14 P. 637, 638–639 (1887). Delligatti's proposed action-inaction distinction has no basis in ordinary meaning.

[12] Similarly, we reject the argument that the phrase “against another” excludes crimes of omission. At most, that phrase requires that another person be “the conscious object” of the force the offender uses. *Borden v. United States*, 593 U.S. 420, 430, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021) (plurality opinion). Put differently, the language “against another” specifies the required object of the force (another person, rather than, say, an animal), and possibly also the *mens rea* with which the object must be targeted (knowingly or intentionally, rather than negligently or recklessly). *Id.*, at 430–434, 141 S.Ct. 1817.⁵ Whenever an offender deliberately causes bodily harm by omission, he necessarily makes another person the conscious object of physical force. In the bleach example, the mother's refusal to take away the bleach is not an accident, but rather a deliberate effort to make the child suffer the bleach's poisonous effects. The mother thus uses force *against her child*. It would be passing strange to say the mother used force to cause the child's death, but did not use force *against* anyone.

[13] [14] Context also confirms that crimes of omission fall within the elements clause. The elements clause is a definition of the term “crime of violence.” § 924(c)(3). When choosing among interpretations of a statutory definition, the “ordinary meaning” of the “defined term” is an important contextual clue. *Bond v. United States*, 572 U.S. 844, 861, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014). Thus, we prefer interpretations of the elements clause that encompass prototypical “crimes of violence” over those that do not. See *Stokeling*, 586 U.S., at 81–82, 139 S.Ct. 544; *Voisine v. United States*, 579 U.S. 686, 696, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016); *Castleman*, 572 U.S., at 167, 134 S.Ct. 1405.

[15] Intentional murder is the prototypical “crime of violence,” and it has long been understood to incorporate liability for both act and omission. At the time of the elements clause's enactment, it was widely accepted that one could commit murder by refusing to perform a legal duty, like feeding one's child. See, e.g., *Lackey v. State*, 246 Ga. 331, 331–332, 336, 271 S.E.2d 478, 480–481, 483 (1980); *State v. Nicholson*, 585 P.2d 60, 61–63 (Utah 1978) (*per curiam*);

*809 *People v. Burden*, 72 Cal.App.3d 603, 616–619, 140 Cal.Rptr. 282, 289–291 (1977); *Biddle v. Commonwealth*, 206 Va. 14, 20–21, 141 S.E.2d 710, 714–715 (1965); *State v. Shephard*, 255 Iowa 1218, 1232–1235, 124 N.W.2d 712, 720–722 (1963); 1 LaFave & Scott § 3.3, at 282–283. As the Government notes, this view had deep roots in the common law. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 297, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (Scalia, J., concurring) (collecting authorities); *Commonwealth v. Hall*, 322 Mass. 523, 527–528, 78 N.E.2d 644, 647 (1948) (same); 1 W. Hawkins, Pleas of the Crown § 8, p. 79 (1716); Brief for United States 23–26.

Moreover, murder was not the only violent crime that States recognized could arise from omission. Knowingly causing nonlethal injury to one's child by neglect, for example, could amount to common-law battery. See, e.g., *People v. Bernard*, 149 Ill.App.3d 684, 693–695, 103 Ill.Dec. 3, 500 N.E.2d 1074, 1079–1080 (1986); *State v. Walden*, 306 N.C. 466, 476, 293 S.E.2d 780, 786–787 (1982); 1 LaFave & Scott § 3.3(e), at 294. In 1986, at least 33 States had statutes generally defining criminally culpable acts to include omission of a legal duty. See Brief for United States 27–28, n. 3. Leading criminal-law treatises similarly equated act and omission. 1 LaFave & Scott § 3.3, at 282–283; 1 Wharton § 25, at 116–120 (1978); see also ALI, *Model Penal Code* § 1.13(7), p. 209 (1985) (“acted” “includes, where relevant, ‘omitted to act’”).

Thus, we cannot adopt Delligatti's interpretation without excluding traditional and widely accepted definitions of murder and other prototypical violent crimes from the elements clause's reach. If the elements clause is to have a reasonable relationship to the term it defines, it must encompass cases where the offender makes use of physical force by deliberate inaction. To the extent any doubt remains that Congress meant for the elements clause to cover crimes of omission, the ordinary meaning of “crime of violence” resolves it.

Delligatti insists that his position—that murder is not a crime of violence—is not as outlandish as it sounds. Congress, he tells us, expected crimes like his to fall within the now-defunct residual clause. See § 924(c)(3)(B) (covering offenses that involve “a substantial risk that physical force ... may be used”). But, to say that killing someone involves a “risk” of force is a gross understatement in ordinary speech, rendering the residual clause at best an awkward fit. The elements clause is thus the natural home for murder and other prototypical violent crimes, and the unreasonableness of excluding such

crimes from the elements clause is an “additional reason to read the statute as we do.” *Castleman*, 572 U.S., at 167, 134 S.Ct. 1405.

C

[16] [17] The dissent's arguments fare no better than Delligatti's. The dissent asserts that the use of physical force requires “a violent or extreme physical act” rather than “mere touching or pre-existing natural forces.” *Post*, at 812 (opinion of GORSUCH, J.). In other words, disagreeing with Justice Scalia, the dissent maintains that many ways of causing bodily harm indirectly, such as deceiving the victim or slipping poison into his drink, do not involve the use of violent force. *Post*, at 812 - 813, n. 1; see *Castleman*, 572 U.S., at 175, n. 1, 134 S.Ct. 1405 (opinion of Scalia, J.). This view runs headlong into *Stokeling*'s holding that violent force encompasses “the ‘force’ required for common-law robbery.” 586 U.S., at 80, 139 S.Ct. 544. Common-law robbery is a crime that may be committed indirectly, *supra*, at 806 - 807, such as by slipping a sedative into the victim's coffee, *Dreas*, 153 Cal.App.3d at 627, 200 Cal.Rptr. at 589. Thus, no violent *810 or extreme physical act is needed to use force within the meaning of the elements clause. Not even Delligatti disagrees with that basic proposition. See *supra*, at 806 - 807.

[18] The dissent suggests that, in any event, criminal statutes do not cover omissions absent express language to that effect. *Post*, at 813 - 814. No such clear-statement rule exists. Many crimes “may be committed either by affirmative action or by failure to act” even though they are not “specifically so defined.” 1 LaFave & Scott § 3.3, at 282; see *supra*, at 808 - 809. New York's second-degree murder statute is a prime example. It prohibits intentionally “caus[ing] the death of another person” without explicitly mentioning omissions. N. Y. Penal Law Ann. § 125.25(1). But, because one can cause death by omission, the statute covers omissions. *Supra*, at 803 - 804. So too here, because one can make “use of physical force” against another by omission, § 924(c)(3)(A), the elements clause covers omissions.

Nor do any of our precedents establish that, in the context of the elements clause, it is impossible to “use” force by omission. *Contra, post*, at 815 - 816. In *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), this Court explained that the word “use” means “‘[t]o convert to one's service,’ ‘to employ,’ ‘to avail oneself of,’ and ‘to carry out a purpose or action by means of.’” *Id.*, at 145, 116 S.Ct.

501. Thus, the “mere possession of a firearm” during a crime does not amount to a “use” of the firearm under § 924(c) if the wrongdoer does not employ the firearm to accomplish his criminal end. *Id.*, at 143, 116 S.Ct. 501; see also *Voisine*, 579 U.S., at 692–693, and n. 3, 136 S.Ct. 2272 (reiterating *Bailey*'s interpretation of “use”); *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (same). In contrast, a mother who lets her child drink bleach because she wants him to die *uses* the force of the bleach within the meaning of the elements clause because she accomplishes her purpose by means of the bleach's harmful effects. And, by targeting a particular individual, the mother has taken a “specific actio[n] against [a] specific perso[n],” not merely “pose[d] an abstract risk to community peace and order.” *Taylor*, 596 U.S., at 856, 142 S.Ct. 2015. As a matter of both text and precedent, deliberately causing injury or death by omission is a *use* of physical force.

Finally, the dissent takes issue with our reliance on the ordinary meaning of “crime of violence,” branding it an impermissible “resort to unexpressed legislative intentions.” *Post*, at 818. To the contrary, we engage in the standard task of reading a statutory definition in light of the conventional meaning of the term it defines. “Since on this side of the looking-glass an entirely artificial definition is rare, the meaning of the definition is almost always closely related to the ordinary meaning of the word being defined.” A. Scalia & B. Garner, *Reading Law* 228 (2012). Thus, when the meaning of the elements clause “is not clear,” the ordinary meaning of the term “crime of violence” is one of “the most important” factors we can consider. *Ibid.*

* * *

The knowing or intentional causation of injury or death, whether by act or omission, necessarily involves the use of physical force against another person. The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

Justice GORSUCH, with whom Justice JACKSON joins, dissenting.

Imagine a lifeguard perched on his chair at the beach who spots a swimmer struggling *811 against the waves. Instead of leaping into action, the lifeguard chooses to settle back in his chair, twirl his whistle, and watch the swimmer slip away. The lifeguard may know that his inaction will cause

death. Perhaps the swimmer is the lifeguard's enemy and the lifeguard even wishes to see him die. Either way, the lifeguard is a bad man. In many States, he may be guilty of a serious crime for failing to fulfill his legal duty to help the swimmer. But does the lifeguard's offense also qualify under 18 U.S.C. § 924(c)(3)(A) as a "crime of violence" involving the "use ... of physical force against the person ... of another"? The Court thinks so. I do not. Section 924(c)(3)(A) may reach many crimes, but it does not reach crimes of omission.

I

A

As I see it, the Court reaches the wrong destination because it takes a wrong turn at the start. Our cases are replete with reminders that, when faced with a question of statutory interpretation, the text is where we must begin (and often end). Today, however, the Court whistles past the terms Congress gave us in § 924(c)(3)(A). Instead, it chooses to begin (and largely end) its analysis of this case with an examination of precedent and assumptions about congressional purposes. *Ante*, at 805 - 810. I will get to those matters later. But first, let's do what the Court does not and look to the text.

Section 924(c)(1) imposes a sentencing enhancement on individuals who "us[e]," "carr[y]," or "posses[s]" firearms "during and in relation to" a "crime of violence." See *ante*, at 803. Section 924(c)(3)(A) then proceeds to define the phrase "crime of violence" as "an offense that is a felony and ... has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Today, the Court reworks that definition at the government's request. Now, the Court says, a "crime of violence" includes "the knowing or intentional causation of bodily injury ... by omission." *Ante*, at —. Under that approach, the government admits, even our lifeguard, whose offense stems from inaction, is guilty of a "crime of violence." Tr. of Oral Arg. 51. The only trouble is, nothing like the rule the government proposes and the Court adopts appears anywhere in § 924(c).

To appreciate how unlikely the Court's new rule is, just walk through the statute's key definitional terms, beginning with the word "use." When Congress adopted the current version of § 924(c) in 1984, the word "use" meant, as it does today,

"to employ," "to convert to one's service," or "to avail one's self of." Black's Law Dictionary 1381 (def. 1) (5th ed. 1979); see also Webster's New Universal Unabridged Dictionary 2012 (def. 1) (2d ed. 1983) (similar). As this Court has long recognized, "[t]hese various definitions of 'use' imply action." *Bailey v. United States*, 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995); see also *Voisine v. United States*, 579 U.S. 686, 692–693, and n. 3, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (collecting cases). And because "use" has an "active meaning," one does not "use" something through mere "inact[ion]," "inert[ia]," or "nonactiv[ity]." *Bailey*, 516 U.S., at 148–149, 116 S.Ct. 501.

What must a person actively employ to commit a crime of violence? The statute tells us: "physical force." § 924(c)(3)(A). That is, "[f]orce applied to the body; actual violence." Black's Law Dictionary, at 1032. This Court explained as much in *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). There, the *812 Court addressed the meaning of the phrase "physical force" in the definition of the term "violent felony" in § 924(e). "[P]hysical force," the Court held, does not reach "emotional" or "intellectual" force. *Id.*, at 138, 130 S.Ct. 1265. Nor does it carry its "specialized meaning in the field of physics: a cause of the acceleration of mass." *Id.*, at 138–139, 130 S.Ct. 1265. So letting a pre-existing force of nature run its course does not suffice. Instead, an individual must employ "[f]orce consisting in a physical act." *Id.*, at 139, 130 S.Ct. 1265.

The "physical act" must also be a violent one. Again, consider *Johnson*. Because § 924(e) uses the phrase "physical force" to define what qualifies as a "violent felony," the Court in *Johnson* rejected the government's effort to equate the "physical act" required by the statute with the kind of "mer[e] touching" sufficient to establish the common-law crime of battery. *Id.*, at 139, 130 S.Ct. 1265. Resort to common-law battery principles in this statutory scheme, the Court reasoned, would produce "a comical misfit." *Id.*, at 145, 130 S.Ct. 1265. Instead, the Court ruled, the requisite "physical act" must be "violent," which is to say "extreme" and "severe." *Id.*, at 140, 130 S.Ct. 1265. And if that much follows when the phrase "physical force" is used to define a "violent felony" in § 924(e), surely the same must hold true when the same phrase is used in the same section of the U. S. Code to define a "felony" "crime of violence." § 924(c); see *Azar v. Allina Health Services*, 587 U.S. 566, 574, 139 S.Ct. 1804, 204 L.Ed.2d 139 (2019).

Finally, the statute requires the use of force “against the person or property of another.” Again addressing § 924(e), a plurality of this Court has recognized that similar language modifies the “volitional conduct (*i.e.*, the use of force)” discussed in the statute, and in doing so identifies the “conscious object” of a defendant’s “use of physical force.” *Borden v. United States*, 593 U.S. 420, 431, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021). All of which suggests that the statute before us captures only active violent force when it is knowingly or intentionally applied against the person or property of another. See *id.*, at 431–432, 141 S.Ct. 1817.

Putting these pieces together reveals the implausibility of the Court’s new rule. To commit a “crime of violence,” an individual must (1) actively (not just through inertia) employ (2) a violent or extreme physical act (not a mere touching or pre-existing natural forces) (3) knowingly or intentionally to harm another person or his property. An individual who, as the Court puts it, “causes bodily injury by omission” does not begin to meet these criteria. *Ante*, at 805. Someone like our lifeguard may knowingly or intentionally cause another’s death by refusing to fulfill his legal duty to act. Maliciously, he may choose to allow natural forces to take their toll. But by remaining in his chair, he does not actively employ even the merest touching, let alone violent physical force. Of course, crimes of omission like our lifeguard’s are serious ones that can invite serious punishments under various state and federal laws. But § 924(c)(3)(A) was not written to reach every felony found in our Nation’s many criminal codes. And the statute’s terms simply cannot be stretched to cover crimes of “inact[ion],” “inert[ia],” or “nonact[ivity].” *Bailey*, 516 U.S., at 149, 116 S.Ct. 501.¹

*813 B

Not only does the Court fail to grapple with the statutory text, it breezes past the next best evidence of statutory meaning: context. As it turns out, several pieces of contextual evidence, all unmentioned by the Court, weigh against the notion that a § 924(c)(3)(A) “crime of violence” can include a crime of omission.

First, consider how informed readers understood the phrase in 1981. When Congress first considered defining “crime of violence” to require the “use of physical force against the person or property of another,” legislators recognized that those terms would not reach omissions. S. Rep. No. 97–307, p. 591 (1981). A Senate report explained that the “operator of

a dam [who] refuse[d] to open the floodgates during a flood, thereby placing the residents of an upstream area in jeopardy of their lives” would not commit a “crime of violence” since “he did not ... use physical force.” *Ibid.* Of course, “legislative history is not the law” and should not be confused for it. *Epac Systems Corp. v. Lewis*, 584 U.S. 497, 523, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018). But the report supplies at least some evidence that ordinary speakers at the time of § 924(c)(3)(A)’s enactment understood the phrase “use ... of physical force” to exclude crimes of omission. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 388 (2012) (Scalia & Garner) (recognizing that courts may use legislative history “for the purpose of establishing linguistic usage”).

Second, analyzing “how particular combinations of words are used in a vast database of English prose” can shed light on how ordinary people understand statutory terms. See *Facebook, Inc. v. Duguid*, 592 U.S. 395, 412, 141 S.Ct. 1163, 209 L.Ed.2d 272 (2021) (ALITO, J., concurring in judgment). Just such a database—the Corpus of Contemporary American English—contains “forty-seven non-specialist instances of ‘use of physical force.’ ” *United States v. Scott*, 990 F.3d 94, 129, n. 8 (C.A.2 2021) (en banc) (Menashi, J., concurring in part and concurring in judgment). Of those references, “all refer to physical contact; none plausibly refer to ‘deriv[ing] service from’ a preexisting physical force.” *Ibid.* Thus the phrase “prototypically refers to assertive physical contact —‘punches, kicks, slaps[,] and body slams.’ ” *Id.*, at 129.

Third, any other interpretation introduces redundancy into the statutory scheme. Section 924(c)(3) details two separate ways in which an offense may qualify as a “crime of violence.” The first, the focus of our attention, is found in § 924(c)(3)(A), or what is sometimes called the elements clause. That provision addresses those felony offenses that have “as an element the use ... of physical force against the person or property of another.” The second, found in § 924(c)(3)(B), or what is sometimes called the residual clause, speaks to felony offenses that “by [their] nature, involv[e] a substantial risk [of] physical force.” To the extent § 924(c) might address omission offenses, the residual clause is their natural home. It requires no active employment of physical force, only a risk some such force might be deployed. Expanding the elements clause to reach omission offenses, as the Court *814 does today, goes a long way toward rendering the residual clause pointless. Perhaps the Court considers that outcome a virtue, given that we have held the residual clause unconstitutionally vague and thus unenforceable. *United States v. Davis*, 588 U.S. 445, 470, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019).

But conscripting one subsection to do the work no longer performed by another makes a hash of the separate and discrete provisions that Congress enacted.

Finally, a look to the broader federal criminal code reinforces what the statutory text suggests. Congress has exhibited no difficulty addressing omission crimes elsewhere, mentioning them explicitly in dozens of provisions up and down the U. S. Code. *E.g.*, 18 U.S.C. § 13(a) (“act or omission” is punishable); § 542 (similar); § 1166(b) (similar); 28 U.S.C. § 1346(b)(1) (similar). The fact that Congress “knows exactly” how to reach omission offenses “when it wishes” to do so, yet declined to mention them in 18 U.S.C. § 924(c)(3)(A), stands as one more piece of evidence yet that the statute covers only offenses involving the active use of force. *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 704, 142 S.Ct. 1929, 213 L.Ed.2d 221 (2022).²

C

Where does (or should) all this leave us? To determine whether a state offense qualifies as a crime of violence under the elements clause, a court must assess whether the offense “has as an element the use, attempted use, or threatened use of physical force” against another. § 924(c)(3)(A). That assessment “does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime.” *United States v. Taylor*, 596 U.S. 845, 850, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). Were it otherwise and a sentencing judge could find facts about the defendant's underlying conduct, serious Sixth Amendment questions might follow. See *Erlinger v. United States*, 602 U.S. 821, 833, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024).

Now apply the elements clause's test to the New York statute at issue before us. That law makes it a crime intentionally “to cause the death of another.” N. Y. Penal Law Ann. § 125.25(1) (West 2009); see also *ante*, at 804, and n. 2. Doubtless, New York's offense can be (and usually is) committed by affirmative actions involving the use of violent physical force. But, the parties agree, New York's offense can *also* be committed by someone, like our lifeguard, who intentionally causes death by failing to fulfill a legal duty requiring him to act. Brief for Petitioner 18; Brief for United States 8. In cases like that, prosecutors can prevail simply by showing that a defendant did *nothing* when he had a legal duty to do *something*. And because a defendant can be convicted of the crime without proof that he used, attempted to use, or

threatened to use physical force against anyone or anything at all, New York's offense cannot qualify as a crime of violence under § 924(c)(3)(A).

II

The Court chafes at this conclusion. It emphasizes that Mr. Delligatti committed no mere crime of omission but instead plotted to use active force against his victim. *Ante*, at 803 - 805. On that much, there is no room for dispute. But neither is ***815** there room to dispute that § 924(c)(3)(A) focuses on the elements of New York's offense, not the particulars of Mr. Delligatti's crime. Some have criticized this feature of the elements clause, and their voices “could hardly be louder.” *United States v. Harris*, 87 F.4th 195, 212, and n. 25 (C.A.3 2023) (Jordan, J., concurring in denial of rehearing en banc) (collecting criticisms). But no amount of wishful thinking can change the nature of the inquiry that § 924(c)(3)(A) demands. See *Taylor*, 596 U.S., at 850, 142 S.Ct. 2015.

Ultimately, the Court acknowledges as much. For New York's offense to qualify as a “crime of violence,” the Court concedes, it must find some way to explain how committing that offense by omission requires the government to prove, as an element, the “use ... of physical force.” *Ante*, at 804 - 805, 806 - 807. To get there, the Court appeals to precedent, *ante*, at 805 - 808, and implicit congressional purposes, *ante*, at 808 - 809. But, unsurprisingly, our precedents do not require us to ignore the statute's terms. And no amount of conjecture about implicit congressional purposes can substitute for statutory text.

Start with the Court's argument from precedent. The Court asks us to believe that its hands are tied by *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), and *Stokeling v. United States*, 586 U.S. 73, 139 S.Ct. 544, 202 L.Ed.2d 512 (2019). Those two cases, the Court insists, require us to conclude that knowingly or intentionally causing bodily injury by omission always “requires the use of force.” *Ante*, at 805. So, as the Court tells it, even if the statute's terms might suggest a different result, respect for *stare decisis* compels the conclusion that New York's statute satisfies the elements clause. *Ibid*.

Notice, though, what's missing from the Court's account of precedent. While training its attention on *Castleman* and *Stokeling*, the Court neglects so many other relevant cases, relegating them to little more than an afterthought. *Ante*, at

809 - 810. Where is *Bailey*, and its holding that the term “use” in § 924(c)(1) carries an “active meaning,” implying “action and implementation,” not mere “inacti[on],” “inert[ia],” or “nonactivit[y]”? 516 U.S., at 145–149, 116 S.Ct. 501. Where is our precedent holding that the same word in the same law normally carries the same meaning—indicating that the term “use” in § 924(c)(3)(A) should be read the same way? See *Azar*, 587 U.S., at 574, 139 S.Ct. 1804. Where are our decisions in *Leocal* and *Voisine*, interpreting “use” in other analogous contexts to mean “active employment,” *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), or “volitional conduct,” *Voisine*, 579 U.S., at 693, 136 S.Ct. 2272? Where is *Johnson*’s conclusion that the term “physical force” in § 924(e) excludes “its specialized meaning in ... physics,” requires more than “the merest touching,” and cannot be equated with the common law of battery? 559 U.S., at 138–139, 130 S.Ct. 1265. And where is *Taylor*’s admission that a “crime of violence” under § 924(c) “[p]lainly ... requires the government to prove that the defendant took specific actions against specific persons or their property”? 596 U.S., at 856, 142 S.Ct. 2015. Viewing our precedents as a whole leaves little question about how this case should come out. But, rather than engage with so many inconvenient cases, the Court largely ignores them.

Even examined in isolation, the two decisions the Court plucks out of the stack cannot begin to do the work the Court seeks to impress upon them. Take *Castleman* first. It involved § 922(g), which prohibits anyone convicted of a “misdemeanor crime of domestic violence” from owning a *816 firearm. By statute, Congress has defined the phrase “misdemeanor crime[s] of domestic violence” to reach certain offenses that have “as an element, the ... use of physical force.” § 921(a)(33)(A)(ii). The question for the Court was whether a state domestic-assault statute making it a crime to “intentionally or knowingly caus[e] bodily injury” satisfied that definition. 572 U.S., at 161, 134 S.Ct. 1405. The Court held it did. Because § 922(g)(9) focuses on misdemeanor crimes of violence, the Court reasoned, it requires no more “physical force” than that required to establish a battery at common law—so “even the slightest offensive touching” will do. *Ante*, at 806 (quoting *Castleman*, 572 U.S., at 160–168, 134 S.Ct. 1405). And, the Court held, the state offense at issue met that standard because it required proof of “force in the common-law sense.” *Id.*, at 170, 134 S.Ct. 1405.

Nothing in *Castleman* compels the conclusion that omission crimes involve “the use, attempted use, or threatened use of physical force” sufficient to implicate § 924(c)(3)(A). Cf.

ante, at 805. In fact, *Castleman* did not even *discuss* crimes of omission. And when the Court spoke of what it means to “use physical force,” the Court spoke in active terms, stressing that the “knowing or intentional *application* of force is a ‘use’ of force.” 572 U.S., at 170, 134 S.Ct. 1405 (emphasis added). To be sure, the Court observed that a defendant may use physical force “indirectly, rather than directly.” *Id.*, at 170–171, 134 S.Ct. 1405. So, the Court explained, when a defendant “pull[s] the trigger on a gun,” the defendant uses physical force even though the “bullet, not the trigger, ... strikes the victim.” *Ibid*. But from that, it does not follow that a defendant “uses physical force” when he does nothing. Cf. *ante*, at 804 - 806. Someone like our lifeguard stands worlds away from a shooter who indirectly “uses” a firearm’s explosive force when he pulls the trigger.

To the extent *Castleman* has anything to say about our case, it does more to hurt than to help the Court’s cause. To reach its holding that common-law battery informs the degree of physical force required by § 922(g)(9), *Castleman* had to distinguish *Johnson*, where the Court held that the degree of force associated with common-law battery does *not* qualify as the kind of “physical force” necessary to satisfy § 924(e). 559 U.S., at 140, 130 S.Ct. 1265; see Part I–A, *supra*. To distinguish *Johnson*, *Castleman* stressed that § 922(g)(9) addresses “misdemeanor crime[s] of domestic violence,” while § 924(e) focuses on “violent felon[ies].” 572 U.S., at 163–164, 134 S.Ct. 1405 (emphasis added). That difference, the Court reasoned, indicates the two statutes demand different degrees of force. *Id.*, at 164, 134 S.Ct. 1405. Here, of course, we face a statute like § 924(e), one addressing felony crimes of violence, not mere misdemeanors. And if, as *Johnson* held and *Castleman* recognized, a mere touching is insufficient to satisfy § 924(e)’s “physical force” requirement, it is hard to imagine how complete inaction might fit the bill under § 924(c)(3)(A).

With nothing in the *Castleman* majority opinion to help it, the Court eventually turns to Justice Scalia’s solo concurrence. *Ante*, at 813 - 814. There, he rejected the majority’s suggestion that a slight touching qualifies as the “use of physical force” even under § 922(g). 572 U.S., at 173–175, 134 S.Ct. 1405 (opinion concurring in part and concurring in judgment). The common-law battery standard, he said, plays no role in a statute that does not reference it. *Id.*, at 176, 134 S.Ct. 1405. Instead, the author of *Johnson* explained that he read the phrase “physical force” in both § 922(g) and § 924(e) to mean what *Johnson* said it means: “violent force—that is, *817 force capable of causing physical pain or injury.” 572 U.S.,

at 174, 134 S.Ct. 1405 (quoting *Johnson*, 559 U.S., at 140, 130 S.Ct. 1265) (emphasis deleted). Even so, Justice Scalia concurred in the judgment because the state statute at issue in *Castleman* required proof that the defendant “cause[d] bodily injury,” and, in his view, “it is impossible to cause bodily injury” without employing the kind of violent force *Johnson* discussed. 572 U.S., at 174, 134 S.Ct. 1405.

That syllogism is of no use to the Court here. Justice Scalia may have claimed that a defendant whose *actions* cause bodily injury necessarily uses violent physical force. *Ibid.* But he did not claim that a defendant whose *failure to act* causes bodily injury also necessarily uses violent physical force. Quite the opposite. “[N]onphysical conduct” like “acts of omission,” Justice Scalia said, cannot “possibly be relevant to the meaning of a statute requiring ‘physical force.’ ” *Id.*, at 181, 134 S.Ct. 1405 (emphasis deleted; some internal quotation marks omitted). By rejecting the notion that omissions resulting in bodily injury can give rise to liability under statutes like the one before us, Justice Scalia stuck to his view in *Johnson* that the phrase “use ... of physical force” captures only “ ‘a category of violent, *active* crimes.’ ” 559 U.S., at 140, 130 S.Ct. 1265 (quoting *Leocal*, 543 U.S., at 11, 125 S.Ct. 377; emphasis added). And it is a view directly at odds with the Court's decision today.

Finding *Castleman* a dry hole, the Court prospects *Stokeling*. *Ante*, at 806 - 807. But the Court does so only briefly, and understandably so. *Stokeling* held that the phrase “physical force” in § 924(e) “includes the amount of force necessary to overcome a [robbery] victim's resistance.” 586 U.S., at 87, 139 S.Ct. 544. That amount of force, the Court explained, does not encompass “the merest touching,” *id.*, at 83, 139 S.Ct. 544, or simply “snatching of property from another,” *id.*, at 86, 139 S.Ct. 544, but requires more “physical contact,” *id.*, at 83, 139 S.Ct. 544. How any of that helps the Court today mystifies. Our case does not present a question about robbery or purse snatching, and nothing in *Stokeling* begins to address the question whether a crime of omission entails the “use ... of physical force.” More than that, *Stokeling*'s statements about the degree of force required to satisfy § 924(e) indicate that something beyond mere inaction is required.³

III

Unable to ground its decision in precedent, the Court retreats, at the tail end of *818 its opinion, to an argument about statutory purpose. *Ante*, at 808 - 809. The argument runs this

way. The Court observes that some notable crimes at common law, including murder and battery, required prosecutors to prove only that the defendant, with a particular *mens rea*, caused a particular result (*e.g.*, death or bodily injury), whether by affirmative action or by failing to fulfill a legal duty that required him to act. Offenses like that are sometimes called “cause and result” crimes. See 1 LaFare & Scott § 3.3, at 283, 293–294. Many contemporary statutes, the New York murder statute before us among them, follow this common-law pattern. And, on the Court's theory, if § 924(c)(3)(A) failed to reach significant cause-and-result crimes like murder and battery simply because they can be committed by omission as well as by act, the statute would not adequately serve its purpose of addressing “crimes of violence.” *Ante*, at 808 - 809. I am not blind to the appeal of the argument, but I find it unpersuasive for a couple reasons.

A

For one thing, there can be little doubt about what the argument is: a resort to unexpressed legislative intentions. Congress, the Court insists, could not *possibly* have used the phrase “crime of violence” in § 924(c)(3)(A) without intending to capture “prototypical” cause-and-result crimes, like murder and battery, long recognized at common law. See *ante*, at 809.

We have no business entertaining an argument like that. In § 924(c)(3)(A), Congress did not ask us to plumb the legislative mind or to do whatever it takes to ensure the statute reaches certain cause-and-result crimes familiar to the common law. Instead, Congress told us exactly what qualifies as a “crime of violence” for purposes of this law: an offense that has “as an element” the “use, attempted use, or threatened use of physical force.” § 924(c)(3)(A). And, as this Court has often explained, when Congress takes the trouble to supply an express definition, we are obliged to treat it as “virtually conclusive,” even—and perhaps especially—if it “varies” from what we might otherwise understand (or wish) the definition to be. See *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 59, 144 S.Ct. 457, 217 L.Ed.2d 361 (2024); Scalia & Garner 228 (“It is very rare that a defined meaning can be replaced with another permissible meaning of the word ... ”).

The Court offers no persuasive answer to any of this. To be sure, the Court protests that it merely seeks to give voice to the “conventional meaning” of the phrase “crime of violence.”

Ante, at 810. But the Court's focus on that phrase in isolation, followed by an insistence that it must capture common-law cause-and-result crimes like murder and battery—all without any serious attention to the express definition Congress gave us or so much contextual evidence about its meaning—leaves little room for doubt that purpose, not text, is in the driver's seat today.

In saying that much, I do not mean to suggest courts may never look to the common law to inform statutory text. Sometimes, courts properly consider the common law when interpreting a term of art Congress has adapted from that “old soil.” See, e.g., *Sekhar v. United States*, 570 U.S. 729, 733, 133 S.Ct. 2720, 186 L.Ed.2d 794 (2013). And, yes, we may sometimes resort to the common law when a statute leaves a gap (say, by failing to supply a burden of proof or the requisite *mens rea*). See, e.g., *Morrisette v. United States*, 342 U.S. 246, 262, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

The trouble is, we have nothing like that here. Before us is an express statutory ***819** definition that bears no resemblance to traditional common-law terms and leaves no gap to fill. The Court does not claim otherwise. Nor could it, for we have been down this road before. In *Johnson*, the government asked this Court to draw from common-law liability principles to inform parallel statutory language in § 924(e). The Court refused that request because it threatened to generate only a “comical misfit.” 559 U.S., at 145, 130 S.Ct. 1265; see also *Castleman*, 572 U.S., at 175, 134 S.Ct. 1405 (opinion of Scalia, J.) (“expansive common-law” principles cannot displace the “statutory text” of § 924(e)).

The same holds true here. By looking to the common law today, the Court produces a serious misfit. At common law, an omission could give rise to liability for a cause-and-result crime only if the defendant had a well-defined legal duty to act (think of a doctor's duty to his patient, or a father's duty to his child). See 1 LaFare & Scott § 3.3, at 283. Yet the Court's reading of § 924(c)(3)(A) renders the presence of a legal duty irrelevant—as the Court sees it, knowingly or intentionally causing bodily injury by failing to act is *always* a “crime of violence.” *Ante*, at 804 - 805. In the name of revising this statute to better track common-law cause-and-result crimes, then, the Court (ironically) expands the frontiers of criminal liability in ways utterly unknown to the common law.

Along the way, the Court hands us another misfit, too, this one having to do with our own precedents. In *Johnson*, the government asked the Court to read the phrase “physical

force” in a statute addressing “violent felon[ies]” to reach mere touchings consistent with the common law of battery. See 559 U.S., at 140, 130 S.Ct. 1265. Here, the government goes a step further, asking us to read the phrase “physical force” in a statute addressing “felony” “crimes of violence” to embrace common-law cause-and-result crimes (including battery) where not even a mere touching is required. How the Court might reject the first request and indulge the second poses quite the puzzle. If there is some way to reconcile today's decision with *Johnson*, the Court never explains what it might be.

B

Not only do we have no business guessing about unexpressed legislative intentions. Even were we to play that game, the Court's intuition that Congress must have wanted § 924(c)(3)(A) to reach “prototypical” cause-and-result crimes might well be wrong.

Consider a little more closely the concern the Court asks us to ascribe to Congress. The Court cannot really suppose that Congress wanted us to ensure that cause-and-result crimes committed by omission qualify as “crimes of violence” under § 924(c)(3)(A). After all, omission offenses would trigger a sentencing enhancement under § 924(c)(1) only in the most unusual circumstances. Just ask yourself: How would our spiteful lifeguard “us[e],” “carr[y],” or “posses[s]” a firearm during and in relation to his crime of inaction? § 924(c)(1)(A).

Really, the Court's argument must rest on a different assumption. It must rest on a view that Congress implicitly wanted § 924(c)(1)'s sentencing enhancements to apply to cause-and-effect crimes, like Mr. Delligatti's, where an individual uses, carries, or possesses a gun to commit a violent *act* that causes bodily injury. *Ante*, at 804 - 805. To ensure that § 924(c)(1) does its intended job of reaching *those* “prototypical” crimes of violence, the Court goes big. It asks us to accept the (implausible) notion that cause-and-result crimes resulting in bodily injury *always*, even when committed by omission, require the government to prove as an element “the use ... of physical force.” § 924(c)(3)(A); *ante*, at 808.

But even if Congress implicitly wanted § 924(c)(1)'s sentencing enhancements to reach cause-and-result crimes that are committed by act and cause bodily harm, there is no reason to suppose Congress wanted us to mangle § 924(c)(3)

(A) to get the job done. Recall that § 924(c)(1)'s sentencing enhancements apply to a "crime of violence" as that phrase is defined *either* in the elements clause before us (§ 924(c)(3)(A)) *or* in the residual clause (§ 924(c)(3)(B)). See Part I–C, *supra*. By its terms, the latter clause "sweeps more broadly." *Davis*, 588 U.S., at 467, 139 S.Ct. 2319 (internal quotation marks omitted). It does not require an examination of the elements the government must prove to secure a conviction, let alone demand that those elements require proof of the use of physical force. Instead, the residual clause reaches offenses that, in "ordinary" cases, pose a "risk of physical injury." *Id.*, at 452, 139 S.Ct. 2319 (quoting § 924(e)(2)(B)(ii)). And Congress might well have thought the residual clause the more natural home for cause-and-result crimes like murder and battery, for even if those offenses do not require the government *820 to prove as an element the use of physical force, as committed those offenses typically involve physical force (and certainly the *risk* of it).

Equally, Congress might have had another idea in mind. Maybe Congress did not mean for § 924(c)(1) to reach all murder and battery offenses. Maybe Congress wanted § 924(c)(1) to reach only those murder and battery offenses that require the government to prove, as an element, the use of physical force—or that, by their nature, involve a substantial risk of such force. After all, States write their criminal laws in different ways. And, doubtless, some states draft some murder and battery statutes to focus on the degree of force a defendant uses, not just the result he brings about. Maybe Congress honed in on offenses like that, not all murder and battery crimes, because it thought those offenses especially deserving of additional punishment. See, *e.g.*, 18 U.S.C. § 1111(a) (murder involving the torture of a child).

That possibility seems all the more likely because § 924(c)(1)'s enhancements are not the be-all and end-all of federal sentencing. Even when § 924(c)(1)'s enhancements do not apply, sentencing courts enjoy ample tools to ensure a defendant's punishment fits his crime. And that's nowhere truer than when it comes to those who commit serious crimes like murder and battery. In this respect, Mr. Delligatti's case is illustrative. The district court sentenced him to 25 years in prison—20 years for his offenses related to attempted murder, plus 5 additional years under § 924(c). See Judgment in No. 15–491 (SDNY, Aug. 20, 2018), ECF Doc. 729, p.

3. But even without a § 924(c) enhancement, the advisory guidelines suggested, and the judge was free to impose, a sentence of up to 28 years. See Sentencing Submission for United States, ECF Doc. 712, at 10–14; accord, App. to Pet. for Cert. 28a. The judge, too, was free to depart or vary from the recommended guidelines range to impose an even harsher sentence had she deemed it appropriate. See 18 U.S.C. § 3553(b).

Nor would recognizing that § 924(c)(3)(A) fails to reach Mr. Delligatti's offense guarantee him some windfall. Doing so would leave the district court free, on remand, to impose exactly the same sentence it did the first time around, or maybe even a harsher one yet. See *Dean v. United States*, 581 U.S. 62, 69, 137 S.Ct. 1170, 197 L.Ed.2d 490 (2017). Nothing about Mr. Delligatti's case is unique either. With or without a § 924(c)(1) enhancement, *821 those convicted of serious offenses in our federal criminal justice system routinely face serious sentences and judges amply equipped with the means to issue them.

*

In the end, the Court's decision today comes up short on every count. It neglects § 924(c)(3)(A)'s definitional terms and their ordinary meaning. It ignores important contextual clues. It leans heavily on only two, ultimately unhelpful, precedents without addressing others. And it resorts to conjecture about implicit congressional purposes that is unconvincing on its own terms. To my mind, none of the Court's arguments can overcome the hard fact that crimes of omission do not involve the "use ... of physical force against another." Individuals like our lifeguard who commit offenses by omission may face punishment under many other criminal laws, but § 924(c)(3)(A) does not reach them. Even if a reasonable doubt remained about that common-sense conclusion (I confess I harbor none), the rule of lenity would require us to reach the same result anyway. See *Bittner v. United States*, 598 U.S. 85, 101, 143 S.Ct. 713, 215 L.Ed.2d 1 (2023). For all these reasons, I respectfully dissent.

All Citations

604 U.S. ----, 145 S.Ct. 797, 2025 Daily Journal D.A.R. 2477

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 The Second Circuit assumed that the status of Delligatti's VICAR offense turns on whether the underlying state offense is a crime of violence. 83 F.4th, at 119–120. However, at least one Court of Appeals has held that a VICAR offense can be a crime of violence even if its underlying predicate offense is not. *United States v. Thomas*, 87 F.4th 267, 274–275 (C.A.4 2023). We express no view on that issue.
- 2 Before this Court, Delligatti does not dispute the Second Circuit's holding that New York attempted second-degree murder is a crime of violence if the completed offense is a crime of violence. See Pet. for Cert. 28. We decide this case on that assumption.
- 3 We have never addressed the meaning of “physical force” in § 924(c)'s elements clause. The parties, however, agree that the term refers to “violent force” as defined by *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), rather than the battery-level force at issue in *Castleman*. See Brief for Petitioner 19; Brief for United States 10. We assume without deciding that interpretation.
- 4 In the course of explaining why he thought that § 922(g)(9) required the use of *violent* force, Justice Scalia objected to the majority's reliance on advocacy groups that broadly defined “domestic violence” to include, among other things, acts that “humiliate,” “isolate,” “frighten,” or “blame” someone, and acts “of omission.” *Castleman*, 572 U.S., at 181, 134 S.Ct. 1405 (internal quotation marks omitted; emphasis added). In this context, the phrase “acts of omission” plainly is not limited to *causing injury or death* by deliberate inaction. Justice Scalia's rejection of that definition thus sheds no light on the question presented in this case. *Contra, post*, at 817 (GORSUCH, J., dissenting).
- 5 In *Borden*, this Court split evenly on the meaning of “against another” in ACCA's elements clause. The four-Justice plurality held that the phrase identifies the object of the force *and* limits the elements clause to knowing or intentional wrongdoing. 593 U.S., at 430–434, 141 S.Ct. 1817. The four-Justice dissent held that the phrase only identifies the object. *Id.*, at 454–461, 141 S.Ct. 1817 (opinion of KAVANAUGH, J.). The author of this opinion supplied the fifth vote for the holding that the elements clause requires at least knowing conduct, but did so for reasons unrelated to the meaning of “against another.” *Id.*, at 446, 141 S.Ct. 1817 (THOMAS, J., concurring in judgment). We express no view on whether the phrase “against another” imports a *mens rea* requirement, which is not necessary to resolve this case.
- 1 Admittedly, trying to distinguish between acts and omissions can sometime prove a tricky business. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 469, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017) (GORSUCH, J., concurring in part); 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.2, p. 273 (1986) (LaFave & Scott). But as I read this statute, that is a distinction Congress tasked us with drawing here. Nor is that the only line this statute requires us to respect, for even when it comes to active crimes § 924(c)(3)(A) reaches only a subset of them. So imagine, for example, our lifeguard, aware of deadly currents in the area, tricks a beachgoer into the water with a promise about its safety. The lifeguard's deceit might be an act rather than an omission, but his crime does not involve even a mere touching, let alone the use of violent physical force this statute demands.
- 2 In recognizing that Congress's choice of words in other statutes might inform the best reading of this one, I hew to familiar interpretive principles. See, e.g., *Astrue v. Ratliff*, 560 U.S. 586, 595, 130 S.Ct. 2521, 177

[L.Ed.2d 91 \(2010\)](#) (majority opinion of THOMAS, J.) (same reasoning). I do not, as the Court charges, invent a “clear-statement rule” for crimes of omission. *Ante*, at 809 - 810.

- 3 Later in its opinion, the Court returns to [Stokeling](#) and suggests it means that any force actively but “indirectly” applied to another—such as robbing an individual after “slipping a sedative into [his] coffee”— qualifies as the use of violent physical force if it results in some bodily injury. *Ante*, at 809 - 810. But [Stokeling](#) said nothing of the kind. It did not discuss “indirect” applications of force, sedatives—or coffee. Instead, that decision addressed a state robbery statute demanding proof, as an element, that the offender’s “physical force” overcame “resistance by the victim.” [586 U.S., at 76, 139 S.Ct. 544](#) (internal quotation marks omitted). And *that* offense, the Court held, falls within the “category of violent, active crimes” embraced by [§ 924\(e\)](#). *Id.*, at 83, [139 S.Ct. 544](#). Nor could [Stokeling](#) have sensibly said what the Court now supposes. The truth is that some acts involve the use of violent physical force and others do not, regardless whether those acts directly or indirectly cause bodily injury. So, as we have seen, pulling the trigger of a gun involves the indirect application of violent physical force. *Supra*, at 808 - 809. But that hardly means pulling the trigger of a nerf gun, using the force of the coiled spring to expel a projectile, does too—even if striking someone with it causes a bodily injury. In any event, whatever [Stokeling](#) did (or did not) say about crimes involving the active but indirect application of force, it said precisely nothing about crimes of omission where the defendant does nothing at all.

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145 S.Ct. 612

Supreme Court of the United States.

Richard Eugene GLOSSIP, Petitioner

v.

OKLAHOMA

No. 22-7466

|

Argued October 9, 2024

|

Decided February 25, 2025

Synopsis

Background: After the Oklahoma Court of Criminal Appeals, [157 P.3d 143](#), affirmed his murder conviction and death sentence, state prisoner filed fifth application for state post-conviction relief and motions for evidentiary hearing, discovery, and stay of execution. The Oklahoma Court of Criminal Appeals, Lewis, J., [529 P.3d 218](#), denied the application and the motions. Prisoner's petition for writ of certiorari was granted.

Holdings: The Supreme Court, Justice Sotomayor, held that:

[1] Oklahoma Court of Criminal Appeals did not deny post-conviction relief on independent and adequate state ground;

[2] witness who was actual killer falsely testified about his lithium prescription;

[3] prosecution knew witness's testimony was false;

[4] false testimony was reasonably likely to have affected verdict; and

[5] remand for vacatur of conviction and new trial was warranted.

Reversed and remanded.

Chief Justice [Roberts](#) and Justices Kagan, Kavanaugh, and Jackson joined, and Justice Barrett joined in part.

Justice Barrett filed opinion concurring in part and dissenting in part.

Justice Thomas filed dissenting opinion, in which Justice Alito joined and Justice Barrett joined in part.

Justice Gorsuch took no part in the consideration or decision of the case.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (16)

[1] **Federal Courts** **Criminal matters**

The Supreme Court will not take up a question of federal law presented in a criminal case if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment.

[2] **Federal Courts** **Necessity and sufficiency of federal question in general**

In the context of the Supreme Court's direct review of a state court judgment, the “independent and adequate state ground” doctrine is jurisdictional.

[3] **Federal Courts** **Necessity and sufficiency of federal question in general**

A state ground of decision is independent, for purposes of the “independent and adequate state ground” doctrine, only when it does not depend on a federal holding and also is not intertwined with questions of federal law.

[4] **Federal Courts** **Necessity and sufficiency of federal question in general**

For purposes of the “independent and adequate state ground” doctrine, when the adequacy and independence of any possible state law ground for a state court's decision is not clear from the face of the opinion, the Supreme Court will

accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

[5] **Habeas Corpus** 🔑 State court decision on procedural grounds, and adequacy of such independent state grounds

Holding of Oklahoma Court of Criminal Appeals, in denying prisoner's successive petition for post-conviction relief from murder conviction, that petition was procedurally barred under Oklahoma's Post-Conviction Procedures Act (PCPA) rested solely on antecedent holding of federal law, and thus, such holding was not independent and adequate state ground depriving Supreme Court of jurisdiction to review denial of prisoner's petition, which argued prosecutor knew of but failed to correct false testimony in violation of due process and *Napue v. Illinois*, 79 S.Ct. 1173; Oklahoma court first held Oklahoma attorney general's confession of *Napue* error was not "based in law or fact" and could not overcome application of PCPA, then applied PCPA to prisoner. U.S. Const. Amend. 14; 22 Okla. Stat. Ann. § 1089(D)(8).

[6] **Constitutional Law** 🔑 Use of Perjured or Falsified Evidence

Constitutional Law 🔑 Failure to correct false testimony

Criminal Law 🔑 Effect of perjured testimony; remedy

To establish a violation of due process under *Napue v. Illinois*, 79 S.Ct. 1173, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it to go uncorrected when it appeared; if the defendant makes that showing, a new trial is warranted so long as the false testimony may have had an effect on the outcome of the trial, that is, if it in any reasonable likelihood could have affected the judgment of the jury. U.S. Const. Amend. 14.

4 Cases that cite this headnote
More cases on this issue

[7] **Criminal Law** 🔑 Effect of perjured testimony; remedy

The materiality standard for obtaining a new trial based on a conviction knowingly obtained through use of false evidence, in violation of the Due Process Clause and *Napue v. Illinois*, 79 S.Ct. 1173, requires the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. U.S. Const. Amend. 14.

1 Case that cites this headnote
More cases on this issue

[8] **Constitutional Law** 🔑 Use of Perjured or Falsified Evidence

Criminal Law 🔑 What constitutes perjured testimony

Witness at defendant's trial for capital murder under Oklahoma law, who was actual killer, falsely testified that he had been prescribed lithium after asking for cold medication and that he had never seen a psychiatrist, supporting defendant's claim that prosecution knowingly obtained conviction through false evidence in violation of Due Process Clause and *Napue v. Illinois*, 79 S.Ct. 1173; summary of witness's medical records created by sheriff's department indicated someone had diagnosed witness with bipolar disorder and prescribed him lithium, psychiatrist attested in sworn affidavit that he was only medical professional at county jail who would have issued witness that prescription, lithium was used only in psychiatric treatments, and no one would confuse lithium with cold medication. U.S. Const. Amend. 14.

More cases on this issue

[9] **Constitutional Law** 🔑 Use of Perjured or Falsified Evidence

Criminal Law 🔑 Use of False or Perjured Testimony

Prosecution at defendant's Oklahoma capital murder trial knew witness, who was actual killer, falsely testified that he had been prescribed

lithium after asking for cold medication and that he had never seen a psychiatrist, supporting defendant's claim that prosecution knowingly obtained conviction through false evidence in violation of Due Process Clause and *Napue v. Illinois*, 79 S.Ct. 1173; State almost certainly had access to witness's medical file listing lithium prescription and diagnosis of bipolar disorder, lithium was only prescribed for mood disorders, State knew witness previously told competency evaluator he had been prescribed lithium for dental pain, not for cold, and prosecutor had pre-trial conversation with witness at which he mentioned lithium and prescribing psychiatrist. U.S. Const. Amend. 14.

[More cases on this issue](#)

[10] Criminal Law 🔑 Effect of perjured testimony; remedy

Evidence can be material, supporting a new trial under *Napue v. Illinois*, 79 S.Ct. 1173, based on the knowing use of false evidence to obtain a conviction in violation of due process, even if it goes only to the credibility of the witness; indeed, the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. U.S. Const. Amend. 14.

[More cases on this issue](#)

[11] Criminal Law 🔑 Effect of perjured testimony; remedy

False testimony of witness, who was actual killer, that he was prescribed lithium at jail after asking for cold medicine and that he had never seen psychiatrist was reasonably likely to have affected verdict that defendant was guilty of capital murder under Oklahoma law, and thus, prosecution's knowing use of false evidence in violation of due process entitled defendant to new trial under *Napue v. Illinois*, 79 S.Ct. 1173; witness's testimony was only direct evidence of guilt, witness's already-questionable credibility would have suffered if prosecution had corrected him, and witness's diagnosed bipolar disorder combined with admitted drug use could have

caused impulsive violence, which would have undermined State's theory that witness was defendant's puppet and was harmless on his own. U.S. Const. Amend. 14.

[2 Cases that cite this headnote](#)

[More cases on this issue](#)

[12] Criminal Law 🔑 Miscellaneous particular issues

Like any other attorney, a prosecutor may not seek to influence the content of a witness's testimony.

[13] Constitutional Law 🔑 Failure to correct false testimony

Criminal Law 🔑 Duty to correct false or perjured testimony

Any awareness on defense counsel's part that witness, who was actual killer, was taking lithium at time of defendant's trial for capital murder under Oklahoma law did not preclude defendant's claim for post-conviction relief under *Napue v. Illinois*, 79 S.Ct. 1173, on basis that prosecution violated due process by knowingly failing to correct witness's false testimony that he had never seen psychiatrist and had been prescribed lithium after asking for cold medication; witness's false testimony was not limited to fact that he was taking lithium, but also included reasons he was taking it, defense counsel was not aware that witness was taking lithium to treat his diagnosed bipolar disorder, and State, not defense counsel, had duty to correct false testimony. U.S. Const. Amend. 14.

[1 Case that cites this headnote](#)

[More cases on this issue](#)

[14] Constitutional Law 🔑 Failure to correct false testimony

The Due Process Clause, which prohibits the knowing use of false testimony to obtain a conviction, imposes the responsibility and duty to correct false testimony on representatives of the State, not on defense counsel. U.S. Const. Amend. 14.

[More cases on this issue](#)

[15] Federal Courts 🔑 [Particular cases](#)

Upon finding that Oklahoma Court of Criminal Appeals improperly denied petition for post-conviction relief as procedurally barred based on incorrect finding that State did not obtain petitioner's conviction for capital murder through knowing use of false testimony in violation of due process and *Napue v. Illinois*, 79 S.Ct. 1173, Supreme Court would remand for vacatur and new trial rather than remanding for state court to consider alternative state grounds to support denial of petition; state court's rejection of petition was based solely on federal-law holding that no *Napue* violation existed, but facts as conceded by Oklahoma attorney general and supported by record established *Napue* violation, making it proper for Supreme Court, having jurisdiction over the issue, to remand for new trial. U.S. Const. Amend. 14; 22 Okla. Stat. Ann. § 1089(D)(8).

[16] Criminal Law 🔑 [Effect of perjured testimony; remedy](#)

A new trial is the remedy for a due process violation under *Napue v. Illinois*, 79 S.Ct. 1173, which applies where the prosecution knowingly obtains a conviction through the use of false evidence. U.S. Const. Amend. 14.

[1 Case that cites this headnote](#)

614 Syllabus

In 1997, Justin Sneed beat Barry Van Treese to death with a baseball bat at an Oklahoma hotel owned by Van Treese and managed by petitioner Richard Glossip. Glossip initially made inconsistent statements to the police about Sneed's role in the murder, but he ultimately told police that Sneed admitted to killing Van Treese. Sneed later claimed Glossip had asked him to murder Van Treese because, among other things, Glossip had wanted to steal Van Treese's money. Glossip maintained his innocence and refused a plea deal that

would have had him avoid the death penalty in return for testifying against Sneed. Sneed then testified against Glossip at trial in exchange for avoiding the death penalty, and Sneed's testimony was the only direct evidence connecting Glossip to the murder. The jury convicted Glossip and sentenced him to death. The Oklahoma Court of Criminal Appeals (OCCA) overturned that conviction because the defense had been ineffective in challenging Sneed's testimony and the remainder of the evidence only weakly corroborated Sneed's account. At the retrial, Sneed provided inconsistent testimony on potential motives for Glossip's murder. Sneed also denied that he had been prescribed lithium or seen a psychiatrist. After the defense established (through the State's medical examiner) that Van Treese had been attacked with a knife as well as a bat, Sneed testified that he had repeatedly tried to stab Van Treese in the chest with a pocket knife. But Sneed had previously denied stabbing Van Treese both when questioned by the police as well as at Glossip's first trial. Glossip moved for a mistrial based on the prosecution's failure to notify the defense about Sneed's change in testimony, which the trial court denied after the prosecution disclaimed any knowledge about the change. Glossip was again convicted and sentenced to death, and a closely divided OCCA affirmed, holding that circumstantial evidence suggesting Glossip had mismanaged the hotel, combined with Glossip's concession that he had been dishonest in his initial statements after the murder, sufficiently corroborated Sneed's testimony that he killed Van Treese at Glossip's direction.

Glossip subsequently filed several unsuccessful habeas petitions. Concerns over the integrity of his conviction led a bipartisan group of Oklahoma legislators to commission an independent investigation by a law firm, Reed Smith. In June 2022, Reed Smith reported “grave doubt” about Glossip's conviction, citing factors such as the prosecution's deliberate destruction of key evidence and the false portrayal of Justin Sneed as a non-violent “puppet.” The State then disclosed seven boxes of previously withheld documents, including letters suggesting Sneed had considered recanting and a note from prosecutor Connie Smothermon to Sneed's lawyer noting they should “get to” Sneed to discuss his problematic testimony about a knife found in Van Treese's room. Glossip filed for post-conviction relief based on this evidence and evidence revealed by Reed Smith. Glossip also argued that, during his second trial, Smothermon had interfered with Sneed's testimony about the knife in violation of the rule of sequestration, which prohibits witnesses from hearing each other's testimony. Oklahoma waived any procedural

defenses to Glossip's claims, and asked the OCCA to deny the claims on their merits. The OCCA denied Glossip's claims as procedurally barred and meritless.

The State then discovered additional documents revealing that Sneed had been diagnosed with bipolar disorder and prescribed lithium, contradicting his trial testimony. The attorney general determined that Smothermon had knowingly elicited false testimony from Sneed and failed to correct it, violating *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, which held that prosecutors have a constitutional obligation to correct false testimony. Glossip filed a successive petition for post-conviction relief, which the attorney general supported, conceding multiple errors that warranted a new trial. The OCCA denied the unopposed petition without a hearing, holding that Glossip's claims were procedurally barred under Oklahoma's Post-Conviction Procedures Act (PCPA), and further that the State's concession was not "based in law or fact" because it did not create a *Napue* error. This Court stayed Glossip's execution and granted certiorari.

Held:

1. This Court has jurisdiction to review the OCCA's judgment. The independent and adequate state ground doctrine precludes the Court from considering a federal question if the state court's decision rests on an independent and adequate state law ground. OCCA's application of the PCPA was not such a ground, because the OCCA's decision to apply the PCPA depended on its antecedent rejection of the attorney general's confession of a *Napue* error, which was based solely on federal law. The OCCA held that the confession could not overcome the PCPA's limitations because it lacked a basis in law or fact, specifically finding no *Napue* error.

Oklahoma precedent confirms that the OCCA normally rejects an attorney general's confession of error only after finding it unsupported by law and the record. By making the application of the PCPA contingent on its determination that the attorney general's confession of federal constitutional error was baseless, the OCCA made the procedural bar dependent on an antecedent ruling on federal law. To the extent that the OCCA's reasoning on this point is insufficiently "clear from the face of the opinion," the Court presumes reliance on federal law under *Michigan v. Long*, 463 U.S. 1032, 1040–1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201.

2. The prosecution violated its constitutional obligation to correct false testimony.

(a) Under *Napue*, a conviction obtained through the knowing use of false evidence violates the Fourteenth Amendment's Due Process Clause. To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited or allowed false testimony to go uncorrected. If a violation is established, a new trial is warranted if the false testimony could in any reasonable likelihood have affected the jury's judgment; meaning, ordinarily, that the prosecution must establish harmlessness beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667, 680, n. 9, 105 S.Ct. 3375, 87 L.Ed.2d 481; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Here, Oklahoma's attorney general joins Glossip in asserting a *Napue* error, conceding that Sneed's testimony about his lithium prescription was false and that the prosecution knowingly failed to correct it. The record supports that confession of error. Evidence showed that Sneed was prescribed lithium to treat bipolar disorder, not after asking for cold medicine as he claimed at trial. The evidence likewise establishes that the prosecution knew Sneed's testimony was false. The prosecution almost certainly had access to Sneed's medical file through Sneed's competency evaluation. And Smothermon's notes show that she had a pre-trial conversation with Sneed at which he mentioned "lithium" and "Dr. Trumpet." The straightforward inference is that Smothermon was aware before trial that Sneed had received his lithium prescription from Dr. Trombka, a psychiatrist and the sole medical professional at the Oklahoma County jail authorized to prescribe lithium.

Because Sneed's testimony was the only direct evidence of Glossip's guilt, the jury's assessment of Sneed's credibility was material and necessarily determinative. Correcting Sneed's lie would have undermined his credibility and revealed his willingness to lie under oath. The false testimony also bore on Glossip's guilt because evidence of Sneed's bipolar disorder, which could trigger impulsive violence when combined with his drug use, would have contradicted the prosecution's portrayal of Sneed as harmless without Glossip's influence. Hence there is a reasonable likelihood that correcting Sneed's testimony would have affected the judgment of the jury. *Napue*, 360 U.S. at 271, 79 S.Ct. 1173. Additional prosecutorial misconduct, such as violating the rule of sequestration, destroying evidence, and withholding witness statements, further undermines confidence in the verdict. Consequently, the prosecution's failure to correct

Sneed's false testimony entitles Glossip to a new trial under *Napue*.

(b) The OCCA's contrary holding rests on a mistaken interpretation of *Napue*. The OCCA held that there was no violation because the defense was aware or should have been aware that Sneed was taking lithium. But Sneed's false testimony concerned the reasons for his prescription, not merely the fact that he had taken lithium. Moreover, the Due Process Clause imposes the duty to correct false testimony on the State, not the defense. The OCCA's holding that Sneed was likely in denial of his mental health disorders is beside the point; what matters is that the testimony was false and the prosecutor knowingly allowed it to stand.

Additional arguments in support of the OCCA's position are unpersuasive. *Napue* does not require that the false testimony itself must have directly affected the trial's outcome; *Napue* requires assessing whether the prosecutor's failure to correct the testimony could have contributed to the verdict. Also unpersuasive are arguments based on extra-record materials and insufficient time spent interviewing the prosecutor.

Because the attorney general's confession of error is supported by ample evidence, the Court declines to remand this case for further evidentiary proceedings. When the Court has jurisdiction, a new trial is the appropriate remedy for a violation of *Napue*.

529 P.3d 218, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KAGAN, KAVANAUGH, and JACKSON, JJ., joined, and in which BARRETT, J., joined as to Part II. BARRETT, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which BARRETT, J., joined as to Parts IV–A–1, IV–A–2, and IV–A–3. GORSUCH, J., took no part in the consideration or decision of the case.

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

*618 An Oklahoma jury convicted petitioner Richard Glossip of paying Justin Sneed to murder Barry Van Treese and sentenced him to death. At trial, Sneed admitted he beat Van Treese to death, but testified that Glossip had offered him thousands of dollars to do so. Glossip confessed he helped Sneed conceal his crime after the fact, but he denied any involvement in the murder.

Nearly two decades later, the State disclosed eight boxes of previously withheld documents from Glossip's trial. These documents show that Sneed suffered from bipolar disorder, which, combined with his known drug use, could have caused impulsive outbursts of violence. They also established, the State agrees, that a jail psychiatrist prescribed Sneed lithium to treat that condition, and that the prosecution allowed Sneed falsely to testify at trial that he had never seen a psychiatrist. Faced with that evidence, Oklahoma's attorney general confessed error. Before the Oklahoma Court of Criminal Appeals (OCCA), the State conceded that the prosecution's failure to correct Sneed's testimony violated *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), which held that prosecutors have a constitutional obligation to correct false testimony. The attorney general accordingly asked the court to grant Glossip a new trial. The OCCA declined to grant relief because, it held, the State's concession was not “based in law or fact.” 2023 OKCR 5, ¶25, 529 P.3d 218, 226. Because the prosecution violated its

obligations under *Napue*, we reverse the judgment below and remand the case for a new trial.

I

A

Barry Van Treese owned a Best Budget Inn in Tulsa and in Oklahoma City. Richard Glossip managed the Oklahoma City hotel and lived there with his girlfriend. In the summer of 1996, Justin Sneed and his stepbrother approached Glossip and asked him about working for a room. 2 App. 648. Glossip agreed to let them stay in return for help with maintenance and housekeeping. Sneed, however, had a history of violence, angry outbursts, and substance abuse that included marijuana, methamphetamine, cocaine, and acid. *Id.*, at 700–701. When, on January 6, 1997, Van Treese visited the inn to collect cash deposits there, Sneed beat him to death with a baseball bat. See 2007 OKCR 12, ¶¶4–5, 157 P.3d 143, 147–148 (*Glossip II*).

After killing Van Treese, Sneed evaded law enforcement for several days. Police did promptly interview Glossip, who told *619 them that Sneed had knocked on his door that night with a bump on his head “like somebody punched him.” App. to Response to Petitioner’s Succ. Application for Post-Conviction Relief in No. PCD–2022–819, Tr. of Glossip Police Interview 15 (Jan. 8, 1997). Glossip added that Sneed had told him he slipped in the shower. *Ibid.* Glossip disclaimed any knowledge of Van Treese’s murder, but admitted that he helped Sneed replace (from the outside) the broken window of the room where Van Treese’s body was later found. The next day, officers arrested Glossip in front of an attorney’s office with approximately \$1,700 in cash on him. 1 App. 291–292. Glossip then admitted Sneed had told him “that he killed Barry.” Tr. of Glossip Police Interview 10 (Jan. 9, 1997). When confronted with his prior inconsistent statements about the murder and Van Treese’s whereabouts, Glossip said that he had been scared to tell the truth because he feared his failure to notify the police immediately meant he was “already involved in it.” *Id.*, at 29–30.

The State thereafter charged Sneed with capital murder and Glossip as an accessory after the fact based on his inaccurate statements to the police. Eventually, police located and interviewed Sneed, who had \$1,680 in bloody cash on him. See 14 Tr. 18 (May 28, 2004); 15 Tr. 170 (June 1, 2004). The officers told Sneed that before he “ma[de] up [his] mind

on anything” they wanted him “to hear some of the things” they “[had] to say,” including that they did not think Sneed had acted alone and that he should not “take the whole thing” himself. 2 App. 645–646. “[E]verybody” was making Sneed “the scapegoat in this,” they told him—especially Glossip, who was “putting it on [him] the worst.” *Id.*, at 655.

Sneed initially responded to the officers’ prompts by attempting to implicate his brother, *ibid.*, but eventually said that Glossip had wanted to steal Van Treese’s money and that Van Treese’s death had been the result of a robbery gone wrong. *Id.*, at 655–660. Sneed described breaking into Van Treese’s room and beating him with a baseball bat until he “figured he was knocked out.” *Id.*, at 665. According to Sneed, he then took Van Treese’s car keys, stole an envelope with approximately \$4,000 in cash from his car, and split the money with Glossip. *Id.*, at 665–669. When officers pressed him on the state of Van Treese’s body, Sneed asserted that, “[a]ctually,” Glossip had asked him to kill Van Treese so that he “could run the motel without him being the boss.” *Id.*, at 675.

Following Sneed’s interview, Oklahoma charged Glossip, too, with capital murder. The prosecution offered Glossip a deal: plead guilty and avoid the death sentence in return for testifying against Sneed. See App. to Pet. for Cert. in No. 22–6500, p. 144a. When Glossip refused, maintaining his innocence, the State offered Sneed the same deal, and Sneed accepted. 2001 OKCR 21, ¶5, 29 P.3d 597, 599 (*Glossip I*). Sneed then testified at Glossip’s trial that he beat Van Treese to death “because [Glossip] asked him to do it.” *Ibid.* When asked whether there was “any particular reason why Glossip wanted to kill [Van Treese] that night,” Sneed replied, “Not that I know of. Every time that Mr. Van Treese showed up, [Glossip] was wanting me to kill him.” 6 Tr. 89 (June 8, 1998). In closing, the prosecution argued that Glossip had asked Sneed to kill Van Treese because he believed Van Treese planned to fire him for embezzling hotel profits. 8 Tr. 14–15 (June 10, 1998). The jury convicted Glossip and sentenced him to death.

The OCCA unanimously reversed. Sneed’s testimony was the only direct evidence connecting Glossip to the murder, it held, and “[t]he evidence at trial tending to *620 corroborate Sneed’s testimony was extremely weak.” *Glossip I*, 29 P.3d at 599. Defense counsel’s failure to cross-examine Sneed on his many inconsistent statements was therefore “so ineffective” as to undermine any “confidence that a reliable adversarial proceeding took place.” *Ibid.*

In 2004, after Glossip rejected another plea offer, 3 App. 720, the State tried him a second time. Several witnesses confirmed what Glossip had told the police in his second interview: In the hours following Van Treese's killing, Glossip feigned ignorance and lied about Van Treese's whereabouts. As in the first trial, however, only one witness, Justin Sneed, testified that Glossip was involved in anything more.¹

This time, moreover, the defense established (through the State's medical examiner) that Van Treese had been attacked with a knife as well as with a baseball bat. 1 *id.*, at 240–245. Although Sneed had denied stabbing Van Treese to the police and at Glossip's first trial, he now said that he had repeatedly tried to stab Van Treese in the chest with a pocket knife. *Glossip II*, 157 P.3d at 148–149. Because the prosecution had not notified the defense about this change in testimony, Glossip moved for a mistrial. 12 Tr. 105 (May 26, 2004). The trial court denied that motion after the prosecution attested that the change was news to them, too. *Id.*, at 107–108 (“The chest thing we're all hearing at the same time”).

The prosecution also asked Sneed whether anyone had prescribed him any medication:

“Q. After you were arrested, were you placed on any type of prescription medication?”

“A. When I was arrested I asked for some *Sudafed* because I had a cold, but then shortly after that somehow they ended up giving me Lithium for some reason, I don't know why. I never seen no psychiatrist or anything.

“Q. So you don't know why they gave you that?”

“A. No.” *Id.*, at 64.

Sneed then confirmed that he used illegal drugs including marijuana and “crank” (methamphetamine) “twice a week” prior to his arrest. *Id.*, at 64–65. Finally, Sneed testified about Glossip's purported motives for killing Van Treese. He asserted that Glossip had suggested “robbing Barry of his money,” *id.*, at 75, that he had “told [Sneed] at one point that with Mr. Van Treese out of the way ... he would be able not only [to] manage the motel on Council but also another one they had [in Tulsa],” *id.*, at 89, and that he had worried he “was going to get fired” because “a couple of the rooms that were already *621 supposed to be remodeled ... weren't,” *id.*, at 95.

The prosecution weaved these suggestions into its closing argument along with its original theory that Glossip had wanted Van Treese dead to avoid being fired for embezzlement. See 15 Tr. 65 (June 1, 2004) (arguing Glossip's motive was “a big wad of around 4,000 bucks of American good Yankee dollars to split with the kid”); *id.*, at 153, 163 (arguing Glossip was going to be fired because of “missing money”); *id.*, at 164–165 (arguing Glossip was going to be fired because of the condition of the rooms). It then argued that Sneed, “satisfied and contented with [his] humble life,” *id.*, at 68, had no propensity to violence except at Glossip's direction:

“[I]t's as if Justin Sneed was a Rottweiler puppy, let's say 11 months old, and Richard Glossip was the dog trainer. You can sure sick a dog on somebody, but if you're going to do that and you send a dog that's not trained or is a little bit too young, he might trip and fall, he might get scared and run away, he might do something stupid, he might not do a good job. But no matter how you slice it, no matter how you parse it, the person that says ‘sick’ em’ is the person that makes the decision.” *Id.*, at 73.

The jury again convicted Glossip of capital murder and again sentenced him to death.

A closely divided OCCA affirmed, holding that circumstantial evidence suggesting Glossip had mismanaged the hotel, combined with the concession that Glossip had been dishonest in his initial statements after the murder, sufficiently corroborated Sneed's testimony that he killed Van Treese at Glossip's direction. *Glossip II*, 157 P.3d at 151–153. In dissent, Judge Chapel and Judge A. Johnson argued that the majority “overstate[d] the strength of the accomplice corroboration evidence.” *Id.*, at 164–165, 175.

B

Glossip continued to maintain his innocence in the years after his conviction, filing several habeas petitions in state and federal court. Although that litigation did not result in relief, mounting concerns over the integrity of Glossip's conviction drew the attention of the Oklahoma Legislature. A bipartisan group of 62 Oklahoma legislators retained a law firm, Reed Smith, to conduct an independent investigation into the case. Pet. for Cert. 12; App. to Pet. for Cert. 390a–391a. In June 2022, Reed Smith reported its “grave doubt as to the integrity of Glossip's murder conviction and death sentence.”

Independent Investigation of *State v. Richard E. Glossip* 6 (June 7, 2022). Among other things, Reed Smith concluded the prosecution had deliberately destroyed “key physical evidence” before Glossip’s retrial, including several items from the crime scene and the inn’s receipts and deposit books, which could have helped Glossip address the accusations of embezzlement. *Id.*, at 7, 9, n. 25, 34, 48. Reed Smith further concluded that the State had “falsely portrayed Sneed at trial as a meek and non-violent ‘puppet,’ ” *id.*, at 10, and that key testimony about Glossip’s motive and actions on the morning after the murder had been provided by a former police officer of “ ‘very limited honesty and integrity’ ” who was jailed for making false statements shortly after Glossip’s second trial, *id.*, at 6–12.

Two months after Reed Smith’s report, the State disclosed seven boxes of previously withheld documents from Glossip’s trials. Those boxes contained a note the head prosecutor, Connie Smothermon, sent to Sneed’s lawyer before Sneed testified at the second trial. Smothermon’s note concerned “a few items that have been testified *622 to that I needed to discuss with Justin,” including the “biggest problem,” which (the note said) was “still the knife.” 3 App. 953. The examiners’ testimony about the knife was problematic, Smothermon’s note explained, because “Justin [told] the police that the knife fell out of his pocket and that he didn’t stab the victim with it,” yet the victim had “ ‘lacerations’ ” consistent with the “knife blade.” *Ibid.* It did not “make much sense” to Smothermon, moreover, “that Justin could have control of the bat and a knife” on his own. *Ibid.* “[W]e should get to him this afternoon,” the note concluded. *Ibid.* The boxes further contained letters from Sneed to his attorney suggesting he had expressed a desire to recant his testimony prior to Glossip’s second trial. See *id.*, at 811–816. For example, in a letter dated May 15, 2003, Sneed wrote to his attorney asking “ ‘do I have the choice of recanting my testimony at any time during my life,’ ” and is “ ‘there ... anything you know, on [Glossip’s] court date and about re-canting.’ ” *Id.*, at 815; App. to Pet. for Cert. in *Glossip v. Oklahoma*, No. 22–6500, at 192a.²

Based on this new evidence and the evidence revealed by Reed Smith, Glossip filed another motion for postconviction relief with the OCCA. Among other things, Glossip argued that, during his second trial, Smothermon had interfered with Sneed’s testimony about the knife in violation of the rule of sequestration, which prohibits witnesses from hearing each other’s testimony. 3 App. 785–882. Oklahoma responded that Glossip’s claims were meritless, but that it would nonetheless

waive any procedural defenses in order to mitigate the damage from a “media campaign” on Glossip’s behalf. *Id.*, at 717–718. Oklahoma further asked the OCCA to deny Glossip’s claims on their merits so as “to trigger the state court deference anticipated in [the Antiterrorism and Effective Death Penalty Act]” in any future federal review. *Id.*, at 718, n. 7. Noting that it alone would “determine whether the rules of this Court should be abandoned,” the OCCA held that Glossip’s claims were procedurally barred as well as meritless. *Id.*, at 775–783.

Shortly thereafter, the State “unearthed disturbing revelations about the contents of ” an eighth box of trial documents “consisting of material it previously prevented the defense from obtaining.” Brief for Respondent 10. “Buried inside Box 8,” the State says, “was a page of notes handwritten by Smothermon during a pretrial interview with Sneed,” indicating “that Sneed had told Smothermon that he was ‘on lithium’ not by mistake, but in connection with a ‘Dr. Trumpet.’ ” *Ibid.* Oklahoma’s attorney general “deduced the import of these notes in short order”: Only a single psychiatrist worked in the Oklahoma County jail when Sneed was held there, and his name was Dr. Larry Trombka. *Ibid.*; see also 3 App. 930. A summary of Sneed’s medical records (previously withheld from Glossip’s counsel after motion practice seeking their discovery) showed that Sneed had received lithium to treat his undisclosed [bipolar disorder](#). Brief for Respondent 10; 3 App. 1005. After this discovery, Dr. Trombka signed an affidavit attesting that he was the only *623 medical professional at the jail who would have prescribed Sneed lithium. *Id.*, at 1003.

The attorney general accordingly determined that Sneed “was not in fact mis-prescribed [lithium](#), but rather diagnosed with [bipolar disorder](#) and treated with [lithium](#) under the care of a psychiatrist”—and “despite her knowledge of these facts,” Smothermon “elicited false testimony from Sneed” on that subject. Brief for Respondent 11.³

The attorney general thereafter disclosed Box 8 to Glossip and retained an independent counsel to conduct another review of Glossip’s conviction. As relevant here, the independent counsel concluded that Smothermon’s attempt to interfere with Sneed’s testimony about the knife violated the rule of sequestration, that her failure to turn over Sneed’s statements about his mental health treatment violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that her failure to correct Sneed’s false trial testimony that he had been given lithium after asking for cold medicine violated

Napue, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217. App. to Pet. for Cert. 50a, 58a. His report concluded:

“[T]he State must vacate Glossip's conviction due to its decades-long failure to disclose what I believe is *Brady* material, correct what I believe was false trial testimony of its star witness, and what I believe was a violation of the Court ordered Rule of Sequestration of witnesses.... In my view, this case is also permeated by failures to secure, safeguard, and maintain evidence in a capital murder case.” *Id.*, at 62a.

Following the Box 8 disclosure and the independent counsel's recommendation, Glossip filed a successive petition for post-conviction relief with the OCCA asserting *Brady*, *Napue*, cumulative error, and actual innocence claims.⁴ The attorney general filed a “Response in Support of Petitioner's Successive Application for Post-Conviction Relief.” 3 App. 973. Although the attorney general did not endorse Glossip's actual innocence claim, he represented that his office had “concluded that Justin Sneed ... made material misstatements to the jury regarding his psychiatric treatment and the reasons for his lithium prescription,” which the State had failed to correct in violation of *Napue*. 3 App. 974. In addition, the State indicated it was “concerned that there were multiple and cumulative errors, such as violation of the rule of sequestration and destruction of evidence, that when taken together with Sneed's misstatements warrant” a new trial. *Ibid.*; see also *id.*, at 977 (“[T]he State believes Glossip is entitled to post-conviction relief”); *id.*, at 978 (State is “compelled, consistent with *Napue*,” to correct misstatements); *id.*, at 979 (“[T]he State requests that the Court vacate Glossip's *624 conviction and that the case be remanded to the district court”). Because Oklahoma agreed with Glossip on the pertinent facts, it did not request an evidentiary hearing.

The OCCA denied Glossip's unopposed petition without a hearing. It acknowledged the attorney general's request that Glossip's conviction be vacated, noting that this concession alone could not “directly” provide a ground for relief. 529 P.3d at 223. The court said the following about the State's confession of *Napue* error:

“Glossip claims that the State failed to disclose evidence of Justin Sneed's mental health treatment and that Sneed lied about his mental health treatment to the jury. Though the State in its response now concedes that this alleged false testimony combined with other unspecified cumulative errors warrant postconviction relief, the concession alone

cannot overcome the limitations on successive post-conviction review. See 22 O.S. Supp. 2022, § 1089(D)(8). The State's concession is not based in law or fact.” 529 P.3d at 226 (footnote omitted).

The OCCA then applied Oklahoma's Post-Conviction Procedures Act (PCPA) to hold that Glossip's claims were procedurally barred. It concluded separately that the evidence presented by the parties did not “create a *Napue* error.” *Ibid.* (footnote omitted).

This Court thereafter stayed Glossip's execution at the joint request of the parties and granted certiorari to consider Glossip's *Brady* and *Napue* claims and the effect of the attorney general's confession of error.⁵ 601 U. S. —, 144 S.Ct. 691, — L.Ed.2d — (2024). The Court also requested argument on an additional question: whether the OCCA's holding that the PCPA precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

Because Oklahoma agrees with Glossip on the merits of his appeal, the Court appointed Christopher Michel as *amicus curiae* to defend the judgment below. 601 U. S. —, 144 S.Ct. 691, — L.Ed.2d — (2024). He has ably discharged his responsibilities.

II

A

[1] [2] [3] [4] We begin with this Court's jurisdiction to review the OCCA's judgment. “ ‘This Court will not take up a question of federal law presented in a case “if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.” ’ ” *Cruz v. Arizona*, 598 U.S. 17, 25, 143 S.Ct. 650, 214 L.Ed.2d 391 (2023) (quoting *Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002)). “In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.” *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state ground of decision is independent only when it does not depend on a federal holding, *Foster v. Chatman*, 578 U.S. 488, 498, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016), and also is not intertwined with questions of federal law, *Michigan v. Long*, 463 U.S. 1032, 1040–1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). “[W]hen the adequacy and

independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the *625 way it did because it believed that federal law required it to do so.” *Ibid.*

[5] *Amicus* argues this Court lacks jurisdiction because the OCCA held that Glossip's claims were barred under the PCPA, and the PCPA is “a paradigmatic independent and adequate state-law ground.” Brief for Court-Appointed *Amicus Curiae* 13. That argument fails because it overlooks an antecedent holding that turned on federal law. The OCCA first rejected the attorney general's confession of *Napue* error, deeming it meritless and therefore incapable of “overcom[ing]” application of the PCPA. 529 P.3d at 226. Only then did it apply the PCPA to Glossip. Because the OCCA's decision to reject the attorney general's confession of error rested exclusively on federal law, so too did its subsequent decision to apply the PCPA.

In his brief to the OCCA, the attorney general disclaimed reliance on any procedural defenses, including the PCPA. Instead, the attorney general “concede[d] error under *Napue*,” 3 App. 978, acknowledging that, as a matter of federal law, the prosecution's knowing failure to correct Sneed's “material misstatements” entitled Glossip to a new trial. *Id.*, at 977, 978, 979. The OCCA held that this confession of *Napue* error could not “overcome the [PCPA's] limitations on successive post-conviction review” because it was “not based in law or fact.” 529 P.3d at 226. Specifically, the OCCA concluded that the underlying evidence “d[id] not create a *Napue* error.” *Ibid.* (footnote omitted). Thus, the OCCA's application of the PCPA over the attorney general's confession of error depended on its determination that no *Napue* violation had occurred. That was a federal holding, and it was the only reason the OCCA provided for its conclusion that the attorney general's confession could not “overcome” the PCPA. *Ibid.* The PCPA therefore poses no impediment to our review in this case.

Oklahoma precedent involving confessions of error by an attorney general confirms this reading. As the OCCA has repeatedly explained, it will normally reject an attorney general's confession of error only after finding that it lacks a basis in the law and in the record. See, e.g., *Bindrum v. State*, 27 Okla.Crim. 372, 228 P. 168 (1924) (“Where the Attorney General confesses error, th[e] court will examine the record, and, if the confession is sustained thereby, and is well founded in law, the conviction will be reversed” (syllabus by the

court)).⁶ Otherwise, if the confession of error is supported by the law and the record, the OCCA will reverse the underlying conviction and remand for a new trial.⁷ *Ibid.* The OCCA applied that same *626 rule here: It rejected the attorney general's confession of error as having no basis “in law or fact,” and explained that it would therefore apply the PCPA. 529 P.3d at 226.

In doing so, the OCCA “made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error ha[d] been committed.” *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). After all, it made application of the PCPA contingent on its determination that the attorney general's confession of federal constitutional error had no basis in law or fact. To the extent that the OCCA's reasoning on this point is insufficiently “clear from the face of the opinion,” we nonetheless presume reliance on federal law under *Michigan v. Long*, 463 U.S. at 1040–1041, 103 S.Ct. 3469. This Court therefore has jurisdiction to review the judgment below.

B

The dissent dismisses all this as an “invent[ed] ... federal holding that the OCCA never made.” *Post*, at 645. As the dissent sees it, the OCCA rejected the attorney general's confession of error because (the dissent says) the State failed adequately to address all of the PCPA's procedural requirements. See *post*, at 645 – 646. The OCCA plainly held that the attorney general's confession was “not based in law or fact,” 529 P.3d at 226, however, forcing the dissent to provide an awkward explanation that this holding about a federal confession of error on the merits was only about the PCPA's state-law, procedural requirements. *Post*, at 645 – 646. Yet the State expressly attempted to waive those procedural requirements by arguing that Glossip was entitled to a new trial. 3 App. 979 (“[T]he State requests that the Court vacate Glossip's conviction and that the case be remanded to the district court”). So to explain away the “based in law or fact” language, the dissent must proceed on the assumption that Oklahoma law requires applicants to satisfy the PCPA's nonjurisdictional provisions even when the State waives them and even if the State's confession of constitutional error is otherwise meritorious—notwithstanding the many other contexts where the OCCA privileges meritorious confessions of error. See n. 6, *supra* (collecting cases); App. to Brief for National Association of Criminal Defense Lawyers as *Amicus*

Curiae 1a–21a (cataloging the OCCA's decisions in the 298 confession-of-error cases predating Glossip's, all of which resulted in relief).

That assumption is hardly “clear from the face of the opinion” below. *Long*, 463 U.S. at 1041, 103 S.Ct. 3469. Thus, we must “accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.” *Ibid*.

III

A

Turning to the merits, we conclude that the prosecution violated its constitutional obligation to correct false testimony.

[6] [7] In *Napue v. Illinois*, this Court held that a conviction knowingly “obtained through use of false evidence” violates the Fourteenth Amendment's Due Process Clause. 360 U.S. at 269, 79 S.Ct. 1173. To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it “to go uncorrected when it appear[ed].” *Ibid*. If the defendant makes that showing, a new trial is warranted so long as the false testimony “may have had an effect on the outcome of the trial,” *id.*, at 272, 79 S.Ct. 1173—that is, if it “ ‘in any reasonable likelihood [could] have affected *627 the judgment of the jury.’ ” *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S. at 271, 79 S.Ct. 1173). In effect, this materiality standard requires “ ‘the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *United States v. Bagley*, 473 U.S. 667, 680, n. 9, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

[8] Here, Oklahoma's attorney general joins Glossip in asserting a *Napue* error, conceding both that Sneed's testimony was false and that the prosecution knowingly failed to correct it. The record supports that confession of error. A summary of Sneed's medical records created by the local sheriff's department establishes that someone diagnosed Sneed with bipolar disorder and prescribed him lithium. 3 App. 1005. Dr. Trombka, a psychiatrist, attested in a sworn affidavit that he was the only medical professional at the

Oklahoma County jail who would have issued Sneed that prescription. *Id.*, at 930–931. Dr. Trombka also confirmed, and nobody contests, that lithium is used only in psychiatric treatments and not for dental pain (as Sneed said at a pretrial hearing) or a cold (as Sneed testified at Glossip's trial). *Ibid*. Nor would anyone confuse lithium with Sudafed, which is a cold medication. *Ibid*. Sneed's trial testimony that he had been given lithium after asking for Sudafed and had “never seen no psychiatrist or anything” was therefore false.

[9] The evidence likewise establishes that the prosecution knew Sneed's statements were false as he testified to them. The prosecution almost certainly had access to Sneed's medical file, which would have listed both the lithium prescription and the bipolar diagnosis. Among other things, those records would have been provided to the State as part of Sneed's competency evaluation, *id.*, at 931, and the State opposed Glossip's discovery request of Sneed's medical files on its merits, 2 *id.*, at 622–623; 3 *id.*, at 933. As *amicus* and the dissent emphasize, moreover, “[l]ithium is prescribed only for mood disorders.” Brief for Court-Appointed *Amicus Curiae* 14; *post*, at 639 (“It is undisputed that lithium's sole medical purpose, both in 1997 and today, is to treat bipolar disorder and other mental health disorders”). Yet the prosecution knew that Sneed had previously told a competency evaluator that he had been prescribed lithium “after his tooth was pulled,” 2 App. 700; that statement was part of a competency record to which both the State and Glossip had access, *id.*, at 698–703. Prosecutors then heard Sneed testify to a different version of events at trial: that the lithium had been given to him after he asked for Sudafed because he had a cold. 1 *id.*, at 312.

In addition, Smothermon's notes show that she had a pre-trial conversation with Sneed at which he mentioned “lithium” and “Dr. Trumpet.” 3 *id.*, at 927. Glossip argues, and the attorney general admits, that this shows Sneed told Smothermon that Dr. Trumpet (meaning Dr. Trombka) had prescribed him lithium. As just discussed, the record shows that, in fact, Dr. Trombka did diagnose Sneed with bipolar disorder and prescribe him lithium. Sneed plainly discussed these matters with the prosecution. In that private conversation, he would have had little to gain from prevaricating about his prescriptions, nor do the notes suggest he did anything of the kind. The straightforward inference is that Sneed told Smothermon that Dr. Trombka had prescribed him the lithium.⁸

*628 [10] [11] That leaves materiality. Evidence can be material even if it “goes only to the credibility of the witness,”

Napue, 360 U.S. at 269, 79 S.Ct. 1173; indeed, “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence,” *ibid*. Because Sneed’s testimony was the only direct evidence of Glossip’s guilt of capital murder, the jury’s assessment of Sneed’s credibility was necessarily determinative here. Besides Sneed, no other witness and no physical evidence established that Glossip orchestrated Van Treese’s murder. Thus, the jury could convict Glossip only if it believed Sneed.

Had the prosecution corrected Sneed on the stand, his credibility plainly would have suffered. That correction would have revealed to the jury not just that Sneed was untrustworthy (as *amicus* points out, the jury already knew he repeatedly lied to the police), but also that Sneed was willing to lie to them under oath. Such a revelation would be significant in any case, and was especially so here where Sneed was already “nobody’s idea of a strong witness.” Brief for Court-Appointed *Amicus Curiae* 37. Even if Sneed’s bipolar disorder were wholly irrelevant, as *amicus* argues, his willingness to lie about it to the jury was not. “ ‘A lie is a lie, no matter what its subject.’ ” *Napue*, 360 U.S. at 269, 79 S.Ct. 1173 (quoting *People v. Savvides*, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 136 N.E.2d 853, 854–855 (1956)).

Sneed’s false testimony also bore on Glossip’s guilt in a more direct way. As Smothermon’s co-counsel Gary Ackley has conceded, it “would have been an important fact for the defense to know” that Sneed had been prescribed lithium to treat bipolar disorder. 3 App. 940. After the Box 8 disclosures, Dr. Trombka explained to Glossip’s counsel that bipolar disorder symptoms “can be exacerbated by illicit drug use, such as methamphetamine,” to “cause an individual to be more paranoid or potentially violent.” *Id.*, at 932. Sneed admitted at trial that he regularly used drugs, including methamphetamine. His diagnosis with a disorder that could trigger impulsive violence when combined with drug use thus would have undermined the prosecution’s theory that Sneed was harmless on his own—a Rottweiler puppy beholden to his trainer. 15 Tr. 73 (June 1, 2004). That theory was an important part of the prosecution’s case and featured prominently in its opening and closing statements. See, e.g., 3 Tr. 209 (May 13, 2004) (arguing in opening that Sneed was “pretty content ... to do whatever it is that Richard Glossip wanted him to do”); 15 Tr. 69–74 (June 1, 2004) (emphasizing in closing that Sneed would have never committed murder without Glossip). Hence there is a reasonable likelihood that correcting Sneed’s testimony would have affected the judgment of the jury. *Napue*, 360 U.S. at 271, 79 S.Ct. 1173.

Amicus objects that “the jury already knew that Sneed had been prescribed lithium, used illegal drugs, and behaved impulsively; he admitted that he beat a man to death with a baseball bat in the middle of the night with no advanced planning.” Brief for Court-Appointed *Amicus Curiae* 36. As *amicus* sees it, the additional evidence *629 provided by Sneed’s lie and his treatment for bipolar disorder could hardly have made a difference in light of so much other impeaching evidence. *Id.*, at 36–37. Of course, at trial, the prosecution urged the jury to believe just the opposite: that despite his prior dishonesty and violence, Sneed was now telling the truth. See, e.g., 15 Tr. 153–155 (June 1, 2004). A prosecutor’s midtrial revelation that Sneed lied on the stand would have significantly undercut that argument.

In any event, *amicus*’s position is self-defeating. If the evidence impeaching Sneed’s credibility was already overwhelming, then no reasonable jury could have convicted Glossip in the first place, given that the prosecution’s case rested centrally on Sneed’s credibility. *Amicus* appears to assume the jury would have believed Sneed no matter what. Such an assumption has no place in a materiality analysis, which asks what a reasonable decisionmaker would have done with the new evidence. See *Wearry v. Cain*, 577 U.S. 385, 393–394, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) (*per curiam*) (rejecting argument that evidence was immaterial because witness’s credibility was “already impugned”); cf. *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[12] Although the prosecution’s failure to correct Sneed’s false testimony was a material *Napue* violation on its own, additional conduct by the prosecution further undermines confidence in the verdict. The attorney general has confessed to “ ‘violation of the rule of sequestration’ ” with respect to Smothermon’s apparent midtrial attempt to speak with Sneed about the knife, as well as to “ ‘destruction of evidence,’ ” including the hotel’s financial records and items Glossip and Sneed allegedly handled in Van Treese’s room. See Brief for Respondent 13; 3 App. 935 (prosecutor Ackley attesting under oath that “I was informed that a box of evidence containing 10 items was destroyed by the Oklahoma City Police Department.... It is likely that I was aware of that fact during the 2004 retrial That this happened horrifies me”); Independent Investigation of *State v. Richard E. Glossip*, at 7, 12–13, 41–43 (cataloging destroyed items). In addition, the eight boxes of documents released to Glossip included statements from Sneed evincing a desire to recant

his testimony and witness notes with details not previously turned over to the defense. For example, the files suggest one witness told the prosecution (contrary to his trial testimony) that Glossip sold him a couch and a TV for \$900. 3 App. 952. That evidence would have supported Glossip's account of the cash he carried at his arrest outside an attorney's office: that he had sold his possessions to pay for an attorney. See 2 *id.*, at 703. Because prejudice analysis requires a “cumulative evaluation” of all the evidence, whether or not that evidence is before the Court in the form of an independent claim for relief, these documents reinforce our conclusion that the *Napue* error here prejudiced the defense. *Kyles v. Whitley*, 514 U.S. 419, 441, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).⁹

*630 For these reasons, we conclude that the prosecution's failure to correct Sneed's trial testimony violated the Due Process Clause. Glossip is entitled to a new trial.

B

[13] [14] The OCCA's contrary holding rested on a mistaken interpretation of *Napue*. According to the OCCA, there was no violation because the defense “was aware or should have been aware that Sneed was taking lithium at the time of trial,” and the prosecution could not have “knowingly concealed” something the defense already knew. 529 P.3d at 226. As an initial matter, Sneed's false testimony concerned the reasons for his lithium prescription, not the mere fact that he had taken it. Glossip's counsel was aware of the latter, not of the former. In any event, the Due Process Clause imposes “ ‘the responsibility and duty to correct’ ” false testimony on “ ‘representatives of the State,’ ” not on defense counsel. *Napue*, 360 U.S. at 269–270, 79 S.Ct. 1173 (quoting *Savvides*, 1 N.Y.2d at 557, 154 N.Y.S.2d 885, 136 N.E.2d at 854).

The OCCA also held that Sneed's testimony was not “clearly false” because Sneed was “more than likely in denial of his mental health disorders.” 529 P.3d at 226, 227. It is not apparent why the OCCA thought Sneed was in denial, nor why such denial should have caused Sneed to believe that he had never seen a psychiatrist, when in fact he had. Even supposing it did, however, Sneed's beliefs are beside the point. What matters is that his testimony was false and a prosecutor knowingly let it stand nonetheless. *Napue*, 360 U.S. at 269, 79 S.Ct. 1173 (“[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment”).

The dissent's arguments in support of the OCCA's conclusions fare no better. As an initial matter, even the dissent does not dispute that Sneed falsely testified he had never seen a psychiatrist. See *post*, at 651 – 652 (suggesting Sneed “misremembered” that a psychiatrist prescribed him lithium to treat *bipolar disorder*). The dissent does maintain that other aspects of Sneed's statement were true, noting that because Sneed was in denial about his diagnosis, his “statement about his own knowledge was not false.” *Post*, at 652. Sneed's statement that he asked for “*Sudafed*” to treat “a cold” and was given *lithium* instead, 12 Tr. 64 (May 26, 2004), was not, however, a statement “about his own knowledge.” Even if Sneed himself did not believe that he suffered from *bipolar disorder*, moreover, that would not render true his assertion that he had no idea why his doctor thought he needed lithium.

The dissent next claims that the false testimony must itself have directly affected the trial's outcome to be material under *Napue*. *Post*, at 650 (“[T]he relevant inquiry under *Napue* is whether the *content* of the false testimony at issue is material”). As *Napue* made clear, however, “ ‘[a] lie is a lie, no matter what its subject.’ ” *631 360 U.S. at 269–270, 79 S.Ct. 1173 (quoting *Savvides*, 1 N.Y.2d at 557, 154 N.Y.S.2d 885, 136 N.E.2d at 854–855)). Nothing in *Napue* requires ignoring the fact of Sneed's perjury in the prejudice analysis. To the contrary, materiality instead always requires courts to assess whether “the error complained of” could have contributed to the verdict. *Chapman*, 386 U.S. at 24, 87 S.Ct. 824; *Bagley*, 473 U.S. at 680, n. 9, 105 S.Ct. 3375. Here, the prosecutor's failure to correct Sneed's false testimony is the relevant error, so the Court asks whether a correction could have made a material difference. The answer is clearly yes. See *supra*, at 627 – 630.¹⁰

The remaining arguments offered in defense of the OCCA's position are likewise unpersuasive. In an *amicus* brief, the Van Treese family argues that it was Glossip's counsel who asked Sneed about his lithium prescription, and that Smothermon's notes reveal only that Sneed relayed those questions to Smothermon. See Brief for Victim Family Members as *Amici Curiae* 7–22. That argument relies heavily on extra-record materials not properly before the Court, including a recent unsworn statement from Smothermon adopting the family's interpretation of the notes. (The dissent, which criticizes the independent counsel for “impugning” the trial prosecutors' reputation, *post*, at 643 – 644, justifies its reliance on these materials by accusing the Oklahoma attorney general of “collusively exclud[ing]” them from the record, see *post*,

at 658 – 659.) Nor would accepting the family's account change the *Napue* analysis. Whatever the impetus for the conversation, the family agrees that Sneed and Smothermon discussed Dr. Trombka and lithium. The natural inference is that Sneed explained to Smothermon the circumstances that led to his lithium use. To avoid that inference, the family in turn suggests both that Sneed was never diagnosed with bipolar disorder in the first place, Brief for Victim Family Members as *Amici Curiae* 17, and that Glossip's counsel “knew about [Dr. Trombka] more than two decades ago,” *id.*, at 21. Yet for the reasons previously explained, defense counsel's purported knowledge of Dr. Trombka's existence is irrelevant, and the prison medical record supports the attorney general's concession that Sneed received a lithium prescription as treatment for his bipolar disorder.

The family also maintains (and the dissent agrees) that Reed Smith and the independent counsel spent insufficient time interviewing Smothermon. Neither the family nor Smothermon raised that objection before the OCCA, nor does anyone now explain its relevance to the *Napue* analysis. The argument is also unpersuasive on its own terms. Both investigators spoke to Smothermon. When they did, Smothermon did not provide the account she now endorses: that Sneed relayed to her a conversation with Glossip's counsel about Dr. Trombka and lithium. Instead, during a third interview, Smothermon asked the independent counsel “why he thought it was Dr Trombka and not Dr *632 Trumpet the jazz musician and I was making a personal note or something else.” App. to Brief for Victim Family Members as *Amici Curiae* 31a. There is no compelling evidence that a fourth or fifth consultation with Smothermon would have yielded materially different results.

The Court-appointed *amicus*, for his part, largely abandons the OCCA's reasoning and focuses instead on ambiguities in Smothermon's notes. *Amicus* maintains that too many inferential steps separate those notes from the conclusion that Sneed lied on the stand and that Smothermon knew it. For example, *amicus* argues that “the parties do not explain the basis for their asserted link between ‘Dr. Trumpet?’ and Trombka,” reiterating Smothermon's earlier statements that she “ ‘is not convinced that Dr. Trombka and ‘Dr. Trumpet’ are the same person.’ ” Brief for Court-Appointed *Amicus Curiae* 32. As already explained, however, there is ample evidence in the record before this Court supporting the inference that Smothermon knew about Sneed's psychiatric treatment and lithium

prescription, including the prison medical record, Dr. Trombka's attestations, and Smothermon's own notes.

Because ample evidence supports the attorney general's confession of error in this Court, there also is no need to remand for further evidentiary proceedings at the OCCA. Indeed, that such proceedings are not necessary is the one point on which Glossip, Oklahoma, *amicus*, and the OCCA unanimously agree. See Tr. of Oral Arg. 108 (*amicus* conceding that “I guess we all agree that [an evidentiary hearing is] not ... that it's not necessary”). The partial concurrence suggests this Court should nonetheless remand for further proceedings on the ground that the evidence does not remove all doubt that the attorney general's view of the record is correct. *Post*, at 635 – 636 (BARRETT, J., concurring in part and dissenting in part). Yet for the reasons already explained, the record establishes a violation of *Napue*. See *supra*, at 626 – 630. This Court has not required an evidentiary record free of doubt to find a *Napue* violation in any case, much less when an attorney general confesses that his own office erroneously obtained a capital conviction.¹¹

C

[15] Finally, the dissent maintains this Court lacks the authority to remand for a new trial, but its analysis proves the contrary. The dissent emphasizes that “ ‘[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.’ ” *Post*, at 654 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126, 65 S.Ct. 459, 89 L.Ed. 789 (1945)). It further agrees that, where a state court relies on a procedural rule whose application turns on “whether federal constitutional error has been committed,” *Ake*, 470 U.S. at 75, 105 S.Ct. 1087, this Court may remand for a new trial if it “ha[s] confidence that no other state ground could support the decision below,” *post*, at 657. Those principles describe this case.

*633 As explained above, the OCCA “incorrectly adjudge[d]” Glossip's “federal rights.” *Herb*, 324 U.S. at 126, 65 S.Ct. 459. In doing so, it relied on a procedural rule whose application turned on the merits of a federal claim: “ ‘Where the Attorney General confesses error, [the OCCA] will examine the record, and if the confession is sustained thereby, and is well founded in law, the conviction will be reversed.’ ” See *supra*, at 625 (quoting *Bindrum*, 27 Okla.Crim. at 372, 228 P. at 168, and collecting authorities). Here, the attorney general “concede[d] error under *Napue*,”

3 App. 978, and the OCCA rejected that confession because it wrongly concluded that no such federal error had occurred. See *supra*, at 625 – 626. Because the *Napue* confession was “well founded in law,” it follows that “the conviction will be reversed.” *Bindrum*, 27 Okla.Crim. at 372, 228 P. at 168. Accordingly, all that remains below is to vacate the conviction, and a new trial follows *a fortiori*.

The dissent concludes otherwise because, in its view, a remand for further consideration of alternative state grounds is mandatory in every case where *Michigan v. Long* resolves lingering doubt over the Court's jurisdiction. *Post*, at 654 – 655. *Long* describes the circumstances under which this Court has jurisdiction to review a state-court judgment; it does not limit the Court's remedial authority over an established federal constitutional violation. Nor does any other precedent support the dissent's rule. That state courts who “grant relief to criminal defendants” under an erroneous interpretation of federal law may later grant relief “as a matter of [more protective] state law,” *Kansas v. Carr*, 577 U.S. 108, 128, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016) (SOTOMAYOR, J., dissenting), plainly does not deprive this Court of the authority to grant relief where it finds a federal violation, *contra post*, at 654 – 655; cf. *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (“Under [*Michigan v. Long*] state courts are absolutely free to interpret constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution”).

[16] The dissent inverts this precedent, asserting that state courts should always have another opportunity to identify additional grounds for denying relief, even where this Court has found a federal constitutional violation. Yet there is no reason to allow state courts a second (or third, or fourth) bite at the apple to identify alternative state grounds for their decision in every case involving a dependent ground. The facts as conceded by the attorney general and supported by the record establish a violation of *Napue*. A new trial is the remedy for a *Napue* violation. See *Giglio*, 405 U.S. at 155, 92 S.Ct. 763. Here, this Court has jurisdiction and a *Napue* violation occurred. Thus, Glossip is entitled to a new trial. See *Ake*, 470 U.S. at 86–87, 105 S.Ct. 1087 (vacating conviction and remanding case to the OCCA under similar circumstances).

* * *

The judgment of the Oklahoma Court of Criminal Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

Justice BARRETT, concurring in part and dissenting in part. While I agree with much of the Court's analysis, I would not order the Oklahoma Court of Criminal Appeals (OCCA) to set aside Richard Glossip's conviction. The OCCA did not make factual findings on the *634 most important questions, and the record is open to multiple plausible interpretations. Consistent with our ordinary practice, the Court should have corrected the OCCA's misstatement of *Napue v. Illinois* and remanded this case for further proceedings. 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Instead, the Court has drawn its own conclusions about what the record shows, thereby exceeding its role.

I begin with the common ground. At the threshold, I agree with the Court's jurisdictional holding and therefore join Part II of its opinion. We lack jurisdiction to review a state court's adjudication of federal claims if the state court's decision “rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). But when a state-law ground of decision is intertwined with analysis of a federal question, we will treat the decision as independent only if the state court “make[s] clear by a plain statement” that its resolution of the state-law question does not depend on its resolution of the federal question. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Though it is a closer question for me than it is for the Court, I agree that the OCCA's opinion does not clear this bar. True, the OCCA rejected Glossip's application based on state-law procedural limits on postconviction relief. But the opinion can be read to say that the OCCA refused to accept the attorney general's waiver of this procedural bar because his confession of error was not “based in law.” 2023 OKCR 5, ¶25, 529 P.3d 218, 226. If that is what the OCCA meant, then its reliance on state law depended on the merits of Glossip's federal claims. After all, if the trial contained federal constitutional error, then the attorney general's confession of error may have been

“based in law.” Because the opinion lacks a “plain statement” clarifying that the OCCA’s reliance on state law was truly independent of its assessment of Glossip’s federal claims, the Court rightly proceeds to the merits. *Michigan*, 463 U.S. at 1041, 103 S.Ct. 3469.

I also share the Court’s view that the OCCA misapplied *Napue*. The OCCA appeared to think that Justin Sneed’s testimony “was not clearly false” because he “was more than likely in denial of his mental health disorders.” 529 P.3d at 227. But for purposes of *Napue*, the question is not whether a witness subjectively thought he was lying—it is whether the prosecution knowingly presented untrue testimony. The OCCA also stated that Sneed’s “known mental health treatment evidence” would not have created a “reasonable probability that the result of the proceeding would have been different had Sneed’s testimony regarding his use of lithium been further developed at trial.” 529 P.3d at 227. Yet the OCCA ignored the critical fact that—had the prosecutor, Connie Smothermon, corrected Sneed’s testimony—the jury would have learned that Sneed made a false statement on the stand. Sneed’s testimony was the primary evidence that the State offered to prove that Glossip planned the murder. Faced with a prosecutor forced to correct her star witness, a juror might have disbelieved Sneed’s testimony in its entirety. And if a juror went from belief to disbelief in Sneed, she might have changed her ultimate assessment of whether the State had proved Glossip’s guilt beyond a reasonable doubt. So if Sneed really did give false testimony, and if Smothermon really did knowingly allow that testimony to go uncorrected, then Smothermon violated Glossip’s due process rights under *Napue*. The OCCA’s contrary statements were wrong as a matter of federal law.

*635 I part ways with the Court on what comes next. In exercising our appellate function, it is not our role to find facts; instead, we review the factual findings of lower courts, subject to a deferential standard of appellate review. See *Price v. Johnston*, 334 U.S. 266, 291, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948). This practice makes good sense. This Court is well equipped to answer questions of federal law; it is ill equipped either to determine the credibility of witnesses or to master voluminous trial records. Other actors in our judicial system—including, where appropriate, state courts like the OCCA—better serve these functions, as our standard of review reflects. In this case, however, the Court has chosen to function as the initial factfinder.

To establish a violation of *Napue*, Glossip must show that (1) Sneed gave false testimony and (2) Smothermon knew that the testimony was false. To make these showings, Glossip relies largely on notes taken by Smothermon, an affidavit from Dr. Trombka, and a “medical information sheet.” According to the Court, these documents clearly demonstrate that (1) Sneed lied when he said that he did not know why he had been given lithium and that he had never seen a psychiatrist and (2) Smothermon knew that both of these statements were lies. See *ante*, at 626 – 628, 631 – 632. Thus, the Court concludes, there is no need for the OCCA to make its own factual findings.¹

I respectfully disagree. Smothermon’s notes, taken during a jailhouse interview of Sneed, consist of the words “on Lithium?” and “Dr. Trumpet?” 3 App. 927. These notes are hardly clear, and there are competing explanations of what they mean. Glossip, the Oklahoma attorney general, and the Court argue that they demonstrate Smothermon’s knowledge that Sneed had lied about Dr. Trombka’s prescribing him lithium for bipolar disorder. See *ante*, at 627 – 628, 631 – 632. The Van Treese *amicus* brief and Justice THOMAS contend that the notes instead reflect Sneed’s account of a conversation with Glossip’s lawyers, who had asked Sneed whether he had received lithium from a “Dr. Trumpet.” See *post*, at 641 – 643, and n. 3 (dissenting opinion). There are other possibilities too: For instance, perhaps Smothermon was confused by references to “Dr. Trumpet” and lithium but never investigated the issue further. Neither Dr. Trombka’s affidavit nor the attached medical information sheet nor any of the other *636 record evidence discussed by the Court forecloses any of these possibilities.

When the record is susceptible to multiple plausible inferences, this Court should not be in the business of choosing between them. It should have corrected the OCCA’s misstatements of federal law and vacated the judgment, leaving next steps—including the decision whether to conduct an evidentiary hearing—to the OCCA. By doing otherwise, the Court has both displaced the OCCA as factfinder and potentially overridden state-law constraints on the OCCA’s remedial authority. See *post*, at 653 – 658 (THOMAS, J., dissenting). Because the Court has exceeded its appellate role, I respectfully dissent in part.

Justice THOMAS, with whom Justice ALITO joins, and with whom Justice BARRETT joins as to Parts IV–A–1, IV–A–2, and IV–A–3, dissenting.

Richard Glossip—a convicted murderer twice sentenced to death by Oklahoma juries—challenges the denial of his fifth application for state post-conviction relief. Although Glossip won the support of Oklahoma's new attorney general, he failed to persuade either body with authority to grant him relief: The Oklahoma Court of Criminal Appeals (OCCA) denied Glossip's application as both procedurally deficient and nonmeritorious, and Oklahoma's Pardon and Parole Board denied clemency. Because this Court lacks the power to override these denials, that should have marked the end of the road for Glossip. Instead, the Court stretches the law at every turn to rule in his favor. At the threshold, it concocts federal jurisdiction by misreading the decision below. On the merits, it finds a due process violation based on patently immaterial testimony about a witness's medical condition. And, for the remedy, it orders a new trial in violation of black-letter law on this Court's power to review state-court judgments. I respectfully dissent.

I

A

This case arises from the 1997 murder of Barry Van Treese, the owner of an Oklahoma City motel. Beginning in 1995, Glossip began working for Van Treese as the motel's manager. 4 Tr. 182–183 (May 14, 2004). In that capacity, Glossip unofficially hired 19-year-old Justin Sneed to be the motel's handyman. Glossip did not pay Sneed; instead, he let him live at the motel free of charge and occasionally bought him food. *Id.*, at 43–44; 5 Tr. 67–70 (May 17, 2004); 2 App. 644. In late 1996, Van Treese learned of discrepancies in Glossip's accounting suggesting that Glossip had been allowing guests to stay at the motel off the books and pocketing the money for himself. 4 Tr. 63, 68–71 (May 14, 2004); 7 Tr. 35, 39–40, 45–49 (May 19, 2004); 11 Tr. 172–173 (May 25, 2004). During a visit to the motel on January 6, 1997, Van Treese confronted Glossip about this issue, and, having discovered unregistered guests staying at the motel, he threatened to report Glossip to the police unless Glossip produced receipts for their rooms. 8 Tr. 82 (May 20, 2004).

Hours later, after Van Treese had gone to bed, Sneed entered Van Treese's motel room and repeatedly beat him over the head with a baseball bat. 2 App. 662–664; 11 Tr. 55 (May 25, 2004). Sneed left when he thought that he had killed Van Treese, although the State's forensic pathologist later determined that Van Treese had initially survived the attack,

and died several hours later after slowly bleeding out. *Id.*, at 55–57, 61; App. to Response to Petitioner's Succ. Application for Post-Conviction Relief in No. PCD–2022–819 (OCCA), Tr. of Glossip Police Interview 10 (Jan. 9, 1997). Following his arrest, Sneed explained *637 to police that Glossip had urged him to kill Van Treese. 2 App. 645, 660. According to Sneed, Glossip told him that they would both be evicted if Glossip lost his job, and Glossip had promised to pay him \$10,000 for carrying out the murder. 12 Tr. 95–96, 98 (May 26, 2004).

Shortly after the attack, Sneed went to Glossip's motel room and informed him that he had killed Van Treese. Tr. of Glossip Police Interview 10 (Jan. 9, 1997). Glossip began directing a coverup. On Sneed's account, Glossip first told Sneed to clean up glass shards from a window that Sneed had broken during the attack. 12 Tr. 122 (May 26, 2004). Glossip also sent Sneed to retrieve about \$4,000 in cash from Van Treese's car, and then to abandon the car in a nearby credit union parking lot. *Id.*, at 124, 129. When Sneed returned, the two divided the cash. *Id.*, at 128–129. They then entered Van Treese's room, whereupon Glossip directed Sneed to tape a shower curtain over the broken window and run the air conditioning at full blast to eliminate any odor. *Id.*, at 130, 132. Glossip then dispatched Sneed to buy plexiglass, which the pair installed over the broken window on the morning of January 7. Tr. of Glossip Police Interview 14–15 (Jan. 9, 1997); 4 Tr. 163–165 (May 14, 2004); 13 Tr. 126 (May 27, 2004).¹

Glossip took additional steps to cover up the murder. He told multiple witnesses that the window in Van Treese's room was broken because two drunks had stayed there the night before and smashed it in a brawl. 5 Tr. 85 (May 17, 2004); 7 Tr. 64 (May 19, 2004); 9 Tr. 46, 206 (May 21, 2004); 11 Tr. 188–189 (May 25, 2004). He told the housekeeper that she did not need to clean the downstairs rooms—including Van Treese's room. 8 Tr. 122–123 (May 20, 2004). Instead, as Glossip explained to another employee and a motel resident, he and Sneed would cover those rooms. 7 Tr. 64 (May 19, 2004); 9 Tr. 49 (May 21, 2004). Glossip had never taken such steps before. 8 Tr. 122–123 (May 20, 2004). He also told various witnesses that he had seen Van Treese alive and well around 7 o'clock that morning. 4 Tr. 99 (May 14, 2004); 7 Tr. 62–63 (May 19, 2004); 9 Tr. 194 (May 21, 2004); 11 Tr. 126–127, 182–183 (May 25, 2004).

That afternoon, the credit union called the motel to report that Van Treese's car had been abandoned in its parking lot. 7 Tr. 70 (May 19, 2004). At that point, it became clear to

the motel's staff that Van *638 Treese was missing. *Id.*, at 72–74. Shortly thereafter, Glossip returned to the motel from a shopping trip, during which he had made several large purchases, including an engagement ring for his girlfriend. *Id.*, at 74; 14 Tr. 41 (May 28, 2004). He then purported to search the rooms and surrounding area for Van Treese. 5 Tr. 97 (May 17, 2004); 9 Tr. 192–193 (May 21, 2004); 11 Tr. 185–186, 190 (May 25, 2004). He even assured Van Treese's wife over the phone that everything was fine and that he had seen Van Treese that morning. 4 Tr. 99–100 (May 14, 2004).

Glossip later repeated to a local police officer the story that two drunks had broken the window and that he had seen Van Treese that morning. 9 Tr. 194, 206–207 (May 21, 2004). Unpersuaded, the officer checked the room with the broken window and discovered Van Treese's body. *Id.*, at 220, 224–225; 11 Tr. 191, 194 (May 25, 2004). Glossip immediately told the officer that he suspected that Sneed had something to do with the murder, explaining that he had heard glass breaking and that Sneed had banged on his door, but he did not claim to know anything more. 9 Tr. 233 (May 21, 2004).

Homicide detectives interviewed Glossip later that night. Tr. of Glossip Police Interview 1, 10–11 (Jan. 8, 1997). He denied knowing that Van Treese had been murdered before the body was discovered. *Id.*, at 70, 86. And, he vacillated between doubting that Sneed was involved and asserting that he likely was. *Id.*, at 27–28, 69–70.

On the morning of January 8, Glossip began to sell all his possessions, telling multiple witnesses that he would like to leave town. 8 Tr. 88 (May 20, 2004); 11 Tr. 199 (May 25, 2004). On January 9, police picked up Glossip after he failed to appear for a meeting with homicide detectives. 12 Tr. 7 (May 26, 2004). He had \$1,757 in cash on his person and no explanation for how he—living paycheck to paycheck and having made only \$490 from selling his possessions the previous day—had so much cash. *Id.*, at 12–13; 14 Tr. 43–44 (May 28, 2004); 15 Tr. 17, 93 (June 1, 2004).

Glossip sat for a second interview with homicide detectives later that day. Tr. of Glossip Police Interview 1 (Jan. 9, 1997). This time, although continuing to deny that he had ordered Sneed to kill Van Treese, Glossip admitted that Sneed had told him about the murder just after committing it, and that he had instructed Sneed to clean up the glass and repair the window. *Id.*, at 13–14, 36. Glossip also admitted that Van Treese “was upset because the motel wasn't doing as well as it could.” *Id.*, at 32. When asked why he hid the murder, Glossip denied

doing so to protect Sneed. He said he covered up the murder instead to protect himself, because he “was involved in it” and risked losing his girlfriend otherwise. *Id.*, at 29–30.

During this interview, Glossip also tried to minimize his involvement in the crime by insisting that he had not gone inside Van Treese's hotel room after the attack. *Id.*, at 18; see also *ante*, at 618 – 619 (emphasizing this denial). At trial, however, a motel resident testified that, on the morning of January 7, Glossip had said that he and Sneed had been “in the room” after the window was broken. 9 Tr. 120 (May 21, 2004).

Police arrested Sneed five days later and charged him with capital murder. 2 App. 644–645. He had \$1,680 in cash in his possession. 14 Tr. 12–18 (May 28, 2004). At first, Sneed denied involvement, claiming that his brother and Glossip had once discussed the idea but that it never went beyond talk. 2 App. 655–657. Later in the interview, however, Sneed confessed to murdering Van Treese at Glossip's instigation. *Id.*, at 660, 664.

*639 B

1

Glossip was convicted and sentenced to death in 1998, but the OCCA ordered a retrial based on ineffective assistance of counsel. 2001 OKCR 21, 29 P.3d 597.

At his second trial in 2004, a jury convicted Glossip again, and the judge again sentenced him to death. Sneed testified against Glossip during the guilt phase, as he had at the first trial. While Sneed was providing background information about himself at the outset of this testimony, the State's lead prosecutor, Connie Smothermon, asked him whether he had received any “prescription medication” after being arrested. 12 Tr. 63–64 (May 26, 2004). Sneed responded that he had briefly been prescribed “Lithium for some reason, I don't know why. I never seen no psychiatrist or anything.” *Id.*, at 64. The matter did not come up again during the trial.

It would not have been challenging for the parties to deduce the reason for Sneed's lithium prescription. It is undisputed that lithium's sole medical purpose, both in 1997 and today, is to treat [bipolar disorder](#) and other mental health disorders. See *ante*, at 627. Were there any doubt about Sneed's condition, records long available to both sides resolve it. In 1997, Sneed

underwent a pretrial competency evaluation with forensic psychologist Dr. Edith King. Dr. King's report strongly suggested that although Sneed himself may have been in denial, he was taking lithium to treat bipolar disorder or a similar condition. During his evaluation, Sneed asserted that he “d[id] not think he ha[d] any serious mental problems.” 2 App. 701. And, he reported he was given the lithium, apparently by mistake, “after his tooth was pulled.” *Id.*, at 700. Dr. King felt otherwise. Concluding that Sneed qualified as a “mentally ill person or a person requiring treatment,” *ibid.*, she determined that he likely had “an atypical mood swing disorder in his past characterized by ‘ups and downs’ including anger outburst.” *Id.*, at 702. “His present medication [*i.e.*, the lithium] is probably helping him control his moods.” *Ibid.*

The defense was well aware of this report before Glossip's second trial. In fact, on direct appeal of his first conviction, Glossip's appellate counsel had faulted his trial counsel for not using Dr. King's report to show the jury that Sneed was taking lithium to control his anger. 1 *id.*, at 18. Nevertheless, after the OCCA vacated his first conviction, Glossip declined to seek further pretrial discovery on the issue or raise it during his second trial.

After his second conviction and sentence, Glossip ignored the lithium issue on direct appeal, instead raising a general sufficiency-of-the-evidence challenge. The OCCA unanimously rejected that challenge, finding that there was sufficient evidence to convict and that the State had satisfied an additional state-law requirement for corroborative evidence where a conviction rests on accomplice testimony. 2007 OKCR 12, ¶¶47–53, 157 P.3d 143, 153–154. Two judges dissented on different grounds but “agree[d] with the majority that the State presented a strong circumstantial case against Glossip.” *Id.*, at 175 (Chapel, J.); see also *ibid.* (A. Johnson, J.).

2

Glossip has spent the past two decades challenging his conviction and sentence through direct appeal, state and federal collateral proceedings, and civil litigation under Rev. Stat. § 1979, 42 U.S.C. § 1983. Throughout that time, no court has “determined error in [his] trial proceeding” or found that “there [has] been a showing of actual innocence.” 2023 OKCR 5, ¶2, 529 P.3d 218, 229 (Lumpkin, J., specially concurring). *640 And, for almost that entire duration,

the Oklahoma attorney general has steadfastly defended the verdict and sentence, insisting that the evidence the State presented in 1998 and 2004 has never “been credibly rebutted.” 3 App. 769.

In 2022, as Glossip's execution date approached, a group of Oklahoma legislators opposed to his execution commissioned the law firm Reed Smith LLP to conduct an independent investigation of his case. The firm, which is publicly committed to “fighting the death penalty,” *id.*, at 709, n. 3 (alteration and internal quotation marks omitted), issued a final report expressing “grave doubt as to the integrity of Glossip's murder conviction and death sentence,” Independent Investigation of *State v. Richard E. Glossip* 6 (June 7, 2022) (Reed Smith Report). The attorney general vigorously disagreed. In subsequent post-conviction filings, the State asserted that the report was “built on assumptions, half-truths, and (in some cases) outright falsehoods,” 3 App. 769, and criticized its findings at length, see *id.*, at 754–769.

In response to the Reed Smith Report, the attorney general's office released all its files from the case to Glossip, except for one box of attorney work product. Based on this information, Glossip filed a fourth motion for postconviction relief in the OCCA, raising two overarching claims. The first claim was that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding evidence that Sneed considered recanting his original testimony before the second trial. The second claim was that Smothermon, the lead prosecutor, committed misconduct and violated the rule of sequestration (which prohibits witnesses from hearing other witnesses' testimony) during trial. After the State's forensic pathologist testified that there was evidence Sneed used a knife in addition to the bat during the murder, Smothermon sent a memorandum to Sneed's attorney highlighting ways in which this testimony was hard to square with some of Sneed's earlier statements. Glossip thus claimed Smothermon violated the rule of sequestration by conveying witness statements for the purpose of coaching Sneed into altering his testimony to fit the forensic evidence. Attorney General John O'Connor opposed the application, urging the OCCA not to be cowed by the ongoing “public relations campaign” to “falsely” present Glossip as “innocent.” 3 App. 717.

The OCCA unanimously denied the application. Under Oklahoma's Post-Conviction Procedure Act (PCPA), Glossip's post-conviction application could not proceed unless he could show (1) that the “factual basis for the

claim” was previously unavailable and (2) that, but for the alleged error, no reasonable jury would have convicted him or sentenced him to death. *Okla. Stat., Tit. 22, § 1089(D)(8)(b) (2024)*. The OCCA held that both claims failed the first requirement because they were not based on new information. It also held that Glossip's claims failed on the merits.

As to the recantation claim, the OCCA held that Glossip's first claim was procedurally barred because the defense knew even before the 2004 trial that Sneed was reluctant to testify again. 3 App. 777. In fact, one of Glossip's attorneys had even visited Sneed before trial in an effort to persuade him not to testify. *Ibid.* On the merits, there was “no evidence that Sneed had any desire to recant or change his testimony.” *Id.*, at 776. Sneed had even told Reed Smith that “recant[ing]” was “‘impossible because I told the truth.’ ” *Id.*, at 724. Sneed was reluctant to testify because he wanted to obtain a better plea deal or to avoid the disruption to his life that testifying would cause. *Id.*, at 776.²

***641** Turning to the sequestration claim, the OCCA pointed out that Smothermon had acknowledged at trial that she had spoken with Sneed's counsel, so the claim likewise lacked a new factual basis. *Id.*, at 780; see 12 Tr. 107–108 (May 26, 2004). On the merits, the court held that Oklahoma's sequestration statute does not prohibit *counsel* from discussing with a witness other witnesses' testimony. 3 App. 781. Federal courts have similarly interpreted the federal sequestration rule to permit “witnesses ... to discuss the case” with “counsel for either side.” 2A C. Wright & P. Henning, *Federal Practice and Procedure* § 416, p. 195, and n. 29 (4th ed. 2009) (collecting cases). And, nothing in Smothermon's memorandum indicates she was encouraging Sneed to lie. 3 App. 781–782.

3

In January 2023, Gentner Drummond became Oklahoma's attorney general. During his first month in office, Drummond released the final box of evidence (Box 8) to Glossip. He also appointed Rex Duncan, a personal friend and campaign donor, as independent counsel to reexamine the legitimacy of Glossip's conviction.

Among the materials released in Box 8 were handwritten notes taken by Smothermon and her co-counsel Gary Ackley during a 2003 meeting between them, Sneed, and Sneed's attorney.

Glossip's counsel quickly seized on Smothermon's notes. In the top left corner of the notes, Smothermon had written “on Lithium?” and “Dr Trumpet?” See Figure 1, *infra*. According to Glossip's counsel, these phrases meant that Sneed had admitted during the meeting that he had been prescribed lithium by Dr. Lawrence Trombka, the psychiatrist at the Oklahoma County Jail.

Smothermon and Ackley disagree with this interpretation. They assert before this Court that, during the meeting, Sneed recounted two interviews that he previously had with members of Glossip's defense team. In context, Smothermon's notes simply record that Sneed told her that Glossip's defense team had asked him about his use of lithium and about “Dr Trumpet.” The prosecutors claim that this fact is apparent from the other notes on the page and from Ackley's notes, both of which refer to details of these prior interviews. Ackley's notes also highlight the phrase “‘tooth pulled.’ ” 3 App. 940. The prosecutors' interpretation of their own notes thus suggests that Sneed recounted that he had ***642** responded to questions about lithium and Dr. Trombka with his earlier story that he was prescribed lithium in error after having his tooth pulled. This interpretation is explained at great length by the Van Treese family's brief. See Brief for Victim Family Members as *Amici Curiae* 7–22.³ And, as of yet, no one—including the parties and the majority—has attempted to refute it on the merits.

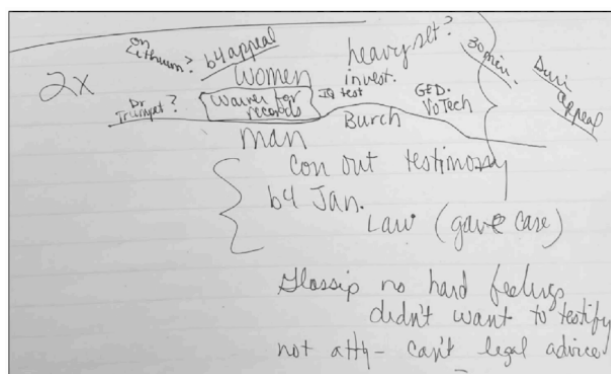


Figure 1. Smothermon's handwritten ***643** notes. See 3 App. 927.

Based on Smothermon's notes, Glossip filed a fifth post-conviction application in the OCCA in March 2023. He framed the notes as new evidence of Sneed's previously unknown **bipolar disorder**. Glossip attached an affidavit from Dr. Trombka stating that he was the only person who would have prescribed lithium while Sneed was in jail. Glossip also attached what appears to be a jail record indicating that Sneed

has [bipolar disorder](#). He argued that the State's refusal to produce these notes before trial violated [Brady](#), on the theory that he could have used Sneed's condition to impeach his testimony.

At the same time, Glossip recognized that he would need additional evidence to prove his theory. Together with his application, Glossip also filed a motion for an evidentiary hearing, in which he sought to call Smothermon and Ackley as witnesses. Motion for Evidentiary Hearing in No. PCD–2023–267 (OCCA), p. 2. Glossip explained in the motion that “the resolution” of his [Brady](#) claim “turns in part on interpretation of prosecutors’ notes.” Motion for Evidentiary Hearing, at 1. “Without their testimony,” he acknowledged, “any finding about what they meant or what the attorneys did or did not know when they wrote them would be speculation.” *Id.*, at 1–2.

Independent Counsel Duncan, on the other hand, determined that no further evidence was needed. Duncan released his final report shortly after Glossip filed his fifth application. He agreed that the State violated Glossip's [Brady](#) rights and asserted that Smothermon's failure to correct Sneed's testimony amounted to a due process violation under [Napue v. Illinois](#), 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Duncan based his conclusions on the speculation that “seasoned capital homicide prosecutors ... could be expected” to know that “Trumpet” referred to Dr. Trombka and that Dr. Trombka was the psychiatrist at the Oklahoma County Jail. App. to Reply Brief in Support of Pet. for Cert. 23a. He then concluded the report with praise for Drummond, stating that Drummond's “decision to seek a stay of execution and more thoroughly examine this case may be the bravest leadership decision I've ever witnessed.” *Id.*, at 30a.

Notably, Duncan failed to give Smothermon a meaningful opportunity to explain what her notes may have meant or what she knew about Sneed's medical history. Instead, he discussed the matter with her only once, during a 3-minute phone call. App. to Brief for Victim Family Members as *Amici Curiae* 31a. Worse, he gave Smothermon no chance to review the decades-old notes before asking her to explain them during the brief call. *Ibid.* Drummond was likewise uninterested in hearing from the attorney he and Duncan were impugning. Following Duncan's report, both Smothermon and the Van Treese family contacted Drummond's office to request that Drummond speak with Smothermon about the notes. *Id.*, at 6a–7a, 71a. Their pleas were ignored.⁴

*644 At the attorney general's behest, the State supported Glossip's post-conviction application. It argued that Smothermon's notes proved that the prosecutors violated [Brady](#) and [Napue](#), and that Glossip was entitled to relief under the State's PCPA. It neglected to address, however, the stringent limitations that the PCPA imposes on such subsequent applications. See § 1089(D)(8)(b).

The OCCA unanimously denied Glossip's fifth postconviction application. The court first held that Glossip had not satisfied either requirement of § 1089(D)(8)(b), and thus that the [Brady](#) and [Napue](#) claims were procedurally barred. 529 P.3d at 226. The OCCA then held that both claims also failed on the merits. No [Brady](#) violation occurred, the court explained, because Sneed's 1997 pretrial competency report already informed the defense of Sneed's prescription and condition. The OCCA determined that defense counsel had likely made a strategic decision not to base a defense on them. 529 P.3d at 226. Nor was there any [Napue](#) violation, according to the court, because Sneed's testimony “was not clearly false” and, in any event, was not material given defense counsel's choice not to raise Sneed's condition. 529 P.3d at 226–227. After the OCCA issued its decision, Oklahoma's Pardon and Parole Board denied clemency.

II

As an initial matter, we lack jurisdiction to review this case. “This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.” [Herb v. Pitcairn](#), 324 U.S. 117, 125, 65 S.Ct. 459, 89 L.Ed. 789 (1945). “Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.” [Coleman v. Thompson](#), 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Thus, on direct review of a state-court judgment, the presence of an adequate and independent state ground imposes a “jurisdictional” limitation. *Ibid.* The decision below rests on such grounds, and the majority concludes otherwise only by grossly mischaracterizing the state court's analysis.

A

The PCPA authorizes a criminal defendant to collaterally challenge his conviction on the ground that it violates the Federal Constitution. *Okla. Stat., Tit. 22, § 1080(1)*. But, given the extraordinary nature of collateral challenges, the statute also imposes a variety of restrictions on relief. In capital cases, the applicant must establish not just a constitutional violation, but also, among other requirements, that his claim “could not have been raised in a direct appeal” and that “the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” *§ 1089(C)*.

The PCPA further bars subsequent applications for relief, such as Glossip's, unless the applicant satisfies two additional requirements. As mentioned, the applicant must show that “the factual basis for the claim” was not previously “ascertainable through the exercise of reasonable diligence.” *§ 1089(D)(8)(b)(1)*. And, the applicant must demonstrate that “the facts underlying the claim” would, if proved, “establish by clear and convincing *645 evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.” *§ 1089(D)(8)(b)(2)*. These two necessary conditions—the diligence and actual-innocence requirements—closely mirror limits that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes on successive federal habeas petitions. See *28 U.S.C. § 2244(b)(2)(B)*; *Davison v. State*, 2023 OKCR 11, ¶9, n. 1, 531 P.3d 649, 651, n. 1.

As with other state-law requirements, the PCPA's bar on subsequent applications ordinarily will constitute an adequate and independent state ground precluding our review. It is independent because its application does not “depend upon a federal constitutional ruling on the merits.” *Stewart v. Smith*, 536 U.S. 856, 860, 122 S.Ct. 2578, 153 L.Ed.2d 762 (2002) (*per curiam*). It is adequate as a general matter because States have no constitutional obligation to create “collateral proceedings” in the first place. *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (plurality opinion). And, it is adequate in particular cases so long as the OCCA's decision to rely on it is not “so unfounded” in existing law or the record “as to be essentially arbitrary.” *Cruz v. Arizona*, 598 U.S. 17, 26, 143 S.Ct. 650, 214 L.Ed.2d 391 (2023) (internal quotation marks omitted). A decision will be inadequate on this basis only in “the rarest of situations.” *Ibid.*

Here, the OCCA held that the PCPA barred Glossip's application twice over because he failed to meet *either*

the diligence or actual-innocence requirements. 529 P.3d at 226. The OCCA properly grounded these conclusions in its analysis of the record: It explained that because Glossip had been aware of Sneed's condition and lithium prescription since 1997, with “reasonable diligence” the *Napue* violation “could have been presented previously.” 529 P.3d at 226. Likewise, Glossip could not establish that, but for the alleged *Napue* violation, “no reasonable fact finder” would have convicted him. 529 P.3d at 226. Correcting Sneed's testimony simply would have furnished the defense with additional impeachment evidence that did not directly contradict the State's basic theory. But, “evidence of factual innocence must be more than that which merely tends to discredit or impeach a witness.” *Id.*, at 225 (collecting cases). The OCCA's reliance on the PCPA thus was both an adequate basis for its judgment and independent of federal law, leaving us without jurisdiction. Glossip's case should end here.

B

The majority evades this straightforward conclusion by inventing a federal holding that the OCCA never made. Before applying the PCPA's bar on subsequent applications, the majority contends, the OCCA first addressed the State's “confession of *Napue* error.” *Ante*, at 625. The OCCA then found this confession to be “ ‘not based in law or fact.’ ” *Ante*, at 625 (quoting 529 P.3d at 226). Thus, the majority concludes, the OCCA premised its application of the PCPA's bar on an “antecedent holding” of “federal law,” which we have jurisdiction to review. *Ante*, at 624 – 625. This theory misstates the decision below and defies logic.

As the OCCA recognized (and the majority does not), the State did not merely confess to a *Napue* violation; it “concede[d] that [Sneed's] alleged false testimony combined with other unspecified cumulative errors warrant postconviction relief.” 529 P.3d at 226 (emphasis added). A federal claim can warrant post-conviction relief under the PCPA only if the applicant meets the PCPA's additional requirements. *646 See *§ 1089(D)(4)*. The State partly recognized as much, expressly acknowledging that, “[t]o obtain post-conviction relief, Glossip needs to show” that he satisfies the requirements of “*§ 1089(C)*.” 3 App. 976. The State therefore argued that the alleged *Napue* violation met those requirements—namely, that the violation “could not have been asserted in a direct appeal,” and that “the result of the trial” likely would not “have been the same but for” the *Napue* violation and cumulative errors. 3 App. 977–978.

The OCCA properly concluded that this argument suffered a threshold defect: It ignored the PCPA's additional requirements for "subsequent application[s] for post-conviction relief" under § 1089(D). Beyond showing that he met the § 1089(C) requirements, Glossip *also* had to show he satisfied § 1089(D)'s diligence and actual-innocence requirements. § 1089(D)(8)(b). Yet, the State never addressed those prerequisites. The OCCA thus held that Oklahoma's "concession alone cannot overcome the limitations on successive post-conviction review." 529 P.3d at 226 (citing § 1089(D)(8)).⁵ Because the State's concession that the circumstances "warrant post-conviction relief" overlooked these additional state-law requirements, the OCCA correctly observed that the State's assertion was "not based in law or fact." 529 P.3d at 226. And, as the OCCA's § 1089(D) citation makes clear, the court was referring to *Oklahoma* law, not *federal* law.

The structure of the OCCA's analysis reinforces this conclusion. The relevant portion of the opinion reads as follows:

"¶25 Glossip claims that the State failed to disclose evidence of Justin Sneed's mental health treatment and that Sneed lied about his mental health treatment to the jury. Though the State in its response now concedes that this alleged false testimony combined with other unspecified cumulative errors warrant postconviction relief, the concession alone cannot overcome the limitations on successive post-conviction review. See 22 O.S.Supp.2022, § 1089(D)(8). The State's concession is not based in law or fact.

"¶26 This issue is one that could have been presented previously, because the factual basis for the claim was ascertainable through the exercise of reasonable diligence, and the facts are not sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

"¶27 [Glossip's *Brady* claim fails on the merits.]

"¶28 The evidence, moreover, does not create a *Napue* error...." *Id.*, at 226–227 (footnotes omitted).

*647 The OCCA's application of § 1089(D)'s diligence and actual-innocence requirements in paragraph 26 immediately

followed its "law or fact" comment in paragraph 25. Only thereafter in paragraph 28 did the court turn to the State's *Napue* claim and conclude that "[t]he evidence, moreover, does not create a *Napue* error." 529 P.3d at 226 (footnote omitted). This structure leaves no doubt that § 1089(D)'s requirements are why the State's concession failed: The application of § 1089(D) in paragraph 26 explained the immediately preceding statement that the "State's concession is not based in law or fact." The merits discussion in paragraph 28 was a follow-on, alternative holding.

The majority's alternative interpretation is incoherent. According to the Court, the OCCA's analysis proceeded as follows: *First*, the court asserted that the State's "concession alone cannot overcome the limitations on successive post-conviction review," and expressly cited § 1089(D)'s diligence and actual-innocence requirements. *Ibid.* *Second*, the OCCA without explanation switched—in the very next sentence—to the merits and decided the *Napue* question in a single, conclusory assertion that the "State's concession is not based in law or fact." 529 P.3d at 226. *Third*, after summarily deciding the merits of a federal constitutional claim, the OCCA toggled back to the procedural bar in the very next paragraph to explain why Glossip failed to meet the PCPA's procedural requirements. *Fourth* and finally, the OCCA circled around to spell out its "antecedent" *Napue* merits holding. *Ante*, at 624 – 625. This reading is as convoluted and implausible as it sounds. If "the only reason" § 1089(D) applied had been because the *Napue* claim independently failed on the merits, there would have been no point in discussing § 1089(D) in the first place. *Ante*, at 625.

Finally, the majority cannot fall back on *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), which establishes a presumption that a state court has based its decision on federal law when it is "insufficiently 'clear from the face of the opinion'" that the court meant to rely on an independent state-law ground. *Ante*, at 625 – 626 (quoting 463 U.S. at 1040–1041, 103 S.Ct. 3469). Here, the OCCA expressly held that § 1089(D) barred any relief based on *Napue*. 529 P.3d at 226. That leaves the "face of the opinion" as "clear" as it gets. *Long*, 463 U.S. at 1041, 103 S.Ct. 3469. The majority's tortured reading of the OCCA's "law or fact" phrase is too farfetched to undermine the force of that "plain statement" that state law resolved the case. *Ibid.*

Unable to make a plausible case from the four corners of the opinion below, the majority attempts to bolster its reading by relying on “Oklahoma precedent involving confessions of error.” *Ante*, at 625. In particular, in a series of decisions issued between 54 and 106 years ago, the OCCA held that a confession of error must have “a basis in the law and in the record” to be sustained. *Ante*, 625 – 626, and n. 6. According to the majority, these decisions establish that whenever the State identifies that a federal constitutional error occurred, all independent legal grounds for sustaining the judgment disappear. *Ante*, at 625 – 626.

We disapproved of the majority's method of finding jurisdiction in *Long*. There, we decided that, as a general matter, we would no longer “decide issues of state law that go beyond the opinion that we review” to determine whether a judgment rests on an adequate and independent state ground. 463 U.S. at 1040, 103 S.Ct. 3469. We adopted this practice because the “process *648 of examining state law” ourselves “requires us to interpret state laws with which we are generally unfamiliar, and which often ... have not been discussed at length by the parties.” *Id.*, at 1039, 103 S.Ct. 3469. That concern is on full display here: Not a single merits brief in this case cites any of the decisions invoked by the majority for its grand theory of confessions of error under Oklahoma law; the majority developed it entirely *sua sponte*. Despite wrapping itself in the mantle of *Long*, the majority disregards one of its central teachings.

If we are to look at other OCCA decisions, I would start with history that is more recent and more on point. In response to Glossip's fourth application for post-conviction relief, the State explicitly “waive[d] its right to argue the claims within this ... application are waived” under the PCPA. 3 App. 717–718. But, the OCCA refused to accept the waiver, holding that “[t]his Court alone will determine whether the rules of this Court should be abandoned.” *Id.*, at 775; see also *ante*, at 622. The OCCA thus made clear that it would apply the PCPA's procedural bars whether the State wanted it to or not. It makes no sense to say, just months later—and in the same case—that the OCCA reversed course without explanation and decided that § 1089(D) becomes irrelevant when the State supports the applicant's claim for relief (while at the same time holding that § 1089(D) applies). See *ante*, at 626. It should go without saying that a decision issued *five months* before the decision below in *Glossip's own case* sheds far more light on what the OCCA meant than decisions issued in *different* cases a *century* ago.

In any event, the majority vastly overreads the case law it cites. The decisions establish the modest point that a confession of error does not automatically entitle a defendant to relief; rather, the OCCA will independently “examine the record” to ensure that the confession is “well founded in law.” *Raymer v. State*, 27 Okla.Crim. 398, 228 P. 500 (1924) (syllabus by the court); see *ante*, at 625 – 626, and n. 6. Of course, a confession *that post-conviction relief is warranted* is not well founded if the PCPA bars relief. And, those decisions nowhere hold that procedural bars that might render an error harmless become irrelevant whenever the State confesses error.

This Court follows the same rule, derived from early English practice, that it must “examine independently” confessions of error before reversing. *Young v. United States*, 315 U.S. 257, 258–259, 62 S.Ct. 510, 86 L.Ed. 832 (1942) (citing *Rex v. Wilkes*, 4 Burr. 2527, 2551, 98 Eng. Rep. 327, 340–341 (K. B. 1770)). And, this Court applies independent bars to relief even when the Government confesses error. See, e.g., *Grzegorzczuk v. United States*, 597 U.S. —, 142 S.Ct. 2580, 213 L.Ed.2d 1128 (2022) (statement of KAVANAUGH, J., joined by ROBERTS, C. J., and THOMAS, ALITO, and BARRETT, JJ., respecting denial of certiorari) (rejecting the Government's confession of error and request for vacatur of the judgment below because the defendant's guilty plea waived his claim). Yet, the majority here foists upon Oklahoma essentially the opposite rule by requiring reversal based on errors a court has not independently ruled to be reversible. There is no basis to infer from the OCCA's *duty* to independently examine confessions of error that it will ignore independent grounds for upholding a conviction.

The Court's detour into state-law materials whose consideration *Long* strongly discouraged does nothing to undermine the straightforward conclusion that the decision below invoked § 1089(D)'s procedural *649 bar as a hurdle independent of the *Napue* claim's merits. That adequate and independent state ground bars our review of this case.

III

Even if we had jurisdiction, we could not grant relief because Glossip has failed to show that he is entitled to a hearing on the merits of his *Napue* claim.

Napue establishes that “a State may not knowingly use false evidence, including false testimony, to obtain a tainted

conviction.” 360 U.S. at 269, 79 S.Ct. 1173. If a witness gives false testimony, which the prosecutor knows to be false but fails to correct, then a new trial is warranted if there is “any reasonable likelihood” that the false testimony could “have affected the judgment of the jury.” *Id.*, at 270–271, 79 S.Ct. 1173. A *Napue* claim therefore requires three elements: falsity, prosecutorial knowledge, and materiality. Here, the OCCA correctly held, at minimum, that the *Napue* claim fails the materiality requirement.⁶

A

The OCCA held that Sneed's allegedly false statements—that he had “never seen” a psychiatrist and did not “know why” he was given lithium—were not material because the defense already had reason to know about Sneed's condition but made a strategic decision not to make an issue of it. 529 P.3d at 226–227. That holding is correct.

The “touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial.” *650 *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). “Even in cases of egregious prosecutorial misconduct,” we have granted relief “only when the tainted evidence was material to the case.” *Id.*, at 220, n. 10, 102 S.Ct. 940. To that end, the proper inquiry is whether “‘the false testimony’” could have “‘affected the judgment of the jury.’” *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (emphasis added); see also *Napue*, 360 U.S. at 269, 79 S.Ct. 1173 (due process violation occurs where the State “use[s] false evidence ... to obtain a tainted conviction”).

There is no reasonable likelihood that Sneed's challenged testimony changed the jury's verdict, because it did not bear on any contested issue. As early as 1997, the defense knew that Sneed likely suffered from an “atypical mood swing disorder” that involved “anger outburst[s],” and that his lithium prescription helped to treat it. 2 App. 699–700, 702–703; see also *ante*, at 627 (agreeing that “Glossip had access” to Sneed's pretrial competency report). On direct appeal from his first conviction, Glossip's counsel identified his use of “lithium” to “‘not to feel so angry’” as “vital evidence to attack Sneed's credibility and the State's specious theory of the case.” 1 App. 18.

Nonetheless, the defense elected not to raise Sneed's mental condition at the second trial. Given defense counsel's

awareness of the pretrial competency report, this choice must have been a conscious one. Perhaps, as the OCCA suggested, the defense was concerned that highlighting “Sneed's mental health” could have the counterproductive effect of “showing that he was mentally vulnerable to Glossip's manipulation and control.” 529 P.3d at 226. Or, perhaps the defense believed it would not be credible to argue that Sneed acted on impulse in a manic state, given other witnesses' testimony that Sneed possessed a consistently mild-mannered disposition. See, e.g., 7 Tr. 26 (May 19, 2004); 8 Tr. 17–18 (May 21, 2004). Whatever the reason, the defense chose not to turn Sneed's mental health into an impeachment issue. That left no work for Sneed's challenged testimony to do, so it could not reasonably have affected the jury's verdict. See *Napue*, 360 U.S. at 269, 79 S.Ct. 1173.

The majority concludes otherwise only by redefining the *Napue* materiality inquiry. In its view, Sneed's testimony is material because the jury's verdict could have changed “[h]ad the prosecution corrected” the testimony. *Ante*, at 627 – 628. Thus, even “wholly irrelevant” testimony that had no impact on the jury can be material, so long as *the act of correcting it* might have caused the jury to doubt the witness's credibility. *Ibid*. We have never defined materiality in these terms. Rather, we have consistently framed the issue as whether “the false testimony” itself “had an effect on the outcome.” *Napue*, 360 U.S. at 272, 79 S.Ct. 1173. Thus, the relevant inquiry under *Napue* is whether the *content* of the false testimony at issue is material. Were the test for materiality whether a counterfactual correction of a false statement might tend to undermine the witness's credibility, the materiality requirement would be meaningless in a great number of cases.

Napue itself illustrates this point. The “principal state witness” in that case “testified ... that he had received no promise of consideration in return for his testimony” when the prosecutor “had in fact promised him consideration” in the form of support for a reduced sentence. *Id.*, at 265–266, 79 S.Ct. 1173. The Court did not find this false testimony material merely because such testimony generally undermines a witness's credibility. Rather, the Court took issue with the content of the testimony: “Had the jury been apprised of *651 the true facts, ... it might well have concluded that [the witness] had fabricated testimony in order to curry the favor of the” prosecutor. *Id.*, at 270; see also *Wearry v. Cain*, 577 U.S. 385, 393–394, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) (*per curiam*) (similarly finding false testimony material because it concerned whether the witness

was receiving favorable treatment in exchange for testimony); *Giglio*, 405 U.S. at 154–155, 92 S.Ct. 763 (same).

Rather than base its holding on *Napue*'s actual discussion of materiality, see 360 U.S. at 270–272, 79 S.Ct. 1173, the majority seizes on a line from a different section of the opinion: that “ ‘[a] lie is a lie, no matter what its subject.’ ” *Ante*, at 628, 630 (quoting 360 U.S. at 269–270, 79 S.Ct. 1173). But, the majority omits the second half of the sentence: “ ‘and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.’ ” *Id.*, at 270, 79 S.Ct. 1173 (emphasis added). Read in its entirety, the sentence makes clear that the prosecutor's “ ‘duty to correct’ ” is triggered only if the false statement “ ‘is ... relevant to the case.’ ” *Ibid.* That specification is inconsistent with the majority's conception of *Napue*, under which *any* known false statement triggers the duty to correct, and then the question of materiality turns on a counterfactual inquiry into whether the failure to correct could have affected the outcome of the trial.⁷

The majority's novel approach also unmoors the *Napue* materiality standard from its theoretical justification. This Court applies a defendant-friendly standard of materiality to *Napue* claims “because they involve a corruption of the truth-seeking function of the trial process.” *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Where the jury does not rely on the false testimony because it is irrelevant, no such corruption occurs.

B

In any event, the majority fails its own test. Even framing the question as whether a *correction* could have affected the outcome of trial, the parties have not established materiality.

First, irrespective of whether Sneed lied, prosecutorial correction of his testimony would not have led the jury to infer that he had consciously committed perjury. The far more plausible inference would have been that Sneed simply misremembered—like numerous other witnesses in the same trial. Recall that Glossip's second trial took place seven years after the events in question and six years after his first trial. Many key witnesses in Glossip's second trial testified in his first, leaving them open to impeachment on any details *652 they remembered differently six years later.

The record is replete with instances of counsel—including the prosecutors—reminding the State's witnesses of facts they had forgotten or misremembered. See, e.g., 5 Tr. 90 (May 17, 2004); 7 Tr. 83–85 (May 19, 2004); 8 Tr. 40–42 (May 20, 2004); 9 Tr. 100 (May 21, 2004); 10 Tr. 31 (May 24, 2004); 14 Tr. 18 (May 28, 2004). Moreover, Sneed took lithium for only a brief period in 1997. Considering that this testimony held no significance for any contested issue at trial, in this environment there is no reason to think its correction would have been noteworthy, much less the *voilà* moment the majority imagines.

Second, correcting Sneed's allegedly false statements would not have led the jury to believe that Sneed's mental condition led him to attack Van Treese on his own initiative. To begin with, the prosecution had no *Napue* obligation to disclose that Sneed had *bipolar disorder*. *Napue* requires prosecutors “to correct” what they know to be “false testimony,” not to proactively identify impeachment material. 360 U.S. at 265, 79 S.Ct. 1173. At most, the only false statement was Sneed's assertion *that* he had not seen a psychiatrist. The OCCA found Sneed “was more than likely in denial of his mental health disorders.” 529 P.3d at 227. This factual finding has record support. Sneed asserted during his pretrial competency evaluation that he “does not think he has any serious mental problems.” 2 App. 701. That statement predated his plea agreement and so cannot be chalked up to trying to maintain his credibility on the stand. The OCCA thus reasonably found Sneed's statement about his own knowledge was not false. Nor did Sneed testify that he was given lithium to treat a cold. See *ante*, at 630–631. He said only that “shortly after” he had asked for *Sudafed* he was given *lithium* for a “reason” that he “d[id]n't know.” 12 Tr. 64 (May 26, 2004). Sneed thus never falsely testified as to *why* he received *lithium*. And, without knowing why a psychiatrist prescribed *lithium* to Sneed, a lay jury would not likely be able to attribute much significance to the mere fact *that* a psychiatrist did so.

Regardless, there is no reason to think that disclosing Sneed's *bipolar disorder* would have affected the outcome of the trial. Glossip's defense team was well aware of Sneed's condition and chose not to use it as impeachment evidence. As appellate judges examining a cold record 20 years after the trial, we should be wary of believing that we understand the import of evidence better than Glossip's counsel. Moreover, the defense made no effort in its questions and argumentation to lay the groundwork for a theory that Sneed acted on a manic impulse. So, it is hard to see why the jury would have developed any theory on its own from a cursory mention of the condition.

Finally, the Court cannot rescue its materiality analysis by invoking the cumulative-error doctrine. The Court asserts with virtually no legal analysis that various other violations of state and federal law undermine confidence in the verdict. *Ante*, at 629 – 630. But, the cumulative-error doctrine applies only if there are multiple errors to consider cumulatively. See *Wearry*, 577 U.S. at 394, 136 S.Ct. 1002 (only “wrongfully withheld” evidence can be assessed cumulatively under *Brady* and *Napue*); *Hanson v. Sherrod*, 797 F.3d 810, 852 (CA10 2015) (“We cumulate error only upon a showing of at least two actual errors”). The OCCA held that the remaining claims of error the Court asserts are either procedurally barred, meritless, or both. See 529 P.3d at 227; 3 App. 776–783; No. PCD–2022–589 (OCCA, Nov. 10, 2022), p. 11; *supra*, at 640 – 641. We did not grant *653 certiorari to review the correctness of those decisions, so they are not properly before us. See Pet. for Cert. i.

In all events, the other claimed violations are meritless or beyond our jurisdiction. The State's supposed violation of the rule of sequestration is a state-law issue over which we have no jurisdiction. See 3 App. 780–781.⁸ The evidence-destruction claim is the majority's own creation. Although both parties mention alleged evidence destruction in the background statements of their briefs, neither argues to this Court that any destruction of evidence amounted to a violation of federal law militating in favor of reversal. See Brief for Petitioner 33–38; Brief for Respondent 30–31. So too, there is no evidence that Sneed wished to “recant” his testimony, *ante*, at 629; to the contrary, Sneed explained to Reed Smith that “recant[ing]” was “impossible because I told the truth,” 3 App. 724 (internal quotation marks omitted); see also n. 2, *supra* (further explaining that Sneed has never denied the truth of his testimony against Glossip). And, the claim that Glossip sold his couch and television for \$900 on January 8—thus suggesting an alternative source for the money he stole from Van Treese—is a nonstarter: Glossip himself testified under oath that he received only \$490 for those items and others. 15 Tr. 17 (June 1, 2004).

In short, even setting aside our lack of jurisdiction, Glossip still lacks a valid *Napue* claim because Sneed's allegedly false testimony was immaterial.

IV

Having erred in both its threshold and merits analyses, the majority rounds out its opinion with an indefensible remedial decree. Rather than vacate the decision below, the majority takes the remarkable step of requiring a new trial. *Ante*, at 632 – 633. But, whether Glossip is entitled to a new trial turns on several unresolved questions of state law that this Court has no authority to disregard or decide for itself. And, at the very least, Glossip cannot show that he is entitled to relief without an evidentiary hearing.

A

Even if the majority is correct that this Court has jurisdiction and that the OCCA misapplied *Napue*, the appropriate remedy is to remand for further proceedings. This Court has no authority to order a new trial.

*654 1

This Court cannot order a new trial unless federal law *required* the OCCA to do so in the decision below. “It is beyond dispute that we do not hold a supervisory power over the courts of the several States.” *Dickerson v. United States*, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). “Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.” *Herb*, 324 U.S. at 125–126, 65 S.Ct. 459. Even when a federal question gives this Court jurisdiction to review a state-court judgment, “State courts” remain “the only proper tribunal” for “the decision of questions” in the case “arising under their local law.” *Murdock v. Memphis*, 20 Wall. 590, 626, 22 L.Ed. 429 (1875). Thus, when a state court's judgment rests on an erroneous interpretation of federal law, this Court must “either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require.” *Id.*, at 636. It has no authority to order relief that the state court could legitimately have refused. And, naturally, we cannot determine what judgment “the State court should have rendered” if doing so requires resolving questions of state law beyond our jurisdiction. *Id.*, at 626, 636. In such cases, remand is the only legitimate disposition. *Id.*, at 636.

Our customary practice reflects these principles. “Normally the Supreme Court, when reversing a state court judgment, remands the case for proceedings ‘not inconsistent’ with the Court's opinion. The state court is therefore free to resolve any undecided questions or even to alter its determination of

underlying state law.” W. Baude, J. Goldsmith, J. Manning, J. Pfander, & A. Tyler, *Hart and Wechsler's The Federal Courts and the Federal System* 634 (8th ed. 2025) (Hart & Wechsler); accord, S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 3.27, p. 3–94 (11th ed. 2019). The Court usually refrains from directing a specific form of relief even when reversing decisions made on direct appeal of a criminal conviction, with no apparent issues of state law remaining to be decided. See, e.g., *Counterterman v. Colorado*, 600 U.S. 66, 82–83, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 656, 142 S.Ct. 2486, 213 L.Ed.2d 847 (2022); *Hemphill v. New York*, 595 U.S. 140, 156, 142 S.Ct. 681, 211 L.Ed.2d 534 (2022).

2

The Court today instead “remand[s] the case for a new trial.” *Ante*, at 618. This step would be unusual even on direct review. In the context of a successive motion for postconviction relief in a state-law regime replete with specialized procedural requirements, it is without precedent. And, more importantly, the majority's directive exceeds the limits on this Court's jurisdiction. For at least three reasons, state-law questions prevent this Court from holding that the OCCA should have granted Glossip a new trial below.

First, the majority's jurisdictional holding necessarily leaves open state-law questions for the OCCA to address on remand. The Court finds jurisdiction by invoking the *Long* presumption that a state court “reli[es] on federal law” when it is “insufficiently ‘clear from the face of the opinion’ ” that its decision rests on state law. *Ante*, at 626 (quoting 463 U.S. at 1040–1041, 103 S.Ct. 3469). But, the *Long* presumption is just that—a presumption. When this Court invokes it, state courts “remai[n] free” to “‘reinstat[e] their prior judgments after clarifying their reliance on state grounds.’ ” *Arizona v. Evans*, 514 U.S. 1, 8, and n. 3, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995); see also *655 *Kansas v. Carr*, 577 U.S. 108, 128, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016) (SOTOMAYOR, J., dissenting) (recognizing that, when this Court relies on the *Long* presumption, the “lower court is able to reinstate its holding as a matter of state law”). “Even when the Supreme Court does review an ambiguous decision and reverses on the federal issue, the state courts retain the power on remand to consider independent state-law grounds and, indeed, to rely on such grounds in reinstating their initial judgment.” Hart & Wechsler 672. The OCCA is therefore entitled to clarify that

it meant to invoke § 1089(D)'s bar on subsequent applications even accepting the majority's *Napue* analysis. The majority's contrary directive ignores settled law.

This error is no mere technical violation. It erases an essential component of the *Long* presumption, which is meant to “preserve the integrity of federal law” and to “provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference.” 463 U.S. at 1041, 103 S.Ct. 3469. Presuming a federal basis for ambiguous decisions ensures that States cannot evade federal review by obfuscation. At the same time, allowing for clarification on remand preserves state courts' freedom to develop and apply their own law as they see fit. We have even said that reversing under the *Long* presumption makes state courts “freer” to develop their own law because they can do so while “disabused of [an] erroneous view of what the United States Constitution requires.” *Evans*, 514 U.S. at 8, 115 S.Ct. 1185. In contrast, under the majority's approach, ambiguity in the decision below gives this Court license to vaporize any independent state grounds that it does not like, no matter how clearly they ought to apply as a matter of state law. This sort of federal power grab dishonors our dual system of state and federal courts.

Second, even setting aside § 1089(D)(8), there are several potential independent state-law grounds for denying relief that the OCCA has not yet considered. Where there is “a possible adequate and independent state ground” for the decision below that “was not addressed by the state court,” “the state court may address th[e] question on remand.” *California v. Ramos*, 463 U.S. 992, 997–998, n. 7, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Indeed, the “settled rule” is that “the Supreme Court will remand to permit the state court to resolve the undetermined state law issue.” Hart & Wechsler 655. “The state court remains free to reinstate its prior judgment on that state-law ground.” *Ibid.* (collecting cases of reinstatement); see also *Smith v. Texas*, 550 U.S. 297, 325, 127 S.Ct. 1686, 167 L.Ed.2d 632 (2007) (ALITO, J., dissenting) (“[I]n cases in which this Court has reversed a state-court decision based on a possible federal constitutional violation, it is not uncommon for the state court on remand to reinstate the same judgment on state-law grounds” (collecting cases)). Here, several potential grounds for reinstating the decision below are apparent.

To begin, the alleged *Napue* violation may be harmless under the PCPA's prejudice standard. See § 1089(C)(2). Below, the OCCA recognized that this standard required Glossip to prove

that preventing the errors he alleged “would have changed the outcome” of the trial. 529 P.3d at 224; see § 1089(C)(2). In its confession of error, the State also agreed that “Glossip needs to show ... that the outcome of the trial would have been different.” 3 App. 976 (citing § 1089(C)). The OCCA had no occasion to consider this standard, however, because it concluded that any false testimony would have been immaterial under the federal no-reasonable-probability standard. See 529 P.3d at 227. The Court today applies that standard and disagrees. *656 *Ante*, at 627 – 630. But, no court has yet applied § 1089(C)(2)’s higher—and concededly applicable—standard. The OCCA should have the chance to do so on remand.

In addition, in the proceedings below, only the State argued that there was a *Napue* violation, and it is unclear whether the State can raise a claim on a defendant’s behalf. See § 1089(A) (assuming that an “application for postconviction relief” comes from “a defendant”). Nor is it clear that the State timely raised its *Napue* objection. State law required Glossip to file his application within 60 days of the State’s disclosure of Box 8. See OCCA Rule 9.7(G)(3). Glossip met that deadline. The State did not. See 3 App. 973 (response dated 69 days after disclosure of Box 8). Thus, any *Napue* claim is at least arguably untimely. And, there may be more state-law issues for the OCCA to consider of which we are unaware simply because we are unfamiliar with Oklahoma’s highly specialized post-conviction procedure.

Third, even if state law does not bar Glossip’s *Napue* claim entirely, state law appears not to authorize a new trial as the remedy for a violation at this stage. Cf. *Price v. Georgia*, 398 U.S. 323, 332, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (remanding after finding petitioner’s conviction unconstitutional because petitioner’s precise remedy turned “upon the construction of several Georgia statutes and on the power of Georgia courts to fashion remedial orders” “under Georgia law”). The PCPA authorizes only two dispositions of a capital post-conviction application when it is first filed with the OCCA: denial, or remand to the trial court for a merits determination. §§ 1089(D)(4) and (5). The OCCA has made clear that the Act does not authorize vacating the applicant’s conviction or sentence at that initial stage, for “affidavits and evidentiary materials filed in support of a post-conviction application are not part of the trial record but are only part of the capital post-conviction record.” *Slaughter v. State*, 2005 OKCR 2, ¶11, 105 P.3d 832, 835. “As such, those affidavits and evidentiary materials are not reviewed on their merits but are reviewed ... ‘[t]o determine if a threshold showing is met

to require a review on the merits.’” *Ibid.* (quoting OCCA Rule 9.7(D)(1)(a); emphasis added).

In this respect, the OCCA’s initial review of capital post-conviction proceedings is analogous to AEDPA’s procedure for second and successive federal habeas petitions. Before an applicant can proceed with such a petition, he must first file a motion for authorization in the court of appeals. 28 U.S.C. § 2244(b)(3)(A). If the applicant makes a prima facie showing that he satisfies the special requirements for second and successive petitions, the court of appeals authorizes proceedings in the district court. § 2244(b)(3)(C). But, if the applicant fails to make a prima facie showing, the court of appeals denies authorization, and the proceedings end. No matter how strong the applicant’s ultimate claim, the court of appeals cannot grant habeas relief at that stage; only a district court may do so. For the same reason, it makes no sense to say that no “further evidentiary proceedings” are warranted because the OCCA “agree[d]” they are unnecessary. *Ante*, at 631 – 632. The OCCA’s authority to *deny* relief without a hearing does not imply corresponding authority to summarily *grant* relief.

In short, multiple state-law issues foreclose this Court from holding that the OCCA “should have rendered” a “judgment” ordering a new trial. *Murdock*, 20 Wall. at 636. The Court therefore has no authority to order one itself.

*657 3

The majority insists that “Glossip is entitled to a new trial” simply because “this Court has jurisdiction” and “[a] new trial is the remedy for a *Napue* violation.” *Ante*, at 633. This response overlooks, however, that “States may apply their own neutral procedural rules to federal claims.” *Howlett v. Rose*, 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Here, Glossip seeks post-conviction relief under Oklahoma’s PCPA. See § 1080(1); *supra*, at 644 – 645. Under that Act, a new trial is *not* the remedy for a *Napue* violation unless Glossip also satisfies certain procedural requirements and unless his case first proceeds to a merits hearing before a state trial court. See § 1089(D)(4); *Slaughter*, 105 P.3d at 835.

For similar reasons, the majority’s reliance on *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), in which this Court reversed the OCCA and remanded for a new trial, *id.*, at 73–74, 87, 105 S.Ct. 1087, is misplaced. See *ante*, at 633. The asserted state ground in that case was

a “waiver rule” with an established exception for “federal constitutional errors.” 470 U.S. at 74–75, 105 S.Ct. 1087. In other words, the waiver rule turned on “whether federal constitutional error ha[d] been committed.” *Id.*, at 75, 105 S.Ct. 1087. Thus, it was perfectly clear that the rule there could not supply an independent ground for denying a federal constitutional claim. And, because the case arose on direct review, *id.*, at 73–74, 105 S.Ct. 1087, the Court could also have confidence that no other state ground could support the decision below, and therefore that the petitioner was legally entitled to a new trial. Here, by contrast, the Court has found jurisdiction only by applying the *Long* presumption; the case arises from a subsequent post-conviction application in a complex state-law regime that imposes numerous procedural bars; there are several state grounds that could foreclose relief entirely; and the OCCA issued the decision below in a preliminary posture in which it was not authorized to order a new trial. Further, although the new-trial order in *Ake* was legally defensible, it was still a significant departure from ordinary practice, which is to remand for further proceedings even on direct review. See *supra*, at 654.

The majority further insists that no “precedent” requires a remand based on the *Long* presumption. *Ante*, at 633. It claims that at most this Court has recognized the power of state courts to “ ‘grant relief to criminal defendants’ ” under state law after erroneously granting relief under federal law. *Ibid*. That assertion is incorrect. *Evans* recognized state courts’ power to reinstate their judgments after reversal as part of a general discussion of the *Long* presumption. See 514 U.S. at 7–9, 115 S.Ct. 1185. Its reasoning was not confined to the specific context of a state court granting relief to a criminal defendant. Similarly, treatise writers have recognized that state courts can reinstate their judgments *whenever* this Court “review[s] an ambiguous decision.” Hart & Wechsler 672. And, more fundamentally, when this Court asserts jurisdiction based on the *Long* presumption, “we merely *assume* that there are no [adequate and independent state] grounds” justifying the decision below; we do not *conclusively decide* that none exists. 463 U.S. at 1042, 103 S.Ct. 3469 (emphasis added). Without a definitive ruling that no independent state ground bars ordering a new trial, we cannot hold that ordering a new trial is the “judgment” that “the State court should have rendered.” *Murdock*, 20 Wall. at 636. The majority cannot have it both ways. If it wants to rely on the *Long* presumption to find jurisdiction, it must accept the limitations that the presumption entails.

*658 4

Finally, the majority asserts that Glossip is presently entitled to a new trial, because, under Oklahoma law, a concession that an error occurred at trial renders irrelevant all other legal obstacles to a new trial. *Ante*, at 632 – 633. As I have already explained, the precedents cited by the Court do not support that proposition; they establish only that courts have an independent duty to assess confessed errors for themselves, which is nearly the opposite of the majority's point. *Supra*, at 648 – 649. To make matters even more implausible, the Court apparently interprets this principle to mean that a confession of error transforms a nonmerits preliminary proceeding into a merits proceeding where the OCCA can directly order ultimate relief. And, more importantly, it is for the OCCA to decide whether state law entitles Glossip to a new trial at this time, and it is absurd to think that the only conclusion the OCCA could reach is the majority's.

B

Even if we could blind ourselves to the foregoing procedural issues, Glossip would still be entitled to no more than an evidentiary hearing on his *Napue* claim. The Court says that the facts “supported by the record establish a violation of *Napue*,” as though it were a trial court making findings after an evidentiary hearing. *Ante*, at 633. That approach cannot possibly be right. The PCPA envisions that further proceedings are necessary if there are “controverted, previously unresolved factual issues.” § 1089(D)(5). On this record, I do not see how one could conclude that there is not even a genuine issue of fact as to whether a *Napue* claim has been established—especially considering that Glossip himself recognized below that, without further discovery, his claims rested on “speculation.” Motion for Evidentiary Hearing, at 1–2.

Concluding that no new factual development is needed is particularly inappropriate given the alternative reading of the notes advanced by the Van Treese family in this Court. As discussed above, the family has argued that the supposed “smoking gun”—the notes from Box 8—in fact reflects Sneed's recollection of what defense counsel had asked him at two prior meetings. *Supra*, at 641 – 643, and n. 3. Smothermon and Ackley have likewise endorsed this interpretation, which casts serious doubt on Glossip's and the State's theory. *Ibid*. If Sneed simply reported that he was *asked*

about Dr. Trombka without *admitting* Dr. Trombka prescribed him lithium, Smothermon and Ackley would have had no reason to know that Dr. Trombka prescribed him [lithium](#). And, the indication in Ackley's notes that Sneed apparently mentioned his “ ‘tooth’ ” being “ ‘pulled’ ” suggests that Sneed stood by his earlier story that he was mistakenly prescribed [lithium](#) when his tooth was pulled. 3 App. 940; see 2 *id.*, at 700 (Sneed's earlier statement).

Given the existence of a plausible alternative interpretation of the evidence, I would not order a new trial at this time even if we had discretion to do so. To the extent the Court insists it cannot endorse the family's theory because it relies on “extra-record materials not properly before the Court,” *ante*, at 631, such as parts of Ackley's notes, that is because the parties collusively excluded this highly relevant evidence from the record in order to reach a predetermined outcome. The majority rewards this gamesmanship, and in so doing denies the victim's family the opportunity to present contrary evidence.

The “Government should turn square corners in dealing with the people.” *659 *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (Black, J., dissenting). That command extends not only to criminal defendants, but also to their victims. “[C]onducting retrials years later inflicts substantial pain on crime victims,” who must “relive their trauma and testify again,” in this case 28 “years after the crim[e] occurred.” *Edwards v. Vannoy*, 593 U.S. 255, 263–264, 141 S.Ct. 1547, 209 L.Ed.2d 651 (2021). The Oklahoma Constitution recognizes this interest by giving crime victims like the Van Treese family the right—“which shall be protected by law in a manner no less vigorous than the rights afforded to the accused”—“to be heard in any proceeding involving release, plea, sentencing, disposition, parole and any proceeding during which a right of the victim is implicated.” Art. II, § 34(A). Glossip, on the other hand, would suffer no prejudice from an evidentiary hearing in which the Van Treese family had the opportunity to present its case. If the evidence is as decisive as the majority believes, Glossip would still receive a new trial. There is no excuse for denying the Van Treese family its day in court.

After having bent the law at every turn to grant relief to Glossip, the Court suddenly retreats to faux formalism when dealing with the victim's family. The Court concludes that it need not honor the family's right to be heard because the family did not request an evidentiary hearing earlier in the proceedings. *Ante*, at —, n. 11. But, the family had no need to do so, since Glossip had conceded that “a hearing is necessary” for his claim to rise above the level of “speculation.” Motion for Evidentiary Hearing, at 2. And, before this Court, the Van Treese family has vigorously asserted its interests. The family filed the only brief opposing certiorari in this case. See Brief for Victim Family Members et al. as *Amici Curiae* in Opposition. It filed a merits brief highlighting critical evidence that the parties sought to sweep under the rug. See *supra*, at — – —, and n. 3. And, it filed a motion to participate in oral argument, which this Court denied. 601 U. S. —, 144 S.Ct. 691, — L.Ed.2d — (2024). The majority's assertion that the family has sat on its rights is groundless. Nor is there any reason to believe that Oklahoma victims' right to be heard in “any proceeding,” Art. II, § 34(A), contains an implicit exception for “post-conviction hearings,” *ante*, at —, n. 11. Finally, even if the family had no formal right to be heard, any reasonable factfinder plainly could consider the account of the evidence that the family has brought to light, making the majority's procedural objections beside the point. Make no mistake: The majority is *choosing* to cast aside the family's interests. I would not.

* * *

The Court's decision distorts our jurisdiction, imagines a constitutional violation where none occurred, and abandons basic principles governing the disposition of state-court appeals. I respectfully dissent.

All Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499 (1906).
- 1 The dissent's narrative, which presents as historical fact the testimony of the prosecution's witnesses at Glossip's second trial, relies heavily on Sneed's testimony to suggest that Glossip directed the crime and an elaborate coverup. See *post*, at 636 – 639 (opinion of THOMAS, J.). To the extent the dissent relies on witnesses other than Sneed, their testimony confirms no more than what Glossip himself admitted to the police. As for Sneed's testimony, the dissent constructs its favored narrative from among his multiple inconsistent accounts of the murder. See *supra*, at 619 – 620; compare *post*, at 636 (dissent asserting that “Sneed left [Van Treese's room] when he thought that he had killed Van Treese”), with 2 App. 665 (Sneed telling police he left Van Treese's room when he thought Van Treese was “knocked out”); compare *post*, at 637 (dissent asserting Glossip told Sneed “they would both be evicted if Glossip lost his job”), with 2 App. 655–665 (Sneed telling police that Van Treese's death was the accidental result of a robbery gone wrong), 6 Tr. 89 (June 8, 1998) (Sneed testifying that he did not know why Glossip wanted him to kill Van Treese), and 12 Tr. 75 (May 26, 2004) (Sneed testifying that Glossip had wanted to rob Van Treese).
- 2 The dissent claims Sneed thought the phrase “ ‘recan[t] my testimony’ ” meant “ ‘refuse to testify,’ ” *post*, at 640 – 641, n. 2, meaning (on the dissent's view) Sneed asked his lawyer: “If I [testify] again, do I have the choice of [refusing to testify] at any time during my life?” The dissent further points to an interview Sneed gave decades later, where (with Glossip's execution imminent) he denied ever “ ‘want[ing] to change the truth.’ ” *Ibid*. Of course, Sneed's much later denials do not erase his prior statements about recanting.
- 3 Also included in Box 8 were prosecutors' witness interview notes suggesting the State may have omitted certain details from the summaries it turned over to the defense. For example, one witness apparently told the prosecution that Glossip had sold him a big screen TV and a couch for \$900, 3 App. 952—a sum that would account for much of the cash Glossip had on his person at his arrest. That same witness testified at trial that he did not know how much money Glossip had received for those sales. 1 *id.*, at 286. Glossip's girlfriend later explained in a post-trial affidavit that Glossip had been selling their possessions to pay for an attorney. 2 *id.*, at 703.
- 4 The dissent faults Glossip for “ignor[ing] the lithium issue on direct appeal” years earlier. *Post*, at 639 – 640. Glossip had no reason to know at the time of his direct appeal that Smothermon knowingly failed to correct Sneed's false testimony about why he had been given lithium, however, so he would have had no occasion to raise his [Napue](#) or [Brady](#) claims then.
- 5 Because the Court grants relief under [Napue](#), the Court need not reach the merits of Glossip's [Brady](#) claim.
- 6 See also [Raymer v. State](#), 27 Okla.Crim. 398, 228 P. 500 (1924) (“Where the Attorney General confesses error, th[e] court will examine the record, and, if the confession is sustained thereby and is well founded in law, the conviction will be reversed” (syllabus by the court)); [Dorsett v. State](#), 16 Okla.Crim. 65, 69, 180 P. 557, 558 (1919) (reversing conviction because “the confession of error [of the attorney general] is well founded” in law); [Whittemore v. State](#), 26 Okla.Crim. 338, 223 P. 890 (1924) (same); [Day v. State](#), 352 P.2d 935 (OCCA 1960) (“Where the Attorney General confesses error, Court of Criminal Appeals will examine the record, and, if confession is sustained thereby, and is well founded in law, conviction will be reversed” (syllabus by the court)); [Casey v. State](#), 440 P.2d 208, 209 (OCCA 1968) (“When the Attorney General confesses error, this Court will carefully examine the record for fundamental error”); [McConnell v. State](#), 485 P.2d 764, 765 (OCCA 1971) (similar); [One Ford Touring Car v. State](#), 100 Okla. 267, 268, 229 P. 231, 232 (1924) (establishing identical rule in civil forfeiture context).

- 7 The PCPA would not stand in the way of a reversal under this rule because it is not a jurisdictional bar. See [Valdez v. State](#), 2002 OKCR 20, ¶¶24–28, 46 P.3d 703, 710.
- 8 The dissent claims Sneed instead repeated his prior false statement that he had been given the lithium after having his tooth pulled. See *post*, at 641 – 642, 642 – 643, n. 3, 649, n. 6, 658 – 659. Yet the dissent's only source for this theory, Smothermon's co-counsel Gary Ackley, acknowledged under oath that he knew lithium was not a pain medication, 3 App. 940, meaning he would have known this story, too, to be wrong. In any event, even if the prosecution did believe Sneed had been given lithium for a toothache, that still would have put them on notice that Sneed's testimony at trial (about receiving lithium after asking for cold medication) was false.
- 9 The dissent's attempts to minimize these issues are unpersuasive. Sneed's letter inquiring about “ ‘the choice of recanting my testimony,’ ” 3 App. 815, disproves the dissent's assertion that “there is no evidence Sneed wished to ‘recant’ his testimony.” *Post*, at 653. That Glossip recalled receiving only \$490 for his possessions during his first trial does not absolve the prosecution from its ordinary duty to disclose inconsistent statements by its witnesses. *Contra, post*, at 653 – 654. The State's conceded sequestration violation also is not merely an insignificant state-law issue, *ibid.*; like any other attorney, a prosecutor may not seek to influence the content of a witness's testimony. See, e.g., [Geders v. United States](#), 425 U.S. 80, 90, n. 3, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (“An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it”). The dissent labors to discredit certain “handwritten notes” on which neither Glossip nor this Court relies, see *post*, at 653, n. 8, but Smothermon undisputedly wrote to Sneed's counsel that she needed to “get to” him “to discuss” his problematic testimony about the knife. 3 App. 953. The next day, Sneed's testimony corrected the very problem raised by Smothermon's letter. Smothermon nonetheless disclaimed any knowledge of Sneed's change in testimony when Glossip objected. 12 Tr. 107–108 (May 26, 2004). Finally, not even the original prosecutors dispute that the police destroyed key evidence before Glossip's retrial; the dissent nonetheless dismisses that claim, undisputed for over two decades, as this Court's “own creation.” *Post*, at 653.
- 10 The dissent also argues Sneed's lithium use was immaterial because “the defense chose not to turn” it “into an impeachment issue,” *post*, at 650, but each premise in that argument is mistaken. First, the defense did not choose “not to raise Sneed's mental condition,” *ibid.*; they asked him about it in cross-examination and Sneed repeated his false testimony. See 13 Tr. 15 (May 27, 2004). Second, the defense did not know during trial that Sneed had been diagnosed with [bipolar disorder](#); to the contrary, Glossip later sought (and the State successfully opposed) discovery on that issue. 2 App. 621–622. Third, even if the defense had made a conscious choice not to raise the (then-uncertain) reasons for Sneed's lithium use, that would be irrelevant to the prosecution's duty to correct false testimony “when it appears.” [Napue](#), 360 U.S. at 269, 79 S.Ct. 1173.
- 11 The dissent would order a hearing to provide “the Van Treese family [with] the opportunity to present its case.” *Post*, at 659 (opinion of THOMAS, J.). The family has not requested an evidentiary hearing (or participation in one) at any stage before the OCCA and does not request that relief before this Court. Nor has the OCCA ever extended Oklahoma victims' right to participate in criminal proceedings to state post-conviction hearings. *Cf. post*, at 658 – 659. The request to do so here is the dissent's alone. In any event, this Court does not “cast aside the family's interests,” on procedural or any other grounds. *Post*, at 659. For the reasons already explained, considering the evidence submitted by the family would not change the outcome. See *supra*, at 631 – 632.
- 1 The Court suggests that this shortcut is appropriate because Glossip, the attorney general, the Court-appointed *amicus*, and the OCCA “unanimously agree” that the record is sufficiently developed. *Ante*, at 631 – 632. I do not think that this assertion fairly captures the views of either the *amicus* or the OCCA. When asked whether he “object[ed] to an evidentiary hearing,” *amicus*—whom we appointed to defend the judgment below in *this* Court—expressed doubt that he “ha[d] standing to object to an evidentiary hearing.” Tr. of Oral

Arg. 107–108. When pushed on the point, he responded that the current record supports affirmance “based on the evidence that [Glossip has] chosen to present and particularly given that he’s now told you *he* wants the case decided on the current record [and] without an evidentiary hearing.” *Id.*, at 109 (emphasis added). In other words, *amicus* simply stated that the current record did not support Glossip’s claim—not that the record was in any objective sense already fully developed. Moreover, the question here is not only whether further factual development is warranted, but also which court should find facts in the first instance. *Amicus* certainly did not concede that this Court, rather than the OCCA, should play that role on this record. As for the OCCA, its lack of explanation of the facts cannot be divorced from its erroneous view of *Napue*. Nothing in its opinion indicates what it would make of this record evidence if it confronted the relevant questions under *Napue*.

1 Despite its consistent theme that Sneed’s testimony is too implausible to sustain Glossip’s conviction, the majority feels the need to bolster its account by finding “inconsisten[cies]” in his testimony that are not genuine. *Ante*, at 620, n. 1. There is no contradiction in Sneed’s claims that he committed the murder as part of a robbery and that he did so to avoid being “ ‘evicted if Glossip lost his job.’ ” *Ibid*. At both of Glossip’s trials, Sneed consistently testified that Glossip proposed taking the cash Van Treese had with him *and* that Glossip told him that they would get evicted if he did not kill Van Treese. 12 Tr. 95–96, 98, 124 (May 26, 2004); 6 Tr. 89–90, 95–96 (June 8, 1998). Contemporaneous evidence supports both motivations. In his confession to police, Sneed stated that Glossip had proposed killing Van Treese and taking the cash that Van Treese had with him. 2 App. 675. And, two days after the murder, Glossip told police that Sneed had committed the murder in part because “[h]e thought Barry [Van Treese] was going to throw him out in the street.” Tr. of Glossip Police Interview 13 (Jan. 9, 1997). Nor did Sneed ever claim that “he did not know why Glossip wanted him to kill Van Treese.” *Ante*, at 620, n. 1. He testified only that he did not know “why Mr. Glossip wanted to kill Mr. Van Treese *on this particular night*,” because “[e]very time that Mr. Van Treese showed up, [Glossip] was wanting me to kill him.” 6 Tr. 89 (June 8, 1998) (emphasis added). As noted, Sneed clearly testified at the same trial that Glossip wanted Sneed to kill Van Treese so that they would not be evicted. *Id.*, at 90.

2 The majority points to a letter from Sneed to his attorney in which Sneed raised the prospect of “ ‘ ‘recanting’ ’ ” his trial testimony. *Ante*, at 621 – 622 (quoting 3 App. 815). But, in two subsequent interviews with Reed Smith attorneys, Sneed made clear that, although he wanted to avoid testifying again if possible, he continued to stand by the truth of his earlier testimony:

“[Reed Smith attorney]: Yeah. Well, I think the bottom line here, the most important things that we needed to clarify was like when you’re talking about recanting, you’re not talking about changing your story about what happened. Have you ever indicated to anybody that you ever wanted to change your story about what happened?”

“JUSTIN SNEED: No, sir. I have not ever indicated that I wanted to change the truth of him applying pressure to me.” App. to Response to Petitioner’s Succ. Application for Post-Conviction Relief in No. PCD–2022–819 (OCCA), Tr. of Sneed Reed Smith Interview 46–47 (Aug. 15, 2022).

See also *id.*, Tr. of Sneed Reed Smith Interview 24 (Sept. 7, 2022) (“There isn’t any way of really making up some [new] storyline that isn’t going to cover all the evidence that is already there ...”). Sneed has never on any occasion indicated that his testimony that Glossip directed him to kill Van Treese was false, see 3 App. 724–725, and the majority cites no such occasion. The best explanation for Sneed’s letter, and the one that the OCCA credited as factual, is thus that Sneed, an eighth-grade dropout, used the phrase “recanting my testimony” imprecisely to mean “refuse to testify.” *Id.*, at 725, 776.

3 According to Smothermon, her notes reflect two visits (“2X”) by defense representatives—with notes about the two visits separated by a horizontal line. According to the notes above the line, Sneed’s first visitors were “women,” one of whom was an investigator (“invest.”) who may have been heavy set (“heavy set?”). These visitors may have been involved in Glossip’s earlier direct “appeal.” These women asked Sneed whether he

was “on Lithium?” and about a “Dr Trumpet?” The notes also document a discussion of a “waiver for records,” “IQ test,” and “GED VoTech.” Similarly, Ackley’s notes record that the “W[itness] [i.e., Sneed] was visited by 2 women who said they rep Glossip.” They were “heavy,” “1 ‘Inv.’ & 1 ‘Atty.’” who may have been on Sneed’s “Appellate” team. These two women asked Sneed about lithium (“Li”), and he responded with something about getting his “tooth pulled.” Brief for Victim Family Members as *Amici Curiae* 9–12.

These notes correspond to Sneed’s 2001 meeting with Wyndi Hobbs (Glossip’s post-conviction counsel) and an investigator named Lisa Cooper, which was documented in the record of Glossip’s fourth postconviction application. See 3 App. 729–730. At this meeting, Sneed “ ‘signed releases for juvenile, jail, prison and criminal records,’ ” *id.*, at 729, which corresponds to the “waiver for records” mentioned in Smothermon’s notes. Sneed later wrote a letter to Cooper to ensure that she received information about his participation in a “vo-tech program,” *id.*, at 730, which corresponds to the reference to “GED VoTech.”

According to Smothermon’s notes below the line, Sneed’s second visit was from a “man” named “Burch” who tried to “con [him] out” of giving “testimony” against Glossip. Burch “gave [Sneed a] case.” Ackley’s notes likewise indicate that Sneed “[l]ater” met with “1 guy” named “Burch.” Sneed said of the meeting, “ ‘Basically all he was trying to do was con me out of not [sic] getting onto the stand.’ ” Brief for Victim Family Members as *Amici Curiae* 9–13 (alteration in original).

The filings from Glossip’s fourth application also recount that Lynne Burch, one of Glossip’s attorneys, met with Sneed after the OCCA vacated Glossip’s first conviction. 3 App. 731. Burch told Sneed “ ‘he didn’t have to testify’ ” in Glossip’s second trial, and (in line with Smothermon’s notes) gave Sneed a case, *Dyer v. State*, 2001 OKCR 31, 34 P.3d 652, holding that the State could not renege on a plea agreement for refusing to testify at a codefendant’s second trial. 3 App. 731–732.

- 4 The majority insists that Smothermon had a fair opportunity to explain her notes because she met once with attorneys at the Reed Smith law firm and had an earlier, longer phone call with Duncan. *Ante*, at 631 – 632. But, the Reed Smith meeting occurred before the release of Box 8. See Reed Smith Report 80, n. 321 (noting that the Reed Smith meeting occurred in May 2022, eight months before Box 8 was released in January 2023). And—by his own admission—Duncan “forgot to ask” Smothermon about “Dr. Larry Trombka” during his earlier, longer phone call. App. to Brief for Victim Family Members as *Amici Curiae* 32a. The majority also faults Smothermon for not having an explanation ready during the 3-minute phone call. *Ante*, at 631 – 632. But, without giving Smothermon an opportunity to review the notes, it was unreasonable to expect her instantaneously to recall their meaning 20 years later.
- 5 The majority claims that the OCCA could not have meant to rely on § 1089(D) because the State “expressly attempted to waive” the requirements of that provision. *Ante*, at 626. The State did no such thing. In its response to Glossip’s application, the State of Oklahoma contended that, “[t]o obtain post-conviction relief, Glossip needs to show” he satisfies the PCPA. 3 App. 976 (citing § 1089(C)). It then offered an *argument* that Glossip had satisfied the PCPA’s requirements. *Id.*, at 976–978. Such an argument is distinct from a “waiver,” which “is the voluntary and intentional relinquishment of a known right.” *Price v. Zhang*, 2022 OK 95, ¶19, 521 P.3d 795, 799–800. Regardless, even if the State had purported to waive § 1089(D), the OCCA nonetheless explicitly applied it. 529 P.3d at 226 (citing § 1089(D)(8)). Perhaps the majority thinks that ruling is too harsh—even though AEDPA’s analogous limitations on successive federal habeas petitions are often, if not always, unwaivable. See *Burton v. Stewart*, 549 U.S. 147, 157, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007) (*per curiam*). But, the *harshness* of such a ruling would not make it any less *independent* of federal law.
- 6 Because the OCCA did not address whether the prosecutors knew that Sneed’s testimony was false, our review of the knowledge element is especially improper. The rule that “we are a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005), applies with special force to such a fact-intensive question. The OCCA, which has resolved two direct appeals and five

post-conviction applications over two decades of appeals in this case, is far more steeped in the relevant facts than this Court. And, it is at least entitled to apply Oklahoma's reticulated post-conviction evidentiary standards in the first instance. See [Okla. Stat., Tit. 22, § 1089\(D\)\(4\)\(a\)\(1\)](#); OCCA Rule 9.7(D) (2024). The majority's analysis well illustrates our comparative disadvantage, as it overreads silence and ignores explicit contrary evidence in an effort to leap across its inferential gaps. For example, Smothermon's notes say nothing about [bipolar disorder](#) or psychiatry. So, even if Sneed said Dr. Trombka prescribed the lithium, that is no justification for inferring that he communicated the reason for the prescription or the fact that Dr. Trombka is a psychiatrist. Further, we cannot assume that Smothermon already knew who Dr. Trombka was at the time of the meeting. In fact, the evidence suggests the opposite; Smothermon clearly did not understand to whom Sneed was referring given that she mistook his name for "Trumpet?" See Figure 1, *supra*. Finally, the Court overlooks the affidavit submitted by *Glossip* from Gary Ackley. It attests that, according to Ackley's contemporaneous notes of the meeting, Sneed said something about his "tooth" being "pulled," 3 App. 940, which is how he said he was mistakenly prescribed [lithium](#) in Dr. King's report, see 2 *id.*, at 700. Ackley also did "not recall knowing or discussing with anyone that Justin Sneed was on [lithium](#) at any time as treatment for [bipolar disorder](#)." 3 *id.*, at 940.

The majority dismisses the significance of Sneed's "tooth pulled" comment on the ground that Ackley "knew [lithium](#) was not a pain medication." *Ante*, at 627 – 628, n. 8. But, whether or not Sneed *in fact* received [lithium](#) in connection with his tooth being pulled, the fact that Sneed *said* something to that effect strongly undermines the supposedly "straightforward inference ... that Sneed told Smothermon that Dr. Trombka had prescribed him the [lithium](#)." *Ante*, at 627. Sneed's disputed testimony is not that he received [lithium](#) to treat a toothache; it is that he had "never seen" a psychiatrist and did not "know why" he was given [lithium](#). 12 Tr. 64 (May 26, 2004).

- 7 The full context of [Napue](#)'s materiality discussion further underscores the decision's emphasis on the content of the false testimony rather than the effect of a counterfactual correction:

"Had the jury been apprised of the true facts, however, it might well have concluded that Hamer [the witness] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration. That the Assistant State's Attorney himself thought it important to establish before the jury that no official source had promised Hamer consideration is made clear by his redirect examination, which was the last testimony of Hamer's heard by the jury:

....

"[O]ur own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." 360 U.S. at 270–272, 79 S.Ct. 1173.

- 8 The majority insists that the alleged violation of the rule of sequestration is more than a state-law issue, *ante*, at 629 – 630, n. 9, but for support it offers only a case discussing "the ethical limits on guiding witnesses" as defined by the American Bar Association's model professional responsibility code for States, see [Geders v. United States](#), 425 U.S. 80, 90, and n. 3, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). Moreover, although the State has confessed a violation of "the rule of sequestration" (without addressing the OCCA's earlier, contrary decision, see *supra*, at 640 – 641), it has *not* conceded that Smothermon improperly influenced Sneed's testimony, see Brief for Respondent 13; 3 App. 978. Such a claim is utterly unsupported. *Glossip* initially based this accusation on "handwritten notes" found in a copy of Smothermon's letter to Sneed's attorney, which *Glossip* claimed were instructions from Smothermon on what Sneed was to say at trial. See Pet. for Cert. in No. 22–6500, p. 20. But, *Glossip* now concedes that those notes came from Sneed's attorney, not

Smothermon. Brief for Petitioner 13, n. 4. Despite this concession, the majority asserts that Smothermon acted improperly when she stated at trial that, although she had spoken with Sneed's attorney, she had never before heard him claim that he had attempted to stab Van Treese in the chest. *Ante*, at 629 – 630, n. 9 (citing 12 Tr. 107–108 (May 26, 2004)). The majority offers no evidence to suggest that this statement was false. Yet, it insists on deeming Smothermon's conduct a serious ethical breach.

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GORSUCH, J., dissenting

SUPREME COURT OF THE UNITED STATES

MICHAEL BASSEM RIMLAWI

24–23

v.

UNITED STATES

MRUGESHKUMAR KUMAR SHAH

24–25

v.

UNITED STATES

JACKSON JACOB

24–5032

v.

UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 24–23, 24–25 and 24–5032. Decided February 24, 2025

The petitions for writs of certiorari are denied.

JUSTICE GORSUCH, dissenting from the denial of certiorari.

The Fifth Circuit held that a judge may order restitution in a criminal case based on his own factual findings, without the aid of a jury. 95 F. 4th 328, 389 (2024). About that, I have my doubts. See *Hester v. United States*, 586 U. S. 1104, 1106–1107 (2019) (GORSUCH, J., dissenting from denial of certiorari).

Consistent with the Sixth Amendment’s promise of a trial by jury, this Court has held that “[o]nly a jury may find ‘facts that increase the prescribed range of penalties to which a criminal defendant is exposed.’” *Erlinger v. United States*, 602 U. S. 821, 833 (2024) (quoting *Apprendi v. New Jersey*, 530 U. S. 466, 490 (2000)). That means a jury must find both those facts that increase a criminal defendant’s exposure to imprisonment and any facts that increase his

GORSUCH, J., dissenting

exposure to monetary fines. See *Southern Union Co. v. United States*, 567 U. S. 343 (2012). If all that is true, it is difficult to see how a judge’s factual findings might suffice to increase a criminal defendant’s exposure to a restitution award. As this Court has recognized, “the scope of the constitutional jury right must be informed by the historical role of the jury at common law.” *Id.*, at 353 (internal quotation marks omitted). And more than a little evidence suggests that, at the time of the founding, juries found the facts needed to justify criminal restitution awards. See *Hester*, 586 U. S., at 1107 (opinion of GORSUCH, J.); see also *Apprendi*, 530 U. S., at 502 (THOMAS, J., concurring); Pet. for Cert. 10–12.

I would have granted review in this case to resolve whether the Fifth Circuit’s decision comports with this Court’s precedents and the Constitution’s original meaning. In the absence of this Court’s review, I can only hope that federal and state courts will continue to consider carefully the Sixth Amendment’s application to criminal restitution orders. Cf. *State v. Davison*, 973 N. W. 2d 276, 279 (Iowa 2022) (“restitution must be based on jury findings”). The right to trial by jury should mean no less today than it did at the Nation’s founding. See *Hester*, 586 U. S., at 1107 (opinion of GORSUCH, J.).

145 S.Ct. 821

Supreme Court of the United States.

Patrick D. THOMPSON, Petitioner

v.

UNITED STATES

No. 23-1095

|

Argued January 14, 2025

|

Decided March 21, 2025

Synopsis

Background: Defendant, who had taken out three loans totaling \$219,000 from a bank that later failed, was convicted in the United States District Court for the Northern District of Illinois, [Franklin U. Valderrama](#), J., of knowingly making any false statement or report for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation (FDIC) upon any loan, for telling the FDIC, as it attempted to collect the bank's outstanding loans, that he had borrowed \$110,000 from the bank, the amount of his first loan. Following the denial of his motion for a judgment of acquittal or a new trial, in which he maintained that his statements were misleading but not false, [2022 WL 1908896](#), defendant appealed. The United States Court of Appeals for the Seventh Circuit, [Pryor](#), Circuit Judge, [89 F.4th 1010](#), affirmed. Certiorari was granted.

[Holding:] In a unanimous opinion, the Supreme Court, Chief Justice [Roberts](#), held that statute prohibiting making false statements to FDIC does not criminalize statements that are misleading but not false; abrogating [United States v. Freed](#), [921 F.3d 716](#).

Vacated and remanded.

Justice Alito filed a concurring opinion.

Justice Jackson filed a concurring opinion.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

West Headnotes (8)

[1] **Finance, Banking, and Credit** 🔑 False applications for loans or credit

Statute prohibiting knowingly making any false statement or report for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation (FDIC) upon any loan could reach some statements that are misleading, deceitful, deceptive, or mendacious, but only because those particular statements are also false. [18 U.S.C.A. § 1014](#).

[More cases on this issue](#)

[2] **Finance, Banking, and Credit** 🔑 False applications for loans or credit

The only relevant question according to the text of the statute prohibiting knowingly making any false statement or report for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation (FDIC) upon any loan is whether the statement is “false.” [18 U.S.C.A. § 1014](#).

[More cases on this issue](#)

[3] **Finance, Banking, and Credit** 🔑 False applications for loans or credit

A conviction under statute prohibiting knowingly making any false statement or report for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation (FDIC) upon any loan requires at least two things: (1) the defendant made a statement, and (2) that statement can be characterized as false and not true. [18 U.S.C.A. § 1014](#).

[More cases on this issue](#)

[4] **Finance, Banking, and Credit** 🔑 False applications for loans or credit

If a material omission renders a statement misleading, the statute prohibiting knowingly making any false statement or report for the

purpose of influencing in any way the action of the Federal Deposit Insurance Corporation (FDIC) upon any loan does not cover that statement unless it can be characterized as false and not true; a statement that is true but misleading does not fit the bill. 18 U.S.C.A. § 1014.

[More cases on this issue](#)

[5] **Fraud** 🔑 [Offenses in general](#)

A statute that criminalizes “false” statements also criminalizes statements that are both false and misleading, or false statements made with intent to mislead.

[1 Case that cites this headnote](#)

[More cases on this issue](#)

[6] **Finance, Banking, and Credit** 🔑 [False applications for loans or credit](#)

Statute prohibiting knowingly making any false statement or report for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation (FDIC) upon any loan does not criminalize statements that are misleading but not false; false and misleading are two different things, as a misleading statement can be true, but a true statement is obviously not false; abrogating *United States v. Freed*, 921 F.3d 716. 18 U.S.C.A. § 1014.

[1 Case that cites this headnote](#)

[More cases on this issue](#)

[7] **Federal Courts** 🔑 [Presentation of Questions Below or on Review; Record; Waiver](#)

The Supreme Court is a court of review, not of first view.

[8] **Finance, Banking, and Credit** 🔑 [False applications for loans or credit](#)

At least some context is relevant to determining whether a statement is false under statute prohibiting knowingly making any false statement or report for the purpose of influencing in any way the action of the Federal Deposit

Insurance Corporation (FDIC) upon any loan. 18 U.S.C.A. § 1014.

[More cases on this issue](#)

***822** *Syllabus* *

Patrick Thompson took out three loans totaling \$219,000 from one bank. After the bank failed, the Federal Deposit Insurance Corporation (FDIC) became responsible for collecting the outstanding loans. During a call with the FDIC's loan servicer, Thompson disputed the \$269,120.58 balance shown on his invoice (which consisted of the \$219,000 Thompson had borrowed plus interest), stating that he had “no idea where the 269 number comes from” and that he “borrowed ... \$110,000.” Thompson made similar statements in a later call with FDIC contractors. Thompson was later charged with violating 18 U.S.C. § 1014, which prohibits “knowingly mak[ing] any false statement” to influence the FDIC's action on any loan. A jury found Thompson guilty, and he moved for acquittal, arguing that his statements were not false because he had in fact borrowed \$110,000, even though he later borrowed more. The courts below concluded that they did not need to reach that argument because they read § 1014 to also criminalize misleading statements, and Thompson's statements were at least misleading.

Held: Section 1014, which prohibits “knowingly mak[ing] any false statement,” does not criminalize statements that are misleading but not false. Pp. 825 - 829.

(a) The statutory text criminalizes “false statement[s]” but does not use the word “misleading.” False and misleading are two different things. A misleading statement can be true, and a true statement is not false. Given that, it is significant that the statute uses only the word “false,” which means “not true.” Adding “any” before “false statement” does not transform the scope of the statute. A statute that applies to “any false statement” does not cover all misleading statements, only the “false” ones. While the Government argues that “false” and “misleading” have long been considered synonyms, the overlap between false statements and misleading ones is beside the point. The only relevant question under the text of § 1014 is whether the statement—even if misleading, deceitful, or some other adjective—is also “false.” Pp. 825 - 827.

(b) Statutory context confirms that § 1014 does not cover all misleading statements. Many other statutes, including other criminal statutes in Title 18, expressly prohibit both “false” and “misleading” statements. Interpreting “false” in § 1014 to include “misleading” would make the inclusion of “misleading” in those statutes superfluous. Further, when § 1014 was enacted in 1948, none of the 11 predecessor provisions consolidated into § 1014 used the word “misleading,” while many other statutes from the same period used the phrase “false or misleading.” Historical context thus confirms that when Congress intended to cover all misleading statements, “it knew how to do so.” *Custis v. United States*, 511 U.S. 485, 492, 114 S.Ct. 1732, 128 L.Ed.2d 517. Pp. 826 - 827.

(c) Precedent supports the Court's reading of § 1014. In *United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107, the Court held that § 1014 does not incorporate a materiality requirement because the statute does not “so much as mention materiality,” whereas many other statutes do. *Id.*, at 490, 492, 117 S.Ct. 921. The same logic suggests that § 1014 does not reach all misleading statements. In *Williams v. United States*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767, the Court reversed a conviction under § 1014 for depositing several bad checks, on the basis that the defendant's conduct “did not involve the making of a ‘false statement’ ” because “a check is not a factual assertion at all, and therefore cannot be characterized as ‘true’ or ‘false.’ ” *Id.*, at 284, 102 S.Ct. 3088. That logic shows that a conviction under § 1014 requires at least two things: (1) the defendant made a statement, and (2) that statement can be characterized as “false” and not “true.” Section 1014 does not cover a statement rendered misleading by virtue of a material omission unless that statement can be characterized as “false” and not “true.” Finally, the Court's decision in *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607, does not support the Government, as *Kay* did not suggest that misleading statements were independently unlawful under § 1014's predecessor. Pp. 828 - 829.

(d) The right question under § 1014 is whether Thompson's statements were false, and the Court agrees that at least some context is relevant to that determination. The Court remands for the Seventh Circuit to determine whether a reasonable jury could find that Thompson's statements were false. Pp. ———.

89 F.4th 1010, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court. ALITO, J., and JACKSON, J., filed concurring opinions.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

*824 Patrick Thompson took out three loans totaling \$219,000 from the same bank. Later, Thompson told the Federal Deposit Insurance Corporation (FDIC) that he had “borrowed ... \$110,000” from the bank. Thompson was indicted under 18 U.S.C. § 1014 for making “false statement[s]” to the FDIC. Thompson argued that his statements were not false because he had in fact taken out a loan for \$110,000 just as he said. Both the District Court and the Seventh Circuit held that they did not need to consider that argument. In their view, the prohibition in § 1014 against “false statement[s]” extends to misleading ones as well, and Thompson's statements were at least misleading in failing to mention the additional loans. The question presented is whether § 1014 criminalizes statements that are misleading but not false.

I

A

Between 2011 and 2014, Patrick Thompson took out three loans from the Washington Federal Bank for Savings. Thompson first borrowed \$110,000 in 2011 to make an equity contribution to a law firm. Thompson then borrowed \$20,000 from the Bank in 2013 and another \$89,000 in 2014, resulting in a total loan balance of \$219,000. In 2017, the Bank failed, and the FDIC became responsible for collecting the Bank's

outstanding loans. As part of that process, the FDIC's loan servicer—Planet Home Lending—sent Thompson an invoice in February 2018 listing a balance due of \$269,120.58, which consisted of the \$219,000 Thompson had borrowed plus interest.

On February 23, 2018, Thompson called the customer service line of Planet Home Lending. During the call, which was recorded, Thompson told the customer service agent that he had “no idea where the 269 number comes from.” App. 52. Thompson said, “I borrowed the money, I owe the money—but I borrowed ... I think it was \$110,000.” *Id.*, at 56. Thompson agreed with the agent that he was claiming a “discrepancy,” and said that he was “disput[ing]” the balance listed on the invoice. *Id.*, at 53, 61. The agent told Thompson that Planet Home Lending would research the issue. *Id.*, at 62.

On March 1, 2018, Thompson received a call from two FDIC contractors. The call was not recorded, but the contractors took notes. According to those notes, Thompson mentioned borrowing \$110,000 for “home improvement.” *Id.*, at 138.

Thompson and the FDIC ultimately agreed to settle Thompson's debt for *825 \$219,000—the principal amount of his loans.

B

Thompson was later charged with two counts of violating 18 U.S.C. § 1014. That statute prohibits “knowingly mak[ing] any false statement or report ... for the purpose of influencing in any way the action of ... the Federal Deposit Insurance Corporation ... upon any ... loan.” Count one of the indictment alleged that on the February 23 phone call, Thompson “falsely stated he only owed ... \$110,000 to [the Bank] and that any higher amount was incorrect, when [he] then knew he had received \$219,000.” App. 4. Count two alleged that on the March 1 phone call, Thompson “falsely stated that he only owed \$110,000 to [the Bank], that any higher amount was incorrect, and that these funds were for home improvement, when [he] then knew he had received \$219,000 from [the Bank] and the \$110,000 was paid to a law firm as [his] capital contribution.” *Id.*, at 5.

The jury found Thompson guilty on both counts. He moved for acquittal or a new trial, arguing that a “conviction for false statements cannot be sustained where, as here, the alleged statements are literally true, even if misleading.” Defendant's

Post-Trial Motion for Judgment of Acquittal and for New Trial in No. 1:21-cr-00279 (ND Ill., Mar. 17, 2022), ECF Doc. 154, p. 7. Thompson argued that his statements about borrowing \$110,000 were literally true because he had in fact borrowed that amount of money from the Bank, even though he later borrowed more. *Id.*, at 10–11.¹

The District Court denied Thompson's motion. It found that “the Seventh Circuit does not require literal falsity in Section 1014 cases.” App. to Pet. for Cert. 52a (citing *United States v. Freed*, 921 F.3d 716, 723 (C.A.7 2019)). The District Court acknowledged that “Thompson's argument would have more traction” in the Sixth Circuit, where “a Section 1014 conviction cannot rest on material omissions or implied misrepresentations.” App. to Pet. for Cert. 52a (citing *United States v. Kurlemann*, 736 F.3d 439 (C.A.6 2013)). But the District Court concluded that Thompson had “failed to direct the Court to a Supreme Court case or Seventh Circuit case that holds that a Section 1014 conviction requires a literally false statement.” App. to Pet. for Cert. 52a. The District Court therefore found it unnecessary to “address the Government's argument that Thompson's statements were literally false,” because “literal falsity is not required to sustain a Section 1014 conviction.” *Id.*, at 56a.

The Seventh Circuit affirmed. Like the District Court, the Seventh Circuit concluded that it “need not decide whether Thompson's statements were literally true because his argument runs headfirst into [Seventh Circuit] precedent.” 89 F.4th 1010, 1016 (2024). According to the panel, the Seventh Circuit had “already decided [in *Freed*] that § 1014 criminalizes misleading representations.” *Ibid.* The panel found that Thompson's statements were misleading because “the implication of his statements was that he owed [the Bank] no more than \$110,000.” *Id.*, at 1017. The panel acknowledged the Sixth Circuit's contrary holding in *United States v. Kurlemann*, 736 F.3d 439, but it concluded that it was bound by Seventh Circuit precedent. 89 F.4th at 1017–1018.

We granted certiorari to determine whether § 1014 criminalizes statements *826 that are misleading but not false. 603 U.S. —, 145 S.Ct. 116, — L.Ed.2d — (2024).

II

A

We start with the text. Section 1014 criminalizes “knowingly mak[ing] any false statement or report.” It does not use the word “misleading.” Yet false and misleading are two different things. A misleading statement can be true. See *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91, 102, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) (noting that a “statement, even if true, could be misleading”). And a true statement is obviously not false. See *Victor v. Nebraska*, 511 U.S. 1, 10, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (“[T]o suppose that the same proposition is both true and false ... is manifestly absurd.” (quoting 1 Works of James Wilson 519 (J. Andrews ed. 1896))). So basic logic dictates that at least some misleading statements are not false.

The Government agrees with this principle, and even suggested an example at oral argument: If a tennis player says she “won the championship” when her opponent forfeited, her statement—even if true—might be misleading because it could lead people to think she had won a contested match. Tr. of Oral Arg. 69. The Government also agreed at oral argument with another example: If a doctor tells a patient, “I’ve done a hundred of these surgeries,” when 99 of those patients died, the statement—even if true—would be misleading because it might lead people to think those surgeries were successful. *Id.*, at 71.

Given that some misleading statements are also true, it is significant that the statute uses only the word “false.” If that word means anything, it means “not true,” both today and in 1948 when the statute was enacted. Black’s Law Dictionary 742 (12th ed. 2024) (“Untrue <a false statement>”); *id.*, at 721 (4th ed. 1951) (“Not true”). Just as a matter of plain text, then, a statement that is misleading but true is by definition not a “false statement.”

Adding “any” before “false statement” does not change that result. Contra, Brief for United States 19–20. Certainly, “any” has an “expansive meaning.” *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997)). But “[e]xpansive, yes; transformative, no.” *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635, 132 S.Ct. 2034, 182 L.Ed.2d 955 (2012). A statute that applies to “any Ford owner” does not cover all car owners, because the car must still be a Ford. So too a statute that applies to “any false statement” does not cover all misleading statements, because the statement must still be false. See *Brogan v. United States*, 522 U.S. 398, 400, 118 S.Ct. 805, 139 L.Ed.2d 830 (1998)

(defining “ ‘any’ false statement” as “a *false* statement ‘of whatever kind’ ” (quoting *Gonzales*, 520 U.S., at 5, 117 S.Ct. 1032; emphasis added)).

[1] [2] The Government wisely agrees that “false” means “not true.” Brief for United States 14. But, dictionary in hand, the Government notes that “false” can also mean “deceitful.” *Id.*, at 15 (quoting Black’s Law Dictionary 748 (3d ed. 1933); alterations omitted). And, thesaurus in the other hand, the Government adds that “false and misleading have long been considered synonyms.” Brief for United States 26 (citing Webster’s Dictionary of Synonyms 327, 549–550 (1942)). Absent from the Government’s account, however, is the fact that some misleading statements are not false, as the Government acknowledged at oral argument. Tr. of *827 Oral Arg. 68. Given that fact, the Government’s textual arguments simply point out the “substantial overlap” between the two terms. Brief for United States 26. That overlap is beside the point. Certainly, the statute’s prohibition on “false statement[s]” could reach *some* statements that are “mislead[ing],” “deceitful,” “deceptive,” or “mendacious,” *id.*, at 15, but only because those particular statements are *also* false. Regardless of whether other adjectives apply, the only relevant question according to the text of the statute is whether the statement is “false.”

B

Statutory context confirms that § 1014 does not cover all misleading statements. Again, the statute uses the word “false.” It does not use “misleading.” Many other statutes do, including other criminal statutes in Title 18 of the U. S. Code. See, e.g., 18 U.S.C. § 1038(a) (“convey false or misleading information”); § 1365(b) (“renders materially false or misleading the labeling of ... a consumer product”); § 1515(b) (“making a false or misleading statement”); see also Securities Act of 1933, 48 Stat. 84–85, as amended, 15 U.S.C. § 77q(a)(2) (prohibiting obtaining property through “any untrue statement of a material fact” or “any omission” that renders a statement “misleading”). Interpreting the word “false” to include “misleading” would make the inclusion of “misleading” in those statutes superfluous. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.”).

Context from the time of enactment of § 1014 further confirms that the statute does not reach all misleading

statements. As we explained in a previous case, “Congress originally enacted § 1014 as part of its recodification of the federal criminal code in 1948.” *United States v. Wells*, 519 U.S. 482, 492, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). Eleven of the thirteen provisions brought together by § 1014 prohibited “false” statements, and none used the word “misleading,” see 7 U.S.C. §§ 1026(a), 1514(a) (1946 ed.); 12 U.S.C. §§ 596, 981, 1122, 1138d(a), 1248, 1312, 1441(a), 1467(a) (1946 ed.); 15 U.S.C. § 616(a) (1946 ed.). These predecessor statutes were all enacted in the decades prior to 1948. Many other statutes enacted in the same period used the phrase “false or misleading.” See, e.g., Perishable Agricultural Commodities Act, 1930, § 2(4), 46 Stat. 532; Public Utility Act of 1935, § 16(a), 49 Stat. 829; Federal Food, Drug, and Cosmetic Act of 1938, § 602(a), 52 Stat. 1054. The language of these other statutes shows that when Congress intended to cover all misleading statements, “it knew how to do so.” *Custis v. United States*, 511 U.S. 485, 492, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).

C

Precedent supports our reading of the text. For example, in *United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107, we held that § 1014 does not incorporate a materiality requirement because the statute does not “so much as mention materiality,” whereas many other statutes do. *Id.*, at 490, 492, 117 S.Ct. 921. The same logic suggests that § 1014 does not reach all misleading statements.

[3] [4] Our decision in *Williams v. United States*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), is also instructive. The defendant in that case deposited several bad checks, then was convicted under § 1014 on the theory that he falsely represented having more money than he had. See *id.*, at 283, 102 S.Ct. 3088. We reversed the conviction because the defendant’s “course of conduct did not involve *828 the making of a ‘false statement’ ” for the “simple reason” that “a check is not a factual assertion at all, and therefore cannot be characterized as ‘true’ or ‘false.’ ” *Id.*, at 284, 102 S.Ct. 3088. That logic shows that a conviction under § 1014 requires at least two things: (1) the defendant made a statement, and (2) that statement can be characterized as “false” and not “true.” The dissent in *Williams* observed that this reasoning “would apply equally to material omissions.” *Id.*, at 296, 102 S.Ct. 3088 (opinion of Marshall, J.). Precisely so. If a material omission renders a statement misleading, § 1014 still does not cover that statement unless it can be characterized as “false”

and not “true.” A statement that is true but misleading does not fit the bill.

[5] [6] The Government contends that one of our precedents points in the opposite direction. In *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607 (1938), this Court described a predecessor statute to § 1014 as “secur[ing] protection against false *and misleading* representations,” even though that statute used only the word “false.” *Id.*, at 7, 58 S.Ct. 468 (emphasis added); see also *id.*, at 3, n. 1, 58 S.Ct. 468. Indeed, as the Government points out, this Court used the word “misleading” (or “mislead”) several times throughout the opinion. *Id.*, at 6, 7, 8, 58 S.Ct. 468. But nearly every time the word appears, it describes a person’s intent while making a false statement, not the statement itself. See *id.*, at 5–6, 58 S.Ct. 468 (“making false statements with intent to mislead”); *id.*, at 6, 58 S.Ct. 468 (“falsely with intent to mislead”); *id.*, at 7, 58 S.Ct. 468 (“false statements designed to mislead”). And in describing the statute as “secur[ing] protections against false and misleading representations,” the Court used the word “and” rather than “or.” *Id.*, at 7, 58 S.Ct. 468; see also *id.*, at 8, 58 S.Ct. 468. *Kay* thus did not suggest that misleading statements were independently unlawful under § 1014’s predecessor. Instead, the Government’s argument about *Kay* again comes down to the overlap between false and misleading. Certainly, a statute that criminalizes “false” statements also criminalizes statements that are both false *and* misleading, or false statements made *with intent* to mislead. But the question before us is whether such a statute also criminalizes statements that are misleading but not false. The answer to that question must be no.

III

[7] [8] The Government argues that we should affirm on the alternative basis that Thompson’s statements *were* false. But neither the District Court nor the Seventh Circuit answered that question, and “we are a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). Our holding shows, however, that this question is the right one to ask under § 1014. And as the litigation before us has clarified, even Thompson agrees that “[c]ontext obviously matters in determining whether a statement is false.” Reply Brief 7. Thompson concedes, for example, that if he “had made his statement in response to a question like ‘did you borrow \$269,000?’ ” then “his statement, in context, would have been false.” *Id.*, at 9. We agree with the parties that at least some context is relevant to

determining whether a statement is false under § 1014. We leave for remand the question whether a reasonable jury could find that Thompson's statements in this case were false.

* * *

In casual conversation, people use many overlapping words to describe shady statements: false, misleading, dishonest, deceptive, literally true, and more. Only one of ***829** those words appears in the statute. Section 1014 does not criminalize statements that are misleading but true. Under the statute, it is not enough that a statement is misleading. It must be “false.”

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

It is so ordered.

Justice ALITO, concurring.

I join the opinion of the Court but write separately to summarize my understanding of the decision. Five aspects of today's decision are most important.

First, the Court holds that 18 U.S.C. § 1014 criminalizes only those statements that are “false.” Other related statutes refer to both “false” and “misleading” statements. But § 1014 does not, so we assume the omission was intentional. See *Rotkiske v. Klemm*, 589 U.S. 8, 14, 140 S.Ct. 355, 205 L.Ed.2d 291 (2019) (“Congress has shown that it knows how to adopt the omitted language”). The decision below, which held that § 1014 applies to merely “misleading representations,” 89 F.4th 1010, 1016 (C.A.7 2024), was therefore erroneous.

Second, as used in § 1014, the term “false” means “not true.” *Ante*, at 826 (internal quotation marks omitted). That is what it means in ordinary speech. See, e.g., Webster's Third New International Dictionary 819 (1976) (“not corresponding to truth or reality: not true”); Random House Dictionary of the English Language 695 (2d ed. 1987) (“not true or correct; erroneous”). Neither party advocates giving “false statement” a specialized or term-of-art reading, and the Court rightly declines to do so. Accordingly, “false statement” in § 1014 bears its ordinary meaning.

Third, in considering whether a statement is “false,” judges and juries must view the statement in “the context in which it is made.” *United States v. Briggs*, 592 U.S. 69, 72, 141

S.Ct. 467, 208 L.Ed.2d 318 (2020). That is how people generally evaluate the truth or falsity of a statement. Cf. *Deal v. United States*, 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (discussing the “fundamental principle ... of language” that “the meaning of a word” or statement “cannot be determined in isolation”). And since § 1014 uses the adjective “false” in the ordinary sense of the term, the same approach applies.

In ordinary speech, we do not regard a statement as true or false based solely on the literal or semantic meaning of its words viewed in isolation. Two examples illustrate this principle. Start with an example adapted from the parties' briefs. See Brief for United States 16; Reply Brief 8–9. After noticing that a plate of 12 fresh-baked cookies has only crumbs remaining, a mother asks her daughter, “Did you eat all the cookies?” If the child says “I ate three” when she actually had all 12, her words would be literally true in isolation but false in context. The child *did* eat three cookies (then nine more). In context, however, the child is implicitly saying that she ate *only* three cookies, and that is false.

Consider another example, adapted from a law-review article by Professor Richard Fallon. See *The Statutory Interpretation Muddle*, 114 Nw. U. L. Rev. 269, 272 (2019). Parents James and Rachel are talking about their teenage son Alex. James enlists Alex to help rake leaves, but Alex is distracted and does little work. Afterwards, James tells Rachel: “As usual, Alex was a big help.” Taken literally, his statement is false. But if James and Rachel have often spoken about Alex's unwillingness to help with household chores, Rachel ***830** would understand that James's statement was ironic and that James actually meant Alex was no help at all. So, in context, James's statement is actually true.

Petitioner readily acknowledges that falsity must be judged in context. See Reply Brief 7–8; Tr. of Oral Arg. 6–7. Courts should keep this important point in mind in future § 1014 cases.

Fourth, as used in ordinary speech, the terms “false” and “misleading” may “overlap.” *Ante*, at 826 – 827. A statement that might in ordinary speech be casually described as “misleading” may actually be misleading *and* false when viewed in context. Because there is no clear line demarcating statements that are false in context from those that are merely misleading, there is no reason why a court should make any reference to misleading statements in a § 1014 case. It was error for the Court of Appeals to hold that § 1014 applies to

“misleading” statements, and it would likewise be wrong for a court to instruct a jury that it must acquit if it finds that a charged statement is misleading. The pattern jury instructions used in the various Circuits avoid this problem, ^{*} and our decision in this case does not necessitate any change.

Finally, the question that the Seventh Circuit must address on remand is narrow. Although the Court of Appeals affirmed petitioner's conviction on the ground that his statements were “misleading,” the trial judge gave no such instruction to the jury. Petitioner did not object to the judge's § 1014 instructions below, and he does not challenge them here. Instead of basing his request for reversal on instructional error, he moved after trial for a judgment of acquittal based on insufficient evidence. See [Fed. Rule Crim. Proc. 29\(c\)](#). Thus, the applicable test on remand is whether, viewing the evidence in the light most favorable to the Government, any rational finder of fact could conclude beyond a reasonable doubt that petitioner's statements were false in context. See [Jackson v. Virginia](#), 443 U.S. 307, 318–319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); [United States v. Armbruster](#), 48 F.4th 527, 531 (C.A.7 2022).

With these observations, I join the Court's opinion.

Justice JACKSON, concurring.

I agree with the Court's conclusion that 18 U.S.C. § 1014 criminalizes only false statements. *Ante*, at 829. I write

separately to note that the pre-verdict instructions the District Court provided to the jury in this case did not say otherwise. That is, while the lower courts may have misunderstood the scope of § 1014, the jury was properly instructed that it could find Thompson guilty only if the prosecution proved beyond a reasonable doubt that Thompson “made the charged false statement[s].” App. 157–158. For count two, the jury specifically found that Thompson made all of the statements alleged. *Id.*, at 160. Moreover, and importantly, the jury was *not* advised that § 1014 “criminalizes misleading representations,” 89 F.4th 1010, 1016 (C.A.7 2024), as was mistakenly required by the Seventh Circuit precedent the Court rejects today.

Thus, in my view, there is little for the Seventh Circuit to do on remand but affirm ^{*}831 the District Court's judgment upholding the jury's guilty verdict. Whether Thompson's statements were, in fact, false is a question for the jury—and here, one the jury has already answered. At most, then, the Seventh Circuit can properly assess whether any reasonable jury could have found that Thompson's statements satisfied § 1014's falsity element. On this record, I think that legal issue is not subject to reasonable debate.

All Citations

604 U.S. ----, 145 S.Ct. 821, 2025 Daily Journal D.A.R. 2472

Footnotes

- ^{*} The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- ¹ Thompson did not argue that his alleged statement about “home improvement” was a true statement. See also Tr. of Oral Arg. 28 (“That is a false statement.”).
- ^{*} Most Circuits simply have the trial judge instruct the jury, in relevant part, that it must find the defendant “made a false statement.” *E.g.*, Model Crim. Jury Instr. § 15.41 (CA9 2022); Pattern Crim. Jury Instr. § 2.48 (CA10 2025). Some Circuits also have the judge add that “[a] statement is ‘false’ if it was untrue when made.” *E.g.*, Pattern Crim. Jury Instr. § 4.18.1014 (CA1 2024); Model Crim. Jury Instr. § 6.18.1014 (CA8 2023). And it appears that none of the pattern jury instructions mentions “misleading” statements. See 2 L. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶17.03 (2024).

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122 F.4th 1278

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

John ARMSTRONG, Jr., Defendant-Appellant.

No. 21-11252

|

Filed: 12/11/2024

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Middle District of Florida, No. 6:19-cr-00224-WWB-EJK-1, [Wendy W. Berger, J.](#), to Hobbs Act robbery, bank robbery, aiding and abetting bank robbery and attempted bank robbery, and using, carrying, and brandishing a firearm in relation to a crime of violence. Defendant appealed. The Court of Appeals, [2021 WL 5919822](#), affirmed. Defendant petitioned for certiorari. The United States Supreme Court, [143 S.Ct. 72, 214 L.Ed.2d 122](#), granted certiorari, vacated the judgment, and remanded to the Court of Appeals for further consideration in light of its intervening decision in *United States v. Taylor*, [596 U.S. 845, 142 S.Ct. 2015, 213 L.Ed.2d 349](#), which held that attempted Hobbs Act robbery does not qualify as a predicate crime of violence under the elements clause of the statutory definition of a crime of violence, as predicate for a felony conviction and enhanced sentence for using a firearm in furtherance of a crime of violence.

Holdings: On remand, the Court of Appeals, [Lagoa](#), Circuit Judge, held that:

[1] on matter of first impression, bank robbery statute is divisible, in that it prohibits the two distinct offenses of bank robbery and bank extortion;

[2] defendant's conviction for bank robbery by intimidation was predicate crime of violence under use-of-force clause of statute prohibiting using, carrying, and brandishing a firearm in relation to crime of violence;

[3] defendant's conviction for aiding and abetting bank robbery by intimidation was predicate crime of violence under the use-of-force clause; and

[4] defendant's conviction for aiding and abetting attempted bank robbery was predicate crime of violence under the use-of-force clause.

Affirmed.

Jordan, Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (14)

[1] **Criminal Law** 🔑 [Review De Novo](#)

Court of Appeals reviews questions of constitutional law de novo.

[2] **Criminal Law** 🔑 [Review De Novo](#)

Court of Appeals reviews de novo whether an offense is a predicate crime of violence under statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence. [18 U.S.C.A. § 924\(c\)](#).

[3] **Courts** 🔑 [Previous Decisions as Controlling or as Precedents](#)

Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

[4] **Criminal Law** 🔑 [Criminal act or omission](#)

An “indivisible statute” is one which sets out a single (or indivisible) set of elements to define a single crime even though it may also spell out various factual ways of committing some component of the offense.

[5] **Weapons** 🔑 [Crimes of violence](#)

When faced with an indivisible statute setting forth a criminal offense, court employs the categorical approach to determine whether the offense is a predicate crime of violence within the meaning of statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence, and under that approach the court asks whether the elements of the predicate offense denote a crime of violence, and it does not look to the particular facts of the defendant's conduct. 18 U.S.C.A. § 924(c).

[6] **Criminal Law** 🔑 **Criminal act or omission**

A “divisible” criminal statute may list elements in the alternative, and thereby define multiple crimes.

[7] **Weapons** 🔑 **Crimes of violence**

When parsing a divisible statute, court applies the modified categorical approach to determine whether the defendant committed a crime of violence within the meaning of statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence, under which approach the court looks beyond the elements enumerated in the statute to a limited set of documents known as *Shepard* documents, which include the indictment, jury instructions, plea agreement, and plea colloquy, to determine which specific crime, comprising which elements, the defendant committed. 18 U.S.C.A. § 924(c).

[8] **Weapons** 🔑 **Crimes of violence**

Statute prohibiting the taking, or attempting to take, by force and violence or by intimidation, as well as obtaining or attempting to obtain by extortion any property, money, or any other thing of value from any bank, credit union, or savings and loan association is a divisible statute that prohibits two distinct offenses, namely bank robbery and bank extortion, each of which can be committed through various factual means,

and thus, modified categorical approach applies to determine whether a conviction under the statute is a predicate crime of violence under the separate statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a).

[9] **Weapons** 🔑 **Crimes of violence**

Defendant's conviction for bank robbery by intimidation was a “crime of violence” under the use-of-force clause of the statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence; intimidation was conduct from which a reasonable person could infer a threat of bodily harm. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a).

2 Cases that cite this headnote

[10] **Courts** 🔑 **Number of judges concurring in opinion, and opinion by divided court**

Under the Court of Appeals' “prior-panel-precedent rule,” a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Court of Appeals sitting en banc.

[11] **Weapons** 🔑 **Crimes of violence**

Defendant's conviction for aiding and abetting bank robbery by intimidation was a “crime of violence” under the use-of-force clause of the statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence; conviction was akin to bank robbery as a principal. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a).

3 Cases that cite this headnote

[12] **Criminal Law** 🔑 **Aiding, abetting, or other participation in offense**

Aiding and abetting is not a separate federal crime, but rather an alternative charge that

permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.

[13] Weapons 🔑 Crimes of violence

Defendant's conviction for aiding and abetting attempted bank robbery categorically required proof that defendant used, attempted to use, or threatened to use force, and thus, the conviction qualified as a "crime of violence" under the use-of-force clause of the statute prohibiting, and imposing an enhanced sentence for using, carrying, and brandishing a firearm in relation to a crime of violence; Congress criminalized only attempted bank robberies that occurred by force and violence, or by intimidation. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a).

3 Cases that cite this headnote

[14] Robbery 🔑 Attempt

One commits an attempted bank robbery when, by force and violence or by intimidation, he attempts to take money from a federally insured bank. 18 U.S.C.A. § 2113(a).

1 Case that cites this headnote

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(c)(3)(B)

***1281** Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:19-cr-00224-WWB-EJK-1

Attorneys and Law Firms

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Before Jordan, Lagoa, and Tjoflat, Circuit Judges.

Opinion

Lagoa, Circuit Judge:

John Armstrong, Jr., appeals his convictions for three counts of brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). In 2021, we affirmed Armstrong's convictions. But after we issued our previous opinion, the Supreme Court handed down its decision in *United States v. Taylor*, 596 U.S. 845, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). Following *Taylor*, the Supreme Court granted Armstrong certiorari, vacated our 2021 opinion, and remanded the case for reconsideration in light of *Taylor*. Upon remand, this Court instructed the parties to file supplemental briefs addressing *Taylor*. After careful consideration of the parties' arguments and with the benefit of oral argument, we affirm.

I. FACTUAL & PROCEDURAL BACKGROUND

In 2020, a grand jury returned a 15-count indictment against Armstrong and two codefendants. Armstrong was named in Counts 1 to 4, 9 to 13, and 15. In those counts, Armstrong was charged with: one count of Hobbs Act Robbery in violation of 18 U.S.C. § 1951(a) and (b) (Count 1); one count of bank robbery in violation of 18 U.S.C. § 2113(a) (Count 3); one count of aiding and abetting attempted bank robbery in violation of § 2113(a) (Count 9); one count of aiding and abetting bank robbery (Count 11); four counts of using, carrying, and brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts 2, 4, 10, 12—relating to Counts 1, 3, 9, and 11, respectively); one count of felon-in-possession of ***1282** a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 13); and one count of possession of cocaine in violation of 21 U.S.C. § 841(b)(1)(C) (Count 15). Armstrong pled guilty to Counts 1, 3, 4, and 9–12, and the government dismissed Counts 2, 13, and 15. Armstrong's PSI calculated his guideline range as 135 to 168 months' imprisonment for Count 1 (Hobbs Act robbery), Count 3 (bank robbery), Count 9 (attempted bank robbery), and Count 11 (aiding and abetting bank robbery), while the sentences for Counts 4, 10, and 12 (the three § 924(c) offenses) would each be the minimum terms required by statute. Each of those § 924(c) convictions carried a mandatory seven-year minimum term (and a life-

sentence maximum term), all to run consecutively to any other term, under the statute.

Before sentencing, Armstrong argued, for the first time, that § 924(c) is unconstitutionally void for vagueness. He challenged the categorical approach to classifying “crimes of violence,” in particular whether bank robbery under § 2113(a) can be considered a categorical crime of violence because that crime can be committed by non-violent means, such as extortion. In response, the government argued that *United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), did not invalidate the elements clause of § 924(c)(3) and that binding Eleventh Circuit precedent holds that federal bank robbery is a crime of violence under the elements clause. Because bank robbery is a categorical crime of violence in this Circuit under the elements clause, the government contended that each of Armstrong’s § 924(c) convictions was properly supported by a predicate crime of violence. At sentencing, the district court accepted the government’s position and rejected Armstrong’s, agreeing that federal bank robbery is a crime of violence under this Circuit’s binding precedents. The district court sentenced Armstrong to 420 months’ imprisonment, comprising 168 months for each of Counts 1, 3, 9, and 11, running concurrently, and 84 months for each of Counts 4, 10, and 12, running consecutively to all other terms. The district court also imposed a five-year period of supervised release.

Armstrong timely appealed after his sentencing. He argued that his convictions and sentences for Counts 4, 10, and 12 (the three § 924(c) offenses) were invalid because the predicate offenses underlying all three of those charges (violations of § 2113(a)), can be committed without violence—i.e., by either intimidation or extortion—thereby rendering the “crime of violence” definition unconstitutionally vague. Armstrong’s argument depended heavily on the Supreme Court’s decision in *Davis*, where the Court held that the “residual clause” in § 924(c)(3)(B) was unconstitutionally vague. First, Armstrong argued that because *Davis* rejected a categorical approach to assessing crimes under the residual clause, we should likewise reject the same categorical approach to the elements clause. Second, Armstrong also contended (without elaboration) that *Davis* abrogated this Court’s decision in *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016), where we held that “a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.” Third, Armstrong pointed to various cases holding that Hobbs Act robbery cannot be a predicate offense for a §

924(c) conviction and asked us to reach the same conclusion with respect to the bank robbery statute, § 2113(a).

After considering these arguments, we affirmed Armstrong’s convictions for Counts 4, 10, and 12, citing our binding precedent in *Sams*. *1283 *United States v. Armstrong*, Case No. 21-11252, 2021 WL 5919822, at *1 (11th Cir. 2021). In that opinion, we explained that bank robbery under § 2113(a), including bank robbery committed “by intimidation,” is a categorical crime of violence under § 924(c)(3)(A)’s use-of-force clause—which *Davis* left untouched—and reiterated that this Court’s decision in *Sams* was based on the reasoning that “a taking ‘by force and violence’ entails the use of physical force and a taking ‘by intimidation’ involves the threat to use such force.” *Id.* at *2 (quoting *Sams*, 830 F.3d at 1239 (alterations adopted)). As for Count 10, Armstrong’s § 924(c) conviction arising from an attempted bank robbery, we relied on a number of our binding cases for the proposition that attempting to commit a crime of violence or aiding and abetting a crime of violence also qualifies as a crime of violence for purposes of § 924(c)(3)(A)’s use-of-force clause. *Id.* We cited, for example, *Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019), where we held that aiding and abetting carjacking is a crime of violence under the elements clause of § 924(c)(3)(A), and *United States v. St. Hubert*, 909 F.3d 335, 351–52 (11th Cir. 2018), where we held that attempted Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). *Id.* In line with those binding precedents, we held that because bank robbery under § 2113 is a categorical crime of violence under the elements clause, attempted bank robbery and aiding and abetting bank robbery are, likewise, categorical crimes of violence. *Id.* For those reasons, we affirmed Armstrong’s convictions. *Id.* Armstrong subsequently petitioned for certiorari of our decision to the Supreme Court.

Six months after we issued our previous opinion, the Supreme Court handed down its decision in *United States v. Taylor*, 596 U.S. 845, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022), abrogating *St. Hubert*. In *Taylor*, the Supreme Court resolved a circuit split and held that attempted Hobbs Act robbery is not a predicate crime of violence under § 924(c)(3)(A)’s elements clause. *Id.* at 852, 142 S.Ct. 2015. At the outset, the Court reiterated that when taking a categorical approach, “[t]he only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” *Id.* at 850, 142

S.Ct. 2015. From there, the Court turned to the elements of a *completed* Hobbs Act robbery: “unlawful taking or obtaining of personal property from the person ... of another, against his will, by means of actual or threatened force.” *Id.* (quoting § 1951(b)). To prove an *attempted* Hobbs Act robbery, therefore, the government must necessarily prove “two things: (1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a ‘substantial step’ toward that end.” *Id.* at 851, 142 S.Ct. 2015. That second prong—the “substantial step”—became the pivotal question. And, of it, the Court determined that “whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property.” *Id.* To illustrate, the Court provided the following hypothetical:

Suppose Adam tells a friend that he is planning to rob a particular store on a particular date. He then sets about researching the business's security measures, layout, and the time of day when its cash registers are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car. Finally, he drafts a note—“Your *1284 money or your life”—that he plans to pass to the cashier. The note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the store, the police immediately arrest him. It turns out Adam's friend tipped them off.

Id. at 851–52, 142 S.Ct. 2015. On those facts, the Court said, “[t]here is little question the government could win a lawful conviction against Adam for attempted Hobbs Act robbery.” *Id.* at 852, 142 S.Ct. 2015. But, “at the same time,” the Court continued, “this example helps show why attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause.” *Id.* “Adam did not ‘use’ physical force. He did not ‘attempt’ to use such force ... [a]nd he never even got to the point of threatening the use of force against anyone or anything,” even though he intended and attempted to make

such a threat. *Id.* “Simply put,” the Court concluded, “no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.” *Id.* Accordingly, Taylor's § 924(c)(3)(A) conviction could not stand. *Id.* at 860, 142 S.Ct. 2015.

Following *Taylor*, the Supreme Court granted Armstrong certiorari, vacated our 2021 opinion, and remanded the case for reconsideration in light of *Taylor*. This Court instructed the parties to file supplemental briefs addressing *Taylor*.

II. STANDARD OF REVIEW

[1] [2] We review questions of constitutional law *de novo*. *United States v. Whatley*, 719 F.3d 1206, 1213 (11th Cir. 2013). We also review *de novo* whether an offense is a crime of violence under § 924(c). *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013).

III. ANALYSIS

In his supplemental brief, Armstrong raises one central argument against his § 924(c) convictions—that neither bank robbery by extortion nor bank robbery by intimidation requires the government to always prove, as an element of the offense, the use, attempted use, or threatened use of force. For this reason, Armstrong asserts, offenses committed under § 2113(a) do not qualify categorically as crimes of violence under Section 924(c). As to Count 10 (which related to the underlying count of aiding and abetting attempted bank robbery), Armstrong adds one more contention—that the conviction must be reversed because the government did not have to prove anything more than mere intent to commit the robbery in order to fulfill the “substantial step” requirement. We address these issues in turn.

A. 18 U.S.C. § 2113(a) is a Divisible Statute

[3] We have previously held that “a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.” *Sams*, 830 F.3d at 1239. In that case, however, we did not decide whether § 2113(a) is divisible between its robbery and extortion provisions.¹ See *id.* at 1238–39. To determine *1285 whether Armstrong's

predicate convictions are crimes of violence under § 924(c)(3)(A), therefore, we must decide, as a matter of first impression in this Circuit, whether that statute is divisible or indivisible.

[4] [5] [6] [7] An indivisible statute is one which “sets out a single (or ‘indivisible’) set of elements to define a single crime,” even though it may also spell out “various factual ways of committing some component of the offense.” *Mathis v. United States*, 579 U.S. 500, 504, 506, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). When faced with an indivisible statute, we employ the categorical approach to determine whether the offense is a crime of violence. See *Alvarado-Linares v. United States*, 44 F.4th 1334, 1342 (11th Cir. 2022). That is, we ask “whether the *elements* of the predicate offense ... denote a ‘crime of violence[.]’” and we “do not look to the particular facts of the defendant’s conduct.” *Id.* (citing *United States v. Bates*, 960 F.3d 1278, 1286 (11th Cir. 2020)). A divisible statute, on the other hand, “may list elements in the alternative, and thereby define multiple crimes.” *Mathis*, 579 U.S. at 505, 136 S.Ct. 2243. When parsing a divisible statute, we apply the modified categorical approach to determine whether the defendant committed a crime of violence. *Alvarado-Linares*, 44 F.4th at 1342. Under the modified categorical approach, we look beyond the elements enumerated in the statute to a limited set of documents²—the indictment, jury instructions, plea agreement, and plea colloquy—to determine which specific crime, comprising which elements, the defendant committed. *Id.*; see also, e.g., *King v. United States*, 965 F.3d 60, 70–71 (1st Cir. 2020) (applying the modified categorical approach to determine whether bank robbery in violation of § 2113(a) is a crime of violence under § 924(c)); *United States v. Runyon*, 994 F.3d 192, 200–03 (4th Cir. 2021) (applying the modified categorical approach to determine whether conspiracy to commit murder for hire in violation of 18 U.S.C. § 1958(a) is a crime of violence under § 924(c)).

[8] When we face a disjunctive statute—like § 2113(a)—we must first “determine whether its listed items are elements or means.” *Mathis*, 579 U.S. at 517, 136 S.Ct. 2243. Armstrong assumes § 2113(a) is indivisible and argues that, under that statute, “robbery may be committed by force and violence, or by intimidation or extortion,” the latter two means not requiring any element of violence. The government urges us to reject this approach because robbery and extortion are two distinct crimes, rendering § 2113(a) a divisible statute. We agree with the government and hold that § 2113(a) is a divisible statute and that § 2113(a)’s first paragraph

criminalizes the two separate offenses of bank robbery, on the one hand, and bank extortion, on the other.³

As we have explained, to determine whether the robbery and extortion clauses represent elements or means, we begin with the text of the statute. See *1286 *Mathis*, 579 U.S. at 518, 136 S.Ct. 2243. The text reads, in relevant part, as follows:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

...

Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a). Our colleagues on the First Circuit have aptly dissected the text, explaining that “the fact that the language ‘or obtains or attempts to obtain’ immediately precedes the phrase ‘by extortion’ (as opposed to ‘takes, or attempts to take,’ which relates to the ‘by force or violence’ and ‘intimidation’) ... suggests that extortion is not an alternative means of commission.” *King*, 965 F.3d at 68. We agree that a plain reading of the text supports the conclusion that robbery and extortion are alternate elements—amounting to separate crimes—not alternate means of committing one crime. The statute’s distinction between “taking” and “obtaining” reflects the fundamental division between robbery and extortion, namely, that robbery involves taking possession of the property of another *against his will* while extortion involves taking possession of the property of another *with consent*—albeit grudging or coerced. See *Ocasio v. United States*, 578 U.S. 282, 297, 136 S.Ct. 1423, 194 L.Ed.2d 520 (2016) (explaining the difference between Hobbs Act robbery and Hobbs Act extortion). This is not new territory for this Court. Indeed, we have opined at length on the common-law origins of robbery and extortion, explaining that our concept of extortion was developed to “plug a loophole in the robbery law by covering sundry threats which will not do for robbery.” *United States v. Harris*, 916 F.3d 948, 955 (11th Cir. 2019). We noted that while “ ‘both crimes equally require that the defendant’s threats induce the victim to give up his property, something which he would not otherwise have done,’ ” the crime of “robbery must be against the victim’s will while extortion must be with his consent.” *Id.*

(quoting Wayne R. LaFave, *Criminal Law* § 20.4, at 1336 (6th ed. 2017)). The prosecution must prove as elements of each offense, therefore, that a defendant either violated the victim's will (robbery) or secured the victim's consent (extortion). In sum, the plain text of § 2113(a) demonstrates that the statute is divisible and criminalizes two distinct acts—robbery and extortion—each of which can be committed through various factual means.

The statutory history of § 2113(a) supports our conclusion. In 1986, Congress amended that statute—which previously prohibited only robbery by force, violence, or intimidation—by adding the “extortion” language, thereby resolving a circuit split as to whether extortion of federally insured banks was properly prosecuted under the Hobbs Act, 18 U.S.C. § 1951, or under the bank robbery statute, § 2113(a). See H.R. Rep. 99-797, 33 (1986) (“Accordingly, section 51 amends 18 U.S.C. 2113(a) expressly to cover crimes of extortion directed at federally insured banks. The Committee intends to overrule those cases holding that only the Hobbs Act applies, and those cases holding that both the Hobbs Act and 18 U.S.C. 2113(a) apply, in order to make 18 U.S.C. 2113(a) the exclusive provision for prosecuting bank extortion.”). That Congress saw fit to expressly add text to cover “crimes of extortion” confirms our conclusion that bank extortion is a separate crime and not merely a *1287 means of committing bank robbery. Courts parsing the language of the Hobbs Act have similarly tracked Congress's distinction between robbery and extortion when determining whether that statute is divisible. The Hobbs Act, § 1951, criminalizes obstructing, delaying, or affecting commerce or the movement of articles in commerce “by robbery or extortion,” and courts across the country—including our highest court—have long held that Hobbs Act robbery and Hobbs Act extortion are two separate and distinct crimes, enumerated in a divisible statute. See, e.g., *Ocasio*, 578 U.S. at 292, 136 S.Ct. 1423 (referring to “the substantive offense of Hobbs Act extortion”); *Evans v. United States*, 504 U.S. 255, 268, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992) (referring to “the offense of extortion ‘under color of official right’ ” under the Hobbs Act); *St. Hubert*, 909 F.3d at 348, *abrogated on other grounds by Taylor*, 596 U.S. 845, 142 S.Ct. 2015 (“We agree with the Sixth Circuit's conclusion that (1) the Hobbs Act is a divisible statute that sets out multiple crimes, and (2) robbery and extortion are distinct offenses, not merely alternative means of violating § 1951(a).”); *United States v. Chappelle*, 41 F.4th 102, 110 (2d Cir. 2022) (analyzing the offenses of “Hobbs Act robbery” as distinct from extortion); *United States v. Gooch*, 850 F.3d 285, 291 (6th Cir. 2017) (“[W]e conclude that § 1951 is a divisible

statute setting out separate crimes of Hobbs Act robbery and Hobbs Act extortion.”); *United States v. O'Connor*, 874 F.3d 1147, 1150 (10th Cir. 2017) (“Mr. O'Connor was convicted of Hobbs Act robbery, not Hobbs Act extortion.”).

We note that we do not stand alone in holding that § 2113(a) is divisible as to bank robbery and bank extortion. See *King*, 965 F.3d at 69 (“Therefore, we do not agree with King that the robbery and extortion clauses denote alternative means of committing a single, indivisible offense. Rather, it is clear from the relevant text as well as the structure and context of the 1986 statutory amendment, that robbery and extortion under § 2113(a) are alternative elements of distinct offenses.” (internal quotation omitted)); *United States v. Evans*, 924 F.3d 21, 28 (2d Cir. 2019) (“First, we need not address Evans's argument regarding bank robbery ‘by extortion’ because we agree with the Ninth Circuit that § 2113(a) contains at least two separate offenses, bank robbery and bank extortion. Because Evans was convicted of bank robbery—indeed Congress amended the statute after his conviction to include bank extortion ... we need not decide whether bank extortion qualifies as a crime of violence.” (internal quotation and citation omitted)); *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (“[Section] 2113(a) does not contain one indivisible offense. Instead, it contains at least two separate offenses, bank robbery and bank extortion.”).

For these reasons, we conclude that § 2113(a) is a divisible statute that prohibits two distinct offenses: bank robbery and bank extortion. Armstrong was convicted of the former offense, bank robbery by force or violence, or by intimidation, and of an attempt to do the same. Armstrong's argument that extortion is a non-violent means of committing bank robbery is, therefore, unavailing, and we proceed with a modified categorical approach to determine whether Armstrong's bank robbery offenses are crimes of violence for § 924(c) purposes. See *Alvarado-Linares*, 44 F.4th at 1342 (“But when a statute is divisible—meaning it defines multiple potential crimes—we instead apply the modified categorical approach.”); see also, e.g., *King*, 965 F.3d at 70–71; *Runyon*, 994 F.3d at 200–01.

B. Counts 4 and 12

[9] Under the modified categorical approach, we “may look beyond the elements *1288 of the predicate offense to a limited class of documents—including the indictment, jury instructions, plea agreement, and plea colloquy—to

determine which specific crime, with which elements, a defendant was convicted of.” *Alvarado-Linares*, 44 F.4th at 1342; see also, *King*, 965 F.3d at 70. Here, Armstrong’s indictment, plea agreement, and plea colloquy tell us that the elements of his predicate crimes in Counts 3 and 11 are (1) “the defendant knowingly took money possessed by a federally insured bank from or in the presence of the person described in the Second Superseding Indictment,” and (2) “the defendant did so by intimidation.” Armstrong’s challenge to both convictions thus fails because *Taylor* did not abrogate our prior cases holding that both bank robbery and aiding and abetting bank robbery are “crimes of violence,” even when committed through intimidation.

[10] In *Sams*, this Court expressly held that “a bank robbery conviction under § 2113(a) by force and violence *or by intimidation* qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.” *Sams*, 830 F.3d at 1239 (emphasis added); see also *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (“Under section 2113(a), ‘intimidation occurs when an ordinary person in the teller’s position reasonably could infer a threat of bodily harm from the defendant’s acts.’ ” (quoting *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (per curiam))). Under our prior-panel-precedent rule, “a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). And there is nothing in *Taylor* suggesting the abrogation of our conclusion and reasoning in *Sams*. On the contrary, *Taylor* tells us that a crime of violence requires, as an element, “the use, attempted use, or threatened use of force.” *Taylor*, 596 U.S. at 853, 142 S.Ct. 2015. Our Circuit’s definition of intimidation—conduct from which a reasonable person “could infer a threat of bodily harm”—fits neatly into that box. See *Kelley*, 412 F.3d at 1244. Our binding precedent in *Sams* thus controls. See *Archer*, 531 F.3d at 1352. Therefore, because bank robbery in violation of § 2113(a) is a crime of violence, we affirm Armstrong’s conviction on Count 4.

[11] [12] We reach the same conclusion for Count 12. This Court has previously held—both before and after *Taylor*—that “[o]ne who aids and abets a crime of violence ‘necessarily commits a crime that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.’ ” *Alvarado-Linares*, 44 F.4th at 1348 (quoting *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016)). We reach this conclusion because aiding and abetting

“is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.” *Id.* (quoting *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015)). Accordingly, even though Armstrong’s conviction under Count 12 was premised on an aiding and abetting theory, it is nevertheless a crime of violence—akin to bank robbery as a principal—for § 924(c) purposes. *Id.*; see also *Sams*, 830 F.3d at 1239. We therefore affirm Armstrong’s conviction on Count 12.

C. Count 10

[13] Count 10, which relates to Armstrong’s conviction for aiding and abetting an attempted bank robbery, requires a different approach. At the outset, we can set aside the “aiding and abetting” qualifier because, as we have said, that is merely *1289 a legal theory “that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.” *Alvarado-Linares*, 44 F.4th at 1348. We are then left to decide whether attempted bank robbery categorically requires proof “that the defendant used, attempted to use, or threatened to use force.” *Taylor*, 596 U.S. at 852, 142 S.Ct. 2015. We conclude that it does.

The first time this case was before this Court, we relied on *St. Hubert* for the principle that attempting to commit a crime of violence is, itself, a crime of violence for § 924(c) purposes. See *St. Hubert*, 909 F.3d at 351–52 (“[A] completed Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)(3)(A) and, therefore, attempt to commit Hobbs Act robbery requires that St. Hubert intended to commit every element of Hobbs Act robbery, including the taking of property in a forcible manner.”). *Taylor* abrogated that portion of *St. Hubert*, though, in holding that we must assess whether the attempt “requires proof that the defendant used, attempted to use, or threatened to use force.” *Taylor*, 596 U.S. at 852, 142 S.Ct. 2015; see also *Alvarado-Linares*, 44 F.4th at 1346 n.2 (“In so holding, *Taylor* overruled our decision in ... *St. Hubert*, which held that any attempt to commit a crime of violence necessarily qualifies as a crime of violence.” (citation omitted)). Instead, we must address the polestar question defined in *Taylor*:

The elements clause does not ask whether the defendant committed a crime of violence *or* attempted to

commit one. It asks whether the defendant *did* commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force.

596 U.S. at 853, 142 S.Ct. 2015 (emphasis in original). We must, therefore, turn back to the elements of the crime charged in Count 9.⁴ Here, we find a crucial distinction between § 2113(a) and § 1951, which the Court parsed in *Taylor*, necessarily leading to a different result.

[14] In writing the bank robbery statute, Congress codified what an “attempt” entails:

(a) *Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;*

...

Shall be fined under this title or imprisoned not more than twenty years, or both.

§ 2113(a) (emphases added). Thus, under the statutory text, one commits an attempted bank robbery when, by force and violence or by intimidation, he attempts to take money from a federally insured bank. Section 1951, on the other hand, is structured differently and does not require any actual or threatened force to sustain a conviction for attempted Hobbs Act robbery. *1290 That charge, the Supreme Court tells us, requires the government to prove only two things: (1) that “[t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force,” and (2) that “he completed a ‘substantial step’ toward that end.” *Taylor*, 596 U.S. at 851, 142 S.Ct. 2015. As Justice Gorsuch’s hypothetical about a thwarted Hobbs Act robber illustrates, a criminal can commit an attempted Hobbs Act robbery without actually using force or violence. See *id.* at 851–52, 142 S.Ct. 2015. Not so for an attempted bank robbery under § 2113(a), however, because Congress criminalized *only* attempts that occur “by force and violence, or by intimidation.” To demonstrate, we will borrow the

hypothetical facts from *Taylor*, but direct them towards a bank instead of a store.

Suppose Adam tells a friend that he is planning to rob a particular bank, which is insured by the Federal Deposit Insurance Corporation, on a particular date. He then sets about researching the bank’s security measures, layout, and the time of day when its cash drawers and safes are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car. Finally, he drafts a note—“Your money or your life”—that he plans to pass to the bank teller. The note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the bank’s lobby, the police immediately arrest him. It turns out Adam’s friend tipped them off.

Taking the facts of this hypothetical, Adam has not, under § 2113(a)’s first paragraph, committed an attempted bank robbery because the statute requires an element of “force and violence, or ... intimidation” to sustain that conviction.⁵ Instead, Adam has potentially committed a bank burglary because he entered a bank with the intent to commit a felony therein, *1291 within the scope of § 2113(a)’s second paragraph. See *Prince v. United States*, 352 U.S. 322, 328, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957) (“It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision [in § 2113(a)’s second paragraph] was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime.”).

Consider one more tweak to the *Taylor* hypothetical to underscore what we mean: imagine that Adam handed the note to the bank teller, and she read it before the police ran in to arrest Adam. In that case, he would be within the scope of § 2113(a)’s first paragraph because his note was “intimidating” and he used it in an attempt to take money from the bank. The act of intimidation is what brings this conduct into the reach of the bank robbery statute.

Back we turn to *Taylor*’s test. Did the defendant commit “a felony that includes as an element the use, attempted use, or threatened use of force?” *Taylor*, 596 U.S. at 853, 142 S.Ct. 2015. We answer in the affirmative. Attempted bank robbery under § 2113(a) is a crime of violence because it requires as an element that the defendant acted “by force and violence, or by intimidation” in committing the inchoate crime. See §

[2113\(a\)](#); *Taylor*, 596 U.S. at 853, 142 S.Ct. 2015. Armstrong's conviction under [§ 924\(c\)](#) in Count 10, therefore, stands.

IV. CONCLUSION

For the foregoing reasons, we affirm Armstrong's convictions for Counts 4, 10, and 12.

AFFIRMED.

Jordan, Circuit Judge, Concurring in Part and Dissenting in Part:

Applying the categorical approach under the elements clause of the Armed Career Criminal Act, [18 U.S.C. § 924\(c\) \(3\)\(A\)](#), often proves a difficult enterprise. So it is here. Acknowledging that the issue before us is hard, my resolution is different than that reached by the court in Part III.C, and I therefore respectfully dissent from that aspect (and only that aspect) of its opinion.

I

In Count 10, Mr. Armstrong was convicted of using, carrying, and brandishing a firearm in relation to a crime of violence. *See* [18 U.S.C. § 924\(c\)\(1\)\(A\)\(ii\)](#). The crime of violence alleged in Count 10 was aiding and abetting attempted bank robbery in violation of [18 U.S.C. § 2113\(a\)](#). The question, as the court correctly frames it, is whether attempted bank robbery in violation of [§ 2113\(a\)](#) is categorically a crime of violence. *See* Maj. Op. at 1289. It is one of first impression in this circuit.

The Supreme Court recently held that attempted Hobbs Act robbery, in violation of [18 U.S.C. § 1951\(a\)](#), is not categorically a crime of violence under the ACCA's elements clause. *See* *United States v. Taylor*, 596 U.S. 845, 852, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). For the reasons which follow, I would hold—consistently with *Taylor*—that attempted bank robbery in violation of [§ 2113\(a\)](#) is also not categorically a crime of violence.

A

I'll start with the text. The federal bank robbery statute punishes, in relevant part, anyone who “*by force and violence, or by intimidation, takes, or attempts to take*, from the person or presence of another, ... any property or money or any other *1292 thing of value, belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings or loan association. [§ 2113\(a\)](#) (emphasis added).

As the court reads this provision, attempted bank robbery requires force and violence or intimidation. This is because the “by force and violence, or by intimidation” clause precedes the “attempts to take” clause, and so “Congress has codified what an ‘attempt’ entails.” Maj. Op. at 1289-90. Essentially, the court's premise is that the “by force and violence, or intimidation” clause is baked into the offense of attempted bank robbery. According to the court, therefore, an attempted bank robbery cannot occur unless actual force, violence, or intimidation is used in the attempt. *See id.*

The court, however, cites to no authority for this proposition. In fact, research reveals a circuit split as to whether a defendant can be convicted of attempted bank robbery under the first paragraph of [§ 2113\(a\)](#) without using *actual* force, violence, or intimidation in the attempt. As it turns out, the majority of circuit courts have held that actual force, violence, or intimidation is *not* required for an attempted bank robbery conviction under the first paragraph of [§ 2113\(a\)](#) and have upheld attempt convictions without such conduct. And our circuit—like nearly every other—has aligned itself with the majority view in upholding convictions for attempted bank robbery on sufficiency grounds even where there is no evidence that the defendant actually used force, violence, or intimidation. Most of these convictions involve some substantially similar version of the facts posed in the majority's hypothetical: a defendant intends to rob a bank, takes substantial steps toward completing the robbery—such as acquiring equipment, staking out the bank, securing a getaway car, and drafting a threatening note—but is stopped or foiled before he has the chance to actually threaten or intimidate anyone.

B

The Second Circuit was the first to answer the question we face today in *United States v. Stallworth*, 543 F.2d 1038, 1040-41 (2d Cir. 1976). In *Stallworth*, the Second Circuit rejected the defendants' argument that their conduct could

not amount to attempted bank robbery because they neither entered the bank nor brandished weapons. See *id.* at 1040. Deeming that contention “wooden logic,” the Second Circuit emphasized that “[a]ttempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled.” *Id.* at 1040–41. Relying on the “classical elements” of attempt, which mirror those of the Model Penal Code, it held that the defendants committed attempted bank robbery because they reconnoitered the bank, discussed their plan of attack, and armed themselves with guns and masks—despite having been caught and arrested before entering the bank. See *id.* at 1041. Those “classical elements” of attempt require the government to show that the defendant was acting “with the kind of culpability otherwise required for the commission of the crime he is charged with attempting,” and that “the defendant ... engaged in conduct which constitutes a substantial step toward commission of the crime, conduct strongly corroborative of the firmness of the defendant’s criminal intent.” *Id.* at 1040 (citing *United States v. Mandujano*, 499 F.2d 370, 376–77 (5th Cir. 1974)).

***1293** The Second Circuit reaffirmed this holding in *United States v. Jackson*, 560 F.2d 112, 119–121 (2d Cir. 1977), where it again rejected a defendant’s argument that § 2113(a)’s first paragraph “clearly contemplate[s] that actual use of force, violence, or intimidation must precede an attempted taking in order to make out the offense of attempted bank robbery.” *Id.* at 116. Unpersuaded, the Second Circuit held that the defendant could be convicted for attempted bank robbery under the first paragraph of § 2113(a) based on the two-tiered attempt inquiry reflected in the Model Penal Code and now universally accepted among the circuit courts. See *id.* at 117–18; Model Penal Code § 5.01 (1962).

The Fourth, Sixth, and Ninth Circuits have followed suit. See, e.g., *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (agreeing with the Second Circuit’s approach and the Model Penal Code’s definition of attempt); *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005) (agreeing with the majority view in an alternative holding and explicitly rejecting the minority approach to the question); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990) (agreeing with the majority view). For example, the Sixth Circuit reasoned that “to read the statute as [the] defendant urges would be inconsistent with our definition of attempt crimes, and would, without reason, require proof that a defendant

actually confronted someone in the bank before he could be convicted of attempted robbery.” *Wesley*, 417 F.3d at 618. Thus, it held that “the only reasonable interpretation is that the statute criminalizes attempted taking ‘by force [and] violence, or by intimidation.’ Actual intimidation is not required to prove attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a).” *Id.* The Ninth Circuit, for its part, clarified the required elements of an attempt under § 2113(a): “Conviction [for attempted bank robbery] under [§] 2113 requires only that the defendant intended to use force, violence[,] or intimidation and made a substantial step toward consummating the robbery.” *Moore*, 921 F.2d at 209.

C

Nearly every circuit—including our own in unpublished decisions—has upheld convictions for attempted bank robbery under the first paragraph of § 2113(a) even where there was no evidence that the defendant used actual force, violence, or intimidation. Our cases include *United States v. Barriera-Vera*, 303 F. App’x 687, 695 (11th Cir. 2008) (overturning district court’s judgment of acquittal on attempted bank robbery charge where the defendant cased the credit union, had a loaded gun and a mask in his car, and drove near the credit union, but was thwarted by police and arrested in a different location), and *United States v. Brown*, 375 F. App’x 927, 930–33 (11th Cir. 2010) (noting that whether actual intimidation is required is an issue of first impression but upholding attempted bank robbery conviction on facts similar to those in *Barriera-Vera*).

The First, Third, Eighth, and Tenth Circuits have done the same. See, e.g., *United States v. Chapdelaine*, 989 F.2d 28, 32–33 (1st Cir. 1993) (upholding conviction where the defendants cased the bank, positioned getaway vehicles for escape, and acquired weapons, but never entered the bank); *United States v. Garner*, 915 F.3d 167, 169–71 (3d Cir. 2019) (same on similar facts); *United States v. Johnson*, 962 F.2d 1308, 1312 (8th Cir. 1992) (same on similar facts); *United States v. Carlisle*, 118 F.3d 1271, 1273–74 (8th Cir. 1997) (same on similar facts); *United States v. Crawford*, 837 F.2d 339, 340 (8th Cir. 1988) (same on similar facts); *United States v. Prichard*, 781 F.2d 179, 182 (10th Cir. 1986) (citing to *McFadden*, 739 F.2d at 152, with approval, ***1294** and upholding conviction on similar facts). So there are nine circuits—the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh—which do not require the use

of force, violence, or intimidation for an attempt conviction under the first paragraph of § 2113(a).

D

The Fifth and Seventh Circuits, which make up the minority view, take what they consider “the most natural” reading of the text of § 2113(a). Based on their reading of the statutory language, they require force, violence, or intimidation for an attempted bank robbery. See *United States v. Bellew*, 369 F.3d 450, 454–55 (5th Cir. 2004); *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008).

In *Bellew*, the Fifth Circuit held that attempted bank robbery under the first paragraph of § 2113(a) requires the government to prove that the defendant actually committed an act of force, violence, or intimidation in an attempt, because the “force and violence, or intimidation” clause precedes the “attempts to take” clause. See 369 F.3d at 454–55. That rationale is almost identical to the one used by the court today.

The Seventh Circuit agreed with the Fifth Circuit and noted that “[u]nder a straightforward reading of § 2113(a), the ‘attempt’ language related only to the taking and not to the intimidation.” *Thornton*, 539 F.3d at 747. The Seventh Circuit explained that more than an “attempt to intimidate while attempting to rob a bank” is necessary; otherwise, the attempt language would precede the “by force and violence, or intimidation” language. See *id.* Therefore, it held that actual force and violence or intimidation is required, “whether the defendant succeeds (takes) or fails (attempts to take) in his robbery attempt.” *Id.*

II

In my view, the text of § 2113(a) is not clear on its face as to the elements of an attempted bank robbery. “The statutory language is perfectly ambiguous on this point.” *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 54, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008) (Breyer, J., dissenting).

As I read the text, it is amenable to different readings. For example, as the Sixth Circuit explained, one reasonable interpretation of the text is that the statute criminalizes “attempted taking ‘by force [and] violence, or by intimidation.’” See *Wesley*, 417 F.3d at 618 (emphasis added). But the text can also be read so that the “by force and violence,

or by intimidation” language applies only to a substantive “taking” offense, not to an inchoate attempt. The defendant need only intend to use force, violence, or intimidation. See *Moore*, 921 F.2d at 209.

After giving this matter some thought, I side with the majority view. Applying the classic elements of attempt is more in line with how our circuit and the Supreme Court have defined the elements of attempt crimes, even when the elements of the attempt offense are purportedly baked into the relevant statute.

Criminal attempt is an inchoate crime. See *United States v. Dupree*, 57 F.4th 1269, 1272 n.1 (11th Cir. 2023) (en banc). As a general matter, an attempt offense requires an intent to commit the completed offense plus a “substantial step” toward its completion. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 106–07, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007). See also *Alvarado-Linares v. United States*, 44 F.4th 1334, 1347 (11th Cir. 2022) (“[T]he hornbook criminal-law definition of ‘attempt’ is a (1) substantial step plus (2) intent.”) *1295 (citing W. LaFave, 2 Sub. Crim. Law § 11.4 (2d ed. 2003)).

That the term “attempt” is included in the first paragraph of § 2113(a) should not change these two classic elements. “There is no general federal statute which proscribes the attempt to commit a criminal offense.” *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983). An attempt offense may be incorporated into a particular statute, as in § 2113(a), or set forth in a separate statute, as in 21 U.S.C. § 846. In either case, federal courts typically employ the Model Penal Code’s approach to attempt. See, e.g., *Resendiz-Ponce*, 549 U.S. at 108 n.4, 127 S.Ct. 782 (analyzing an attempt conviction under 8 U.S.C. § 1326, which makes it illegal to “enter, or attempt to enter”); *Rivera-Sola*, 713 F.2d at 869 (describing federal courts’ use of § 5.01 of the Model Penal Code to define attempt). Indeed, the Supreme Court has noted that “the ‘substantial step’ requirement is implicit in the word ‘attempt,’ ” even where the “attempt” language is included in the statute proscribing the substantive offense. See *Resendiz-Ponce*, 549 U.S. at 108 n.4, 127 S.Ct. 782.

Under the relevant provision of the Hobbs Act, “whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do,” may be subject to up to 20 years of imprisonment. 18 U.S.C. § 1951(a) (emphases added). Thus, to obtain a conviction

for a *completed* Hobbs Act robbery, the government must show that the defendant engaged in the “unlawful taking or obtaining of personal property ... of another, against his will, by means of actual or threatened force, or violence, or fear of injury.” *Taylor*, 596 U.S. at 850, 142 S.Ct. 2015. See § 1951(b) (defining robbery). Based on these elements, the Supreme Court in *Taylor*, like the majority of circuits, relied on the classic elements of attempt: “[I]t follows that to win a case for *attempted* Hobbs Act robbery the government must prove two things: (1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a ‘substantial step’ toward that end.” *Id.* at 851, 142 S.Ct. 2015.

Ultimately, the Court held in *Taylor* that attempted Hobbs Act robbery does not qualify as a crime of violence under § 924(c)’s elements clause because the government could convict a defendant for attempted Hobbs Act robbery by proving that he intended to take property by force or threat. *Id.* at 851–52, 142 S.Ct. 2015. The court’s only basis for distinguishing *Taylor* is premised on its reading of purported structural differences in the respective statutes. But the court provides no persuasive explanation as to why the elements of attempt under federal law should be ignored or displaced in this case. Our circuit “read[s] *Taylor* to hold that, where a crime may be committed by the threatened use of force, an attempt to commit that crime—*i.e.*, an attempt to threaten—falls outside the elements clause.” *Alvarado-Linares*, 44 F.4th at 1346. And when the classic elements of attempt are properly considered, I think the majority view is better reasoned.

Like the majority of circuits, I believe that determining the elements of attempted bank robbery under § 2113(a) requires

us to look at the general elements of attempt. A defendant can therefore be convicted of attempted bank robbery under the first paragraph of § 2113(a) without the actual use of force, violence, or intimidation, and that analysis is consistent with *Taylor*. And because the first paragraph of § 2113(a) can be read—and again, has been read by a majority of circuits—the same way the Supreme Court read the Hobbs Act, we should apply the teaching of *Taylor*: where a substantive crime may be committed by the threatened use of force, violence, or intimidation, an attempt to commit that crime is not categorically a crime of violence under § 924(c)’s elements clause. See *Alvarado-Linares*, 44 F.4th at 1346.

III

The categorical approach requires us to decide “whether the federal felony at issue *always* requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” *Taylor*, 596 U.S. at 850, 142 S.Ct. 2015. Here, as both a textual and practical matter, it does not. “Individuals like our foiled robber [Adam] who are arrested before they can threaten anyone may be convicted too.” *Id.* at 854, 142 S.Ct. 2015. Because I believe that attempted bank robbery under the first paragraph of § 2113(a) can be committed without the actual use of force, violence, or intimidation, I disagree with the premise underlying the court’s affirmance of Count 10 of Mr. Armstrong’s conviction. I therefore respectfully dissent as to Part III.C.

All Citations

122 F.4th 1278, 30 Fla. L. Weekly Fed. C 1689

Footnotes

- 1 Throughout *Sams*, we discussed bank robbery without any reference to extortion as a means of commission. In particular, we said that “bank robbery, in violation of § 2113(a), ... requires that the defendant take the property of a bank ‘by force and violence, or by intimidation.’” *Sams*, 830 F.3d at 1238 (quoting § 2113(a)). This language suggests that we assumed without deciding that bank robbery and bank extortion are two separate crimes. But “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925). So we now make explicit what we previously only presumed.

- 2 These documents are known as *Shepard* documents and are records related to a defendant's prior convictions, including charging documents, plea agreements, plea-colloquy transcripts, and other comparable judicial records. *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).
- 3 The second paragraph of § 2113(a), which prohibits bank burglary, is tangential to our discussion in this case, and this opinion should not be read to announce any new holding about the bank burglary portion of the statute.
- 4 Armstrong's indictment alleged that he aided and abetted his co-defendants in "knowingly attempt[ing] to take from the person and presence of another, that is, a bank employee, by force and violence, and by intimidation, certain money" from a federally insured bank. And when Armstrong pled guilty to that offense, he admitted that he "intended to take money possessed by a federally insured bank from or in the presence of the person described in the Second Superseding Indictment; and [he] intended to do so by intimidation," specifically that he "held PNC Bank employees at gunpoint and ordered them to get money out of the safe."
- 5 We recognize that our sister circuits are divided on this question. Compare *United States v. Thornton*, 539 F.3d 741, 746 (7th Cir. 2008) ("simply read[ing] the text" to conclude that "[t]he 'by force and violence, or by intimidation' language relates to both 'takes' and the phrase 'attempts to take'"), *United States v. Bellew*, 369 F.3d 450, 453–55 (5th Cir. 2004) (examining the plain text and legislative history and concluding that the phrase "by force and violence, or by intimidation" modifies both "takes" and "attempts to take"), and *United States v. Brown*, 412 F.2d 381, 383 (8th Cir. 1969) ("It is apparent that in the statute under consideration [§ 2113(a)] the 'attempt' relates to the taking and not to the intimidation." (quoting *United States v. Baker*, 129 F. Supp. 684, 686 (S.D. Cal. 1955))), with *United States v. Stallworth*, 543 F.2d 1038, 1040–41 (2d Cir. 1976) (affirming an attempted bank robbery conviction where the defendants neither entered the bank nor brandished weapons, based on the Model Penal Code definition of "attempt" and public policy considerations), *United States v. Jackson*, 560 F.2d 112, 116–17 (2d Cir. 1977) (same), *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984) (adopting *Stallworth*, 543 F.2d at 1040), *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005) (adopting *Jackson*, 560 F.2d at 116), and *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990) (announcing, without analysis, that "[c]onviction under section 2113 requires only that the defendant intended to use force, violence or intimidation and made a substantial step toward consummating the robbery"). Because we read the plain text of the statute to require an element of force, violence, or intimidation, we join the Fifth, Seventh, and Eighth Circuits. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). We note, in rejecting the view shared by the Second, Fourth, Sixth, and Ninth Circuits, that none of those courts engaged with the text of the statute—as we are required to do—in reaching their conclusions.

122 F.4th 984

United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee

v.

Bryan BURWELL, also known as Bush, Appellant

No. 16-3009

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Consolidated with 16-3072, 21-3041, 23-3031, 24-3017

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Argued November 8, 2024

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Decided December 9, 2024

Synopsis

Background: Following affirmance of their convictions for offenses relating to bank robberies, [690 F.3d 500](#), movants brought postconviction challenges to their convictions under federal statute for using or carrying a machine gun during and in relation to a crime of violence, alleging federal bank robbery statute was not a crime of violence. The United States District Court for the District of Columbia, [Colleen Kollar-Kotelly, J.](#), [160 F.Supp.3d 301](#) and [2024 WL 474521](#), denied motions. Movants appealed.

[Holding:] The Court of Appeals, Wilkins, Circuit Judge, held that federal bank robbery statute was indivisible for purpose of determining whether bank robbery by extortion was crime of violence.

Convictions vacated and remanded with instructions

Procedural Posture(s): Post-Conviction Review.

West Headnotes (15)

[1] Weapons 🔑 Crimes of violence

“Crime of violence,” for purposes of firearm sentencing enhancement, only encompasses offenses that, categorically speaking, involve the use or threatened use of force. [18 U.S.C.A. § 924\(c\)](#).

[2] Weapons 🔑 Crimes of violence

If the least culpable conduct that could sustain a conviction for a given crime does not necessarily require the use or threat of force, that offense is not a crime of violence and the firearm sentencing enhancement cannot apply. [18 U.S.C.A. § 924\(c\)](#).

[3] Weapons 🔑 Crimes of violence

Federal bank robbery constitutes a crime of violence for purposes of firearm sentencing enhancement when done by force and violence, or by intimidation. [18 U.S.C.A. §§ 924\(c\), 2113\(a\)](#).

[4] Weapons 🔑 Crimes of violence

Federal bank robbery by extortion is not a crime of violence for purposes of firearm sentencing enhancement because extortion need not involve the use or threat of force. [18 U.S.C.A. §§ 924\(c\), 2113\(a\)](#).

[5] Weapons 🔑 Crimes of violence

Federal bank robbery statute is indivisible as to extortion, for the purpose of determining at sentencing whether it constitutes a crime of violence for purposes of firearm sentencing enhancement; force and violence, intimidation, and extortion are three ways a person might rob a bank, and the text and structure of the statute indicate that extortion is a factual means of bank robbery, rather than an element of an entirely separate offense. [18 U.S.C.A. §§ 924\(c\), 2113\(a\)](#).

[6] Weapons 🔑 Controlled substances

Court of Appeals applies categorical approach to determine whether offense in question satisfies elements clause of statute prohibiting using or carrying firearm during and in relation to drug trafficking crime. [18 U.S.C.A. § 924\(c\)](#).

[7] Weapons 🔑 Crimes of violence

If least culpable conduct under statute prohibiting using or carrying firearm during and in relation to drug trafficking crime involves use or threat of force, offense counts as crime of violence and mandatory minimum applies; if it does not, offense is not eligible, even if defendant's actual conduct involved use or threat of physical force. 18 U.S.C.A. § 924(c).

[8] Criminal Law 🔑 Review De Novo

De novo review applies to the issue of whether an offense qualifies as a crime of violence. 18 U.S.C.A. § 924(c).

[9] Weapons 🔑 Crimes of violence

Federal bank robbery statute merely set forth three alternative means—force and violence, intimidation, and extortion—of completing same crime, and therefore it was indivisible for purpose of statutory element of offense of using firearm during and in relation to crime of violence, since same punishment attached for statutory alternatives, statute placed comma before extortion, as it did between force and violence and intimidation, rather than more disjunctive punctuation like semicolon, text did not set out separate mens rea requirements, and legislature had conviction that extortion was third means of committing single offense of bank robbery. 18 U.S.C.A. §§ 924(c), 2113(a).

[10] Criminal Law 🔑 Creation and Definition of Offenses

An indivisible statute sets out just one set of elements to define a single crime; a more complicated divisible statute may list elements in the alternative, and thereby define multiple crimes.

1 Case that cites this headnote

[11] Statutes 🔑 Context

Statutes are interpreted by examining the text and statutory context first.

[12] Sentencing and Punishment 🔑 Nature, degree or seriousness of offense

Statutory alternatives carrying different punishments must be elements of a divisible statute, for purposes of a sentencing enhancement.

1 Case that cites this headnote

[13] Sentencing and Punishment 🔑 Nature, degree or seriousness of offense

When legislators attach the same punishment for statutory alternatives, that provides meaningful evidence that the provision may be indivisible, for purposes of a sentencing enhancement.

[14] Statutes 🔑 Liberal or strict construction; rule of lenity

To invoke rule of lenity, court must conclude that there is grievous ambiguity or uncertainty in statute.

[15] Statutes 🔑 Legislative history

When interpreting a statute, a court does not ordinarily presume that Congressional report does not mean what it says.

***986** Appeals from the United States District Court for the District of Columbia (No. 1:04-cr-00355-5), (No. 1:04-cr-00355-6)

Attorneys and Law Firms

Courtney Millian, Assistant Federal Public Defender, argued the cause for appellant [Aaron Perkins](#). With her on the briefs was [A. J. Kramer](#), Federal Public Defender. Sandra G. Roland, Assistant Federal Public Defender, entered an appearance.

Gregory Stuart Smith, appointed by the court, argued the cause and filed the briefs for appellant Bryan Burwell.

Timothy R. Cahill, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Matthew M. Graves, U.S. Attorney, and Chrisellen R. Kolb and Elizabeth H. Danello, Assistant U.S. Attorneys. Katherine M. Kelly, Assistant U.S. Attorney, entered an appearance.

Before: Srinivasan, Chief Judge, Pillard and Wilkins, Circuit Judges.

Opinion

Wilkins, Circuit Judge:

For nearly twenty years, Bryan Burwell and Aaron Perkins have served prison sentences for their involvement in a series of bank robberies. Much of that time has been for firearms-related convictions that they now argue are erroneous. We agree.

[1] [2] Congress mandates that people convicted of using a firearm during and in relation to a crime of violence be sentenced to a minimum period of incarceration. 18 U.S.C. § 924(c). Sometimes for decades. But “crime of violence” is a term of art. It encompasses only offenses that, categorically speaking, involve the use or threatened use of force. Put differently, if the least culpable conduct that could sustain a conviction for a given crime does *not* necessarily require the use or threat of force, that offense is not a crime of violence and § 924(c)’s firearm sentencing enhancement cannot apply. That’s true even when a judge sentences an individual convicted of using force or violence in the commission of that crime in a particular case.

[3] [4] This appeal concerns whether federal bank robbery, 18 U.S.C. § 2113(a), is a crime of violence under § 924(c). The statute criminalizes bank robbery completed “by force and violence, or by intimidation,” or “by extortion.” *Id.* Our precedent holds that when done by force and violence, or by intimidation, bank robbery satisfies § 924(c)’s requirements. *United States v. Carr*, 946 F.3d 598, 599 (D.C. Cir. 2020). Yet all parties here agree that when done by extortion, bank robbery no longer is a crime of violence, because extortion need not involve the use or threat of force. Thus, the answer to the question turns on another: whether, in writing § 2113(a), Congress created two separate criminal offenses, one violent (done by force and violence, or by intimidation) and the other not (done by extortion). If so, the statute is divisible,

and Burwell’s and Perkins’s sentences must stand. If not, the statute is indivisible and merely sets forth three alternative means—force and violence, intimidation, and extortion—of completing the same crime.

[5] We hold that 18 U.S.C. § 2113(a) is indivisible as to extortion. Force and violence, intimidation, and extortion are three ways a person might rob a bank. The text and structure of the statute indicate that extortion is a factual means of bank robbery, rather than an element of an entirely separate offense. That conclusion is reinforced by the statutory history and common law roots of robbery and extortion. As *987 an indivisible offense, bank robbery is not a § 924(c) crime of violence, and Burwell’s and Perkins’s convictions under that provision are unlawful. We therefore vacate Burwell’s and Perkins’s § 924(c) convictions, and because both have served their entire sentences on their remaining counts of conviction, we remand the case to the District Court with instructions to determine expeditiously whether to release them immediately.

I.

A.

In August 2004, Bryan Burwell and Aaron Perkins were indicted, along with several other co-defendants, in the United States District Court for the District of Columbia for their role in a series of six local bank robberies. The government concedes that neither Burwell nor Perkins were leaders in the robbery scheme. Nouredine Chtaini, the group’s “nominal leader,” and two others purchased machineguns to use in the spree. *United States v. Burwell*, 690 F.3d 500, 502 (D.C. Cir. 2012) (en banc). Burwell later participated in two of the six bank heists, performing “crowd control” in each. According to a presentence investigation report, Perkins participated in just the final robbery but stayed outside the bank the entire time. Chtaini and another leader pleaded guilty before trial and agreed to testify against Burwell, Perkins, and others in exchange for lesser sentences and dismissal of certain charges—including the 18 U.S.C. § 924(c) offense at issue here. A jury convicted Burwell and Perkins of four counts each. Relevant to this appeal are both of their convictions under § 924(c) for using or carrying a machinegun during and in relation to any crime of violence. The District Court had no choice but to sentence Burwell and Perkins on these counts alone to the statutory mandatory minimum of thirty years in prison, to run consecutive to any sentence imposed on

the remaining counts. *Burwell*, 690 F.3d at 503; 18 U.S.C. § 924(c)(1)(B)(ii).

Following trial, our Court affirmed Burwell's and Perkins's convictions. *United States v. Burwell*, 642 F.3d 1062, 1064 (D.C. Cir. 2011). After rehearing *en banc*, we affirmed again. *Burwell*, 690 F.3d at 516. Now, these cases come before us on post-conviction review, as both Burwell and Perkins lodge challenges that they did not make (and, indeed, could not have made) at earlier junctures. Burwell raises two issues and Perkins raises one. Both argue that in light of the Supreme Court's decision in *United States v. Davis*, 588 U.S. 445, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), bank robbery is not a crime of violence for § 924(c) purposes, meaning that the thirty-year mandatory minimum should never have applied. Burwell further argues that his § 924(c) conviction independently must be vacated because the aiding and abetting jury instruction given at his trial on that charge was erroneous under *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). Because we vacate both Burwell's and Perkins's § 924(c) convictions on the *Davis* issue, we need not reach the *Rosemond* claim.

B.

This case implicates both § 924(c)'s firearm sentencing enhancement and the federal bank robbery statute. The former requires judges to impose a thirty-year mandatory minimum whenever a “person who, during and in relation to any crime of violence ... uses or carries a firearm” that is “a machinegun.” 18 U.S.C. § 924(c)(1)(A), (B)(ii). When Burwell and Perkins were convicted, § 924(c) contained both an “elements clause” and a “residual clause.” Under the elements clause, an offense *988 is considered a crime of violence if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* § 924(c)(3)(A). The residual clause applied whenever an offense “by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Davis*, 588 U.S. at 449, 139 S.Ct. 2319 (quoting 18 U.S.C. § 924(c)(3)(B) (internal quotation marks omitted)). The *Davis* Court held that the residual subsection was unconstitutionally vague under the Due Process Clause. *Id.* at 470, 139 S.Ct. 2319. As a result, these § 924(c) convictions must stand, if at all, based upon the “elements” clause.

[6] [7] We apply the categorical approach to determine whether an offense in question satisfies § 924(c)'s elements clause. *United States v. Taylor*, 596 U.S. 845, 850, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). If the least culpable conduct under the statute involves the use or threat of force, the offense counts as a crime of violence and the mandatory minimum applies. If it doesn't, the offense is not § 924(c)-eligible, “even if the defendant's actual conduct (*i.e.*, the facts of the crime)” involved the use or threat of physical force. *Mathis v. United States*, 579 U.S. 500, 504, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) (applying same approach for 18 U.S.C. § 924(e)(1)).

The second statute, which makes bank robbery a federal crime, was amended in 1986. Before then, federal bank robbery only reached those who took or attempted to take anything of value from certain financial institutions “by force and violence, or by intimidation.” 18 U.S.C. § 2113(a) (1982). In 1986, Congress wrote the statute we interpret today. It now defines bank robbery to cover:

[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

18 U.S.C. § 2113(a) (emphasis added); *see also* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99-646, § 68, 100 Stat. 3592, 3616.

C.

Burwell and Perkins both raised *Davis* claims before the District Court. Burwell timely filed his postconviction challenge alleging that his sentence was “imposed in violation of the Constitution or laws of the United States” because 18 U.S.C. § 2113(a) is indivisible. 28 U.S.C. § 2255(a). Perkins raised the same argument in a second or successive § 2255 motion, which this Court in 2016 permitted him to file. The District Court denied both motions.

[8] We have jurisdiction under 28 U.S.C. § 2253(a) and review *de novo* whether an offense qualifies as a crime of violence. *United States v. Sheffield*, 832 F.3d 296, 311 (D.C. Cir. 2016).

II.

[9] Deciding whether federal bank robbery is a crime of violence turns on the antecedent issue of whether the provision is indivisible. Recall that 18 U.S.C. § 2113(a) prohibits anyone who “by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion” anything of value from certain banks or financial institutions. Our precedent concludes that when bank robbery is completed “by force and violence, *989 or by intimidation,” *id.*, it is a crime of violence. *Carr*, 946 F.3d at 599, 602–04. But the parties here agree that when completed by extortion, bank robbery does not necessarily involve the use or threatened use of force. See Appellee’s Br. 18 n.8. This is because extortion can be accomplished using a threat of something other than violence, such as a threat of economic loss or a threat to reveal compromising information. Thus, the question becomes: Did Congress intend § 2113(a)’s first paragraph to be split into two crimes, one violent and the other not? Or, as the doctrine calls it: Is the statute divisible or indivisible? If the latter, Burwell’s and Perkins’s firearms convictions and sentences cannot stand and must be vacated.¹

[10] An “indivisible” statute sets out just one “set of elements to define a single crime.” *Mathis*, 579 U.S. at 504–05, 136 S.Ct. 2243. A “more complicated” divisible statute “may list elements in the alternative, and thereby define multiple crimes.” *Id.* at 505, 136 S.Ct. 2243. In § 2113(a), the statute is indivisible if extortion—like force, violence, and intimidation—is just one of several means of committing one crime: bank robbery. Subsection 2113(a) is divisible if bank robbery by extortion is an entirely separate crime from committing bank robbery by force and violence or by intimidation.

Mathis instructs us how to resolve divisibility questions. To decide whether the listed items (here, force and violence, intimidation, and extortion) are elements or means, we start with the text at issue. In its divisibility analysis, the Supreme Court directed federal courts to consult two further sources when the statutory text alone does not provide a clear answer: state court decisions interpreting the statute’s language and

record documents like indictments or jury instructions. *Mathis*, 579 U.S. at 517–18 & n.7, 136 S.Ct. 2243. The Court in *Mathis* answered whether the elements of a state law offense corresponded to the generic federally enumerated offense as required to satisfy the predicate requirement for a sentence enhancement under the Armed Career Criminal Act (“ACCA”). See 18 U.S.C. § 924(e). Here, unlike an ACCA case, we interpret a federal statute’s divisibility to determine whether a violation necessarily qualifies as a “crime of violence” under § 924(c). We take no position on the pertinence of resorting to those additional sources to settle the divisibility of federal statutes, as here the text and routine tools of statutory interpretation provide a clear answer that is not contradicted by any well-reasoned precedent or by record documents: § 2113(a) is indivisible as to extortion and, therefore, not a crime of violence under § 924(c). Reinforcing our conclusion are the common law roots of robbery and extortion, as well as the statutory history of the 1986 amendment. At bottom, there is one indivisible bank robbery offense in § 2113(a), carried out by means of force and violence, intimidation, or extortion.

A.

[11] We interpret statutes by examining first the text and statutory context. *990 *Noble v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 103 F.4th 45, 50 (D.C. Cir. 2024) (citing *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020); *Petit v. U.S. Dep’t. of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012)). Multiple indicators support reading § 2113(a) as indivisible.

[12] [13] Start with the plain text. Subsection 2113(a) provides a single maximum penalty regardless of how a bank robbery is completed. Whether one is convicted for robbing a bank by force and violence, intimidation, or extortion, their maximum penalty may not exceed twenty years in prison. 18 U.S.C. § 2113(a). Consistent with *Mathis*’s instruction that statutory alternatives carrying *different* punishments must be elements of a divisible statute, 579 U.S. at 518, 136 S.Ct. 2243, we believe the inverse at least points toward the opposite conclusion: when legislators attach the same punishment for statutory alternatives, that provides meaningful evidence that the provision may be indivisible. See *United States v. Redd*, 85 F.4th 153, 165 (4th Cir. 2023) (finding that statute spread out across two subsections was indivisible in part because punishment was the same); *cf. United States v. Buck*, 23 F.4th 919, 925 (9th Cir. 2022)

(finding basic and aggravated offenses in 18 U.S.C. § 2114(a) divisible and collecting cases).

That inference alone is not dispositive. Both the first and second paragraphs of § 2113(a) (bank robbery and bank burglary) carry the same punishment, and Burwell and Perkins concede the two are separate offenses. Perkins Br. 21; *see also* [United States v. Butler](#), 949 F.3d 230, 234 (5th Cir. 2020) (holding § 2113(a) is divisible between its two paragraphs). But here, reinforcing bank robbery's indivisibility as to extortion are the structural and syntactical choices Congress made when redrafting the provision. Subsection 2113(a) locates “obtains or attempts to obtain by extortion” in a list inside a single paragraph. 18 U.S.C. § 2113(a). And, Congress's use of “by” before extortion mirrors “by force and violence” and “by intimidation,” the other two means of committing bank robbery. *Id.*

Congress had other options. Rather than create a separate paragraph, as it did with the second paragraph for bank burglary in § 2113(a), or a separate subsection, as it did for bank larceny in § 2113(b) and receipt of stolen bank property in § 2113(c), Congress chose to group extortion together with force and violence and intimidation in the same paragraph of the bank robbery statute. 18 U.S.C. § 2113(a)–(c). Indeed, the title of Section 2113 is “Bank robbery and incidental crimes.” Congress opted to not penalize obtaining money from a bank by extortion as an incidental (*i.e.*, separate) crime from bank robbery, like it did with bank larceny and receiving stolen bank property. That choice further suggests the statute is indivisible between bank robbery by force and violence, intimidation, and extortion. *Cf.* [Butler](#), 949 F.3d at 234 (reasoning that the disjunctive “or” between § 2113(a)'s paragraphs is different than the use of “or” within the paragraph, and “[t]he paragraphs use ‘or’ internally to set out alternative means” (emphasis added)).

Congress's other syntactical choices confirm our reading. For one, the amended § 2113(a) naturally places a comma before extortion, as it does between force and violence and intimidation, rather than more disjunctive punctuation like a semicolon. *See* [Buck](#), 23 F.4th at 925 (noting that divisible clause is set off by semicolon); [United States v. Enoch](#), 865 F.3d 575, 580 (7th Cir. 2017) (same). The lack of a comma after the extortion clause also bears noting: If “or obtains or attempts to obtain by extortion” was a distinct element of a separate crime, then a comma would naturally follow the word “extortion” to set off ***991** the clause. The absence of such a comma instead denotes a third factual means in

a list of ways to acquire the property described in the rest of the paragraph. And, the text does not set out separate *mens rea* requirements for what the government claims are two purportedly distinct offenses, which in other statutes can suggest divisibility. *See* [Martin v. Kline](#), No. 19-15605, 2021 WL 6102175, at *1 (9th Cir. Dec. 22, 2021) (unpublished mem. op.). Subsection 2113(a)'s first paragraph thus lacks many of the characteristics that would plainly suggest it is divisible.

Instead, the plain text of § 2113(a)'s first paragraph criminalizes *how* someone unlawfully comes into possession of bank property—either by taking or attempting to take by force, violence, or intimidation; or by obtaining, or attempting to obtain bank property by extortion. 18 U.S.C. § 2113(a). The fact that “intimidation” and “extortion” are synonyms is strong evidence that Congress viewed extortion and intimidation as alternative means to commit bank robbery. *See, e.g.,* *Intimidation*, BLACK'S LAW DICTIONARY (5th ed. 1979) (“Intimidation. Unlawful coercion; extortion; duress; putting in fear.”); *Extort*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “extort” as “[t]o obtain from a reluctant person by violence, torture, intimidation”). The statute therefore is best read to contain two distinct elements: coming into possession of bank property and the unlawful means by which that occurs. *Cf.* [United States v. Al-Muwakkil](#), 983 F.3d 748, 756–57 (4th Cir. 2020) (finding Virginia's attempted rape statute indivisible because it was “best read” to boil down to “(1) carnal knowledge (a sexual act)[] and (2) unwillingness,” even though the act itself could be done different ways). Indeed, the 1986 amendment was titled “Addition of Extortion to Bank Robbery Offense,” § 68, 100 Stat. at 3616, which suggests that Congress intended to “add” extortion to the extant offense of bank robbery, rather than to create a new separate and distinct bank extortion offense. *See* [Almendarez-Torres v. United States](#), 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.” (internal quotation marks omitted)).

[14] The text, structure, and statutory history make clear that § 2113(a) is indivisible. That clarity resolves this case.² We note, however, that the 1986 amendment's legislative history supports our reading of the statute. [Noble](#), 103 F.4th at 50. The House Report accompanying the 1986 revision noted that, prior to the amendment, federal courts were “divided over the question whether [§ 2113(a)] proscrib[e]d extortionate

conduct.” *H.R. REP. NO. 99-797*, at 32 (1986). Some courts held bank robbery by extortion could be prosecuted only under § 2113(a), whereas others held the Hobbs Act (18 U.S.C. § 1951(a)) was more appropriate, and still others found that either statute could apply. *Id.* The report concluded that “[t]here is no gap in federal law. Extortionate conduct is prosecutable [under] either.” *Id.* In other words, the report explains that bank robbery by extortion was covered by the pre-existing statutory language—meaning even before the 1986 amendment, extortion, just like *992 “force and violence” and “intimidation,” was simply another means of committing the same crime. Congress merely “clarifi[ed]” that § 2113(a) would be the only statute covering bank robbery and inserted “obtain by extortion” to “expressly” cover what the statute always did. *Id.* at 33. In that way, the 1986 amendment was not creating an altogether separate offense.

The legal context that Congress considered in its 1986 amendment confirms the legislature's conviction that extortion is a third means of committing the single offense of bank robbery. As explained above, Congress amended § 2113(a) to resolve a disagreement among the courts of appeals regarding the proper statute for prosecuting “extortionate activity involving the obtaining of bank monies.” *Id.* The cases cited in the House Report, to which Congress's revision responded, all involved a defendant threatening to harm a bank executive's home, wife, or children unless the executive delivered bank cash to a specified location. *Id.* at 32 nn.13–16. The fact that those cases only concerned extortion as it was used to extract money from federally insured banks underscores Congress's intent to clarify that § 2113(a) treats all coercive conduct aiming to “get money from the bank” the same, whether technically classified as robbery or as extortion. *United States v. Golay*, 560 F.2d 866, 869 n.3 (8th Cir. 1977). Put differently, those cases show that Congress viewed bank robberies effected by extortion as equivalent to bank robberies effected by force and violence or by intimidation: all are unlawfully coercive means to “obtain [...] bank monies.” *H.R. REP. NO. 99-797*, at 33.

B.

The government's primary argument is that § 2113(a) is divisible because robbery and extortion were distinct crimes at common law, and Congress imported this “old soil” first into the Hobbs Act and then later into the bank robbery provision. Appellee's Br. 14–16, 20–24. This argument rests

on two propositions. First is the strength of the common law difference between robbery and extortion, and second is the assumption that Congress wanted any such differences carried into the federal criminal law's understanding of the Hobbs Act and § 2113(a).

The government falters at both steps. Upon inspection, neither argument it raises is persuasive, and instead, the common law and statutory history confirm § 2113(a) is indivisible. As for the historical differences between robbery and extortion, the government sees common law robbery as a “taking of property ‘from the person or in the presence of another, against his will,’ ” Appellee's Br. 15 (quoting *Ocasio v. United States*, 578 U.S. 282, 297, 136 S.Ct. 1423, 194 L.Ed.2d 520 (2016)), that is precipitated by the “use of force or threatened force,” *id.* (quoting *United States v. Harris*, 916 F.3d 948, 955 (11th Cir. 2019)). The latter requirement, in the government's view, means that common law robbery “embraced only threats of immediate bodily harm to the victim.” *Id.* (quoting *Harris*, 916 F.3d at 955).

But the government's premise that common law robbery “embraced only threats of immediate bodily harm to the victim” is flat wrong. As Blackstone explained, robbery is the “felonious and forcible taking from the person of another of goods or money to any value, by violence *or putting him in fear*.” 4 WILLIAM BLACKSTONE, COMMENTARIES *241 (emphasis added).

And multiple treatises, including Blackstone's, make clear that the fear element of common law robbery could be induced by threats of something other than violence. As Blackstone explained, “extorting *993 money or [any] other thing of value by means of a charge of sodomy may be robbery.” *Id.* at *244 n.14; *see also, e.g.*, WILLIAM L. CLARK & WILLIAM L. MARSHALL, TREATISE ON THE LAW OF CRIMES 791 (Melvin F. Wingersky ed., 6th ed. 1958) (“If a man threatens to accuse another of ... sodomy, and thereby obtains property from him, the law regards it as a robbery”); 2 FRANCIS WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 352 (7th ed. 1874) (noting robbery charges involving threats of a sodomy accusation “and similar means”); 2 WILLIAM OLDNALL RUSSELL & CHARLES SPRENGEL GREAVES, A TREATISE ON CRIMES AND MISDEMEANORS 133 (9th Am. ed. 1877) (noting robbery by extortionate “threats to accuse” another). Robbery came to encompass these threats because they would “so injure a person that fear of [them] would naturally cause [a

victim] to give up his property.” WILLIAM L. CLARK, JR., HANDBOOK OF CRIMINAL LAW 377 (3d ed. 1915); *see also White v. United States*, 300 Va. 269, 863 S.E.2d 483, 484–492 (2021) (surveying the common law).

While common law robbery by extortionate threats was limited to accusations of sodomy or an infamous crime, some statutes evolved to include robbery by “extort[ing] money or other things [through] threat[s] [of] a prosecution for any other crime.” ROBERT DESTY, COMPENDIUM OF AMERICAN CRIMINAL LAW 502 (1882). Indeed, the Supreme Court has noted that using an accusation of sodomy to extort money from the victim has been classified as extortion in some state statutes and as robbery in others. *United States v. Nardello*, 393 U.S. 286, 294, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969) (citing Kansas statute of robbery in the third degree).

In sum, as LaFave's treatise states,

“[t]he scope of robbery grew gradually: formerly the offense seems to have been confined to cases of actual violence to the person; but in later times it has been extended to constructive violence by putting in fear, and not only to cases where property has been taken or delivered under a threat of bodily violence to the party robbed, or some other person, but also where the fear has resulted from apprehension of violence to the habitation and property, *or has been occasioned by threats of preferring a charge of an infamous crime* [i.e., sodomy or attempted sodomy].”

WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 (3d ed. 2024) (emphasis added) (internal quotations and citations omitted). The upshot of the common law is that some non-violent extortionate threats rose to the level of robbery. Accordingly, the bright line between robbery and extortion that the government seeks to draw is not so clear. And, as a result, the government's “old soil” argument has far less force.

The same is true with the government's insistence that Congress incorporated the common law into the bank robbery statute. One clue suggesting that Congress rejected old soil in the world of federal bank robberies is that it maintained the same maximum penalty for bank robbery committed by force and violence, intimidation, or extortion, which departs from the common law's application of greater punishment for robbery than extortion. *See* 18 U.S.C. § 2113(a); *Harris*, 916 F.3d at 955 (quoting *Commonwealth v. Froelich*, 458 Pa. 104, 326 A.2d 364, 368 (1974)). The Supreme Court's interpretation of § 2113 further suggests Congress rejected

old soil in drafting the bank robbery statute. The Court has read other subsections in § 2113 as departing from their various common law roots. *Bell v. United States*, 462 U.S. 356, 360, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983) (finding bank larceny in § 2113(b) “[went] beyond the common-law definition of larceny”); *994 *Carter v. United States*, 530 U.S. 255, 256, 264–67, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (noting § 2113(a) and § 2113(b) “bear a close resemblance to the common-law crimes of robbery and larceny,” but “neither term appears in the text” and “the canon on imputing common-law meaning [thus] ha[d] no bearing on [the] case”).

What's more, the text of § 2113(a) and its legislative history further show that common law principles Congress may have brought into the Hobbs Act disappear in the bank robbery statute. Take the focus on consent as an element of extortion and a historical difference between extortion and robbery. J.W. EHRLICH, EHRLICH'S CRIMINAL LAW 260 (Matthew Bender & Co. 1960) (“The element of extortion that the taking of the property must be with the consent of the person from whom it is obtained distinguishes extortion from robbery.” (citation omitted)); ROLLIN M. PERKINS, CRIMINAL LAW 327 (The Foundation Press 1957) (noting the “distinction” between “statutory extortion and robbery by intimidation” is whether the victim “consents” to giving up property); *see also* CLARK & MARSHALL, *supra*, at 794 (“Extortion is the obtaining of the property of another, with his consent induced by the wrongful use of force or fear or under color of official right.”). The government notes this distinction in its brief and highlighted it at argument.

Whatever work “consent” does in the common law and in early statutory definitions of extortion, it appears Congress imported that into the Hobbs Act. *See* 18 U.S.C. § 1951(b)(2) (defining Hobbs Act extortion as “obtaining ... property from another, *with* [the victim's] consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right” (emphasis added)); *see also Ocasio*, 578 U.S. at 297, 136 S.Ct. 1423 (Hobbs Act extortion involves obtaining property with consent while robbery involves obtaining property against the victim's will). But in the bank robbery statute, Congress neglected to give extortion any definition. *See* 18 U.S.C. § 2113(a). This omission is significant. In *Nardello*, the Court refused to define “extortion” in the Travel Act solely by reference to the common law because Congress declined to define the term and the context and history strongly suggested that Congress intended a broader meaning for the term than common

law extortion. 393 U.S. at 292–96, 89 S.Ct. 534. Likewise here, the legislative history suggests that Congress may have viewed extortion in the bank robbery context differently: the House Report accompanying the 1986 amendment specified “[t]he term ‘extortion’ as used in 18 U.S.C. § 2113(a) means obtaining property from another person, *without the other person’s consent*, induced by the wrongful use of actual or threatened force, violence, or fear.” H.R. REP. NO. 99-797, at 33 (1986) (emphasis added).

[15] The government insists that the language in the House Report contrary to the common law meaning of extortion must have been a typo, and that the report actually meant to say that bank robbery by extortion is a taking completed *with the other person’s consent*. See Appellee Br. 18 n.7; Oral Arg. Tr. 65. That is one possible interpretation, and we do not need to definitively interpret the House Report to resolve this case. Nevertheless, we observe that the government cites no evidence to support its contention that Congress imported extortion’s common law tradition wholesale into the bank robbery statute. Further, we do not ordinarily presume that a Congressional report does not mean what it says. Cf. *Niz-Chavez v. Garland*, 593 U.S. 155, 161 n.1, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021) (courts may apply *995 “scrivener’s error” doctrine when construing statutes only in those “unusual” and “exceptional circumstances” where the “obvious” intent of Congress is contrary to the plain text (citations omitted)). Instead, it seems equally likely that the House Report reflects a rejection of the legal fiction that money taken due to an extortionate threat during a bank robbery should be considered as taken “with the consent” of the bank. As stated by one court, “the use of the concept of consent in this context is not necessarily the most informative method of distinguishing between the crimes” of robbery and extortion. *Froelich*, 326 A.2d at 368. Yet another court has said the use of “consent” to distinguish extortion from robbery “is at best a distinction without a difference.” *People v. Krist*, 97 Mich.App. 669, 296 N.W.2d 139, 141 (1980); see also LAFAVE, *supra*, § 20.4(b) (noting that “in spite of the different expressions” of “against the will of the victim” and “with the consent of the victim” used to distinguish robbery from extortion, “there is no difference here, for both crimes equally require that the defendant’s threats induce the victim to give up his property, something which he would not otherwise have done” (cleaned up)).

C.

We next consider whether any binding precedent compels us to disregard § 2113(a)’s text, structure, and common law and statutory history. The Court in *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), noted in dictum that “force” and the “threat of force” are two “means” to commit the same element in § 2113(a)—and there is little daylight between that characterization of means and the proposition that violence, intimidation, and extortion are different means to commit bank robbery. Still, neither this Court nor the Supreme Court has explicitly addressed the bank robbery statute’s divisibility as to extortion. The government concedes that our recent decision in *Carr*, 946 F.3d at 599, “is not directly controlling here because it did not address [A]ppellants’ claim.” Appellee’s Br. 18.

According to the government, “[e]very federal court of appeals that has addressed this issue has similarly concluded that § 2113(a) is divisible between robbery and extortion.” *Id.* 19. We are not persuaded. We start with the decisions from the Second, Ninth, and Eleventh Circuits. The last of those, *In re Jones*, No. 16-14106-J, 2016 U.S. App. LEXIS 23578 (11th Cir. July 27, 2016), does not help the government. *Jones* assumed that “in every § 924(c) armed bank robbery case, the federal indictment will make clear that the companion conviction is an armed bank robbery, rather than some other offense criminalized by § 2113(a).” 2016 U.S. App. LEXIS 23578, at *12. The factual presumption of the *Jones* court is fatally undermined by the list of indictments Perkins cites, each of which charged bank robbery by force, violence, intimidation, *and* extortion in a single count. Perkins Reply Br. 14–15.

The government fares no better with *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (per curiam), and *United States v. Evans*, 924 F.3d 21, 28 (2d Cir. 2019). See Appellee’s Br. 19. The *Watson* Court stated, in cursory fashion, that § 2113(a) “contains at least two separate offenses, bank robbery and bank extortion.” 881 F.3d at 786 (citing *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006); *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991)). *Jennings* and *Eaton*, the cases cited in *Watson*, do not support the government’s divisibility argument here; they neither conducted a divisibility analysis nor addressed in any way whether force and violence, intimidation, *996 and extortion are alternative means or elements. The same is true with the government’s cite to *Evans*, which simply relied on *Watson* to summarily reject an indivisibility argument. 924 F.3d at 28. The Second Circuit stated in passing that it “need not address Evans’s argument regarding bank robbery ‘by extortion,’ ” *id.*,

because it “agree[d] with [*Watson*] that § 2113(a) ‘contains at least two separate offenses, bank robbery and bank extortion.’” *Id.* (quoting *Watson*, 881 F.3d at 786); *see also Collier v. United States*, 989 F.3d 212, 219 n.9 (2d Cir. 2021) (citing *Evans* to again say the Second Circuit follows the Ninth Circuit’s *Watson* decision).

Last in line for the government’s out-of-circuit authority is *King v. United States*, 965 F.3d 60 (1st Cir. 2020). There, the Court found the bank robbery statute divisible as to extortion. *Id.* at 67–71. *King* is also not persuasive, primarily because it rests on the same argument as the government does here—that § 2113(a) “tracks the common law differences between the offenses of robbery (a taking against the victims’ will) and extortion (obtaining with the victim’s consent).” *Id.* at 68 (citations omitted). But, as discussed, the common law differences between robbery and extortion are far more facile than the government (and *King*) represents, and we are convinced that Congress took a different tack in § 2113(a). *See supra* Section II.B.

At bottom, the government’s reliance on purported unanimity among our sister circuits lacks force. We opt to follow *Mathis* and exercise our judgment in determining § 2113(a)’s “single, best meaning.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2266, 219 L.Ed.2d 832 (2024). Subsection 2113(a) is indivisible.

D.

The parties also address what a “peek” at the record documents tells us about the divisibility of § 2113(a). *Mathis* instructed that courts need only look at record documents if the plain text and caselaw are unilluminating. 579 U.S. at 518–19, 136 S.Ct. 2243. And, as we have explained, it remains an open question in this circuit whether or how *Mathis*’s instructions to consider state court decisions and record documents such as indictments might translate to the non-ACCA context. We do not answer that question in this case, where the text clearly supports indivisibility and the reasoning in non-binding out-of-circuit caselaw does not point us to the opposite answer.

We note only, as the belt to accompany our suspenders, that Burwell’s and Perkins’s citations to charging documents further suggest § 2113(a) is indivisible. Charging documents cannot charge “separate offenses in a single count.” 5 WAYNE F. LAFAVE ET AL., CRIMINAL PROCEDURE

§ 19.3(d) (4th ed. 2024) (citations omitted); *see also United States v. Klat*, 156 F.3d 1258, 1266 (D.C. Cir. 1998). Yet, the government has indicted defendants in a single count using the trio of bank robbery methods (force and violence, intimidation, and extortion) on multiple occasions, Perkins Reply Br. 14–15, which shows that each is a means to commit the single offense of bank robbery. We do not credit the government’s response that these examples constitute mere “sloppy drafting” that should not “ ‘override’ other ‘clear indications’ ” that the statute is divisible. Appellee’s Br. 26 (quoting *United States v. Furlow*, 928 F.3d 311, 322 (4th Cir. 2019)). For one, there are no “clear indications” that § 2113(a) is divisible, as we have previously explained. *See supra* Sections II.A, II.B. Second, the government has not offered any evidence to suggest that the indictments reflected sloppy drafting rather than a policy decision to charge defendants *997 for bank robbery by any of three available means. Here, for example, where the facts indicated that Burwell and Perkins committed bank robbery by force and violence, the indictment did not include the alternative means of intimidation or extortion.

Likewise, model jury instructions for the Seventh and Ninth Circuits and at least one district court treat force and violence, intimidation, and extortion as alternative means of committing the single offense of bank robbery. The Seventh Circuit model instructions define the third element of bank robbery as “[t]he defendant acted to take such [money; property; specific thing of value] by force and violence, or by intimidation.” O’Malley et. al., *Fed. Jury Prac. & Instr.* § 57:03 (7th ed. 2024 Update). Further, the Seventh Circuit model instruction specifies that “[t]he statute, at § 2113(a), ¶ 1, includes a means of violation for whoever ‘obtains or attempts to obtain by extortion.’ If a defendant is charged with this means of violating the statute, the instruction should be adapted accordingly.” *Id.* (emphasis added).

Similarly, the Ninth Circuit model instructions describe the first element of bank robbery as “the defendant, through force and violence or intimidation, [[took] [obtained by extortion] [[property] [money] [something of value]] belonging to or in the care, custody, control, management or possession of [specify financial institution].” MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT (2022 ed.) (emphasis omitted). Likewise, this instruction describes obtaining money by extortion as simply another means of committing the offense, the same as by use of force and violence or by intimidation. *See also* Ruschky & Shealy, *Pattern*

Jury Instructions for Federal Criminal Cases, District of South Carolina 375 (2024 ed.) (bank robbery's second element is “that the taking was by force and violence or by intimidation [for the obtaining was by extortion]” (emphasis added)). In *United States v. Goodridge*, 392 F. Supp. 3d 159, 178 (D. Mass. 2019), the Court concluded that because the First Circuit model instructions “do not include ‘extortion’ as a means of committing bank robbery,” the instructions “indicat[e] bank extortion is a separate offense.” We do not find that using an omission in this manner to prove the point is compelling—not only because there are multiple model instructions to the contrary, but also because the First Circuit model instructions do not elsewhere provide a separate instruction for the purported “separate offense” of bank extortion. See PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT 258–61 (D. Me. Internet Site ed. Feb. 26, 2024). Accordingly, a look to charging documents and model

jury instructions would require the same conclusion as the plain text does on the indivisibility of § 2113(a).

III.

For these reasons, we hold that bank robbery under 18 U.S.C. § 2113(a) is indivisible as to extortion and therefore does not qualify as a “crime of violence” under 18 U.S.C. § 924(c) in Burwell's and Perkins's cases. We vacate both § 924(c) convictions and remand to the District Court with instructions to determine expeditiously whether to release Burwell and Perkins immediately.

So ordered.

All Citations

122 F.4th 984

Footnotes

- 1 Burwell and Perkins were convicted under 18 U.S.C. § 2113(a) and (d). The Tenth Circuit has held that notwithstanding any indivisibility within § 2113(a), a conviction that includes subsection (d) is categorically a crime of violence. *United States v. Lucero*, 860 F. App'x 589, 594 (10th Cir. 2021) (unpublished order denying certificate of appealability). As the government concedes in its brief, it did not defend the § 924(c) conviction based upon § 2113(d) in the District Court, and because that issue was not included in the certificate of appealability, it is not before us. Appellee's Br. 17 n.6. However, the government “reserve[d] the right to argue that § 2113(d) may affect the crime-of-violence determination in an appropriate future case.” *Id.*
- 2 Burwell separately invokes the rule of lenity. Lenity does not apply here because “to invoke [it], a court must conclude that ‘there is a *grievous* ambiguity or uncertainty in the statute.’ ” *Burwell*, 690 F.3d at 515 (quoting *Muscarello v. United States*, 524 U.S. 125, 138–39, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998)) (emphasis in *Burwell*). For the reasons discussed above, § 2113(a) is not “grievously” ambiguous and the rule is inapplicable.

No. 24-____

In the
Supreme Court of the United States

Dwayne Barrett,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Double Jeopardy Clause permits two sentences for an act that violates 18 U.S.C. § 924(c) and § 924(j), a question that divides seven circuits but about which the Solicitor General and Petitioner agree.
- II. Whether “Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), a question left open after” *United States v. Taylor*, 596 U.S. 845 (2022). *United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 102 F.4th 60 and appears at Petitioner’s Appendix (“Pet. App.”) 1a-70a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231; the Second Circuit did under 28 U.S.C. § 1291; and this Court does under § 1254(1).

RELEVANT PROVISIONS

“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const., Amend. V.

18 U.S.C. § 924(c)(1)(A) is violated if someone, “during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or [], in furtherance of any such crime, possesses a firearm.”

18 U.S.C. § 924(j) is violated if someone, “in the course of a violation of subsection (c), causes the death of a person through the use of a firearm.”

A “‘crime of violence’ means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A).

Hobbs Act robbery is “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” 18 U.S.C. § 1951(b)(1).

INTRODUCTION

The “government’s longstanding position has been that a defendant may not be sentenced to cumulative punishments for Section 924(c) and (j) offenses arising out of the same conduct.” *Lora v. United States*, No. 22-49, Brief for the United States, 2023 WL 2186455, at *24. Five circuits agree that such double punishment violates the Double Jeopardy Clause. *See United States v. Garcia-Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011); *United States v. Ortiz-Orellana*, 90 F.4th 689, 705 (4th Cir. 2024); *United States v. Gonzales*, 841 F.3d 339, 355-58 (5th Cir. 2016); *United States v. Wilson*, 579 F. App’x 338, 348 (6th Cir. 2014); *United States v. Cervantes*, 2021 WL 2666684, at *7 (9th Cir. 2021).

The Second Circuit disagrees: “§ 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments.” Pet. App. 52a. The Eleventh Circuit is also “unpersuaded by the argument of the United States that the imposition of sentences under both section 924(c) and section 924(j) would violate the Double Jeopardy Clause.” *United States v. Julian*, 633 F.3d 1250, 1256 (11th Cir. 2011).

The Court should resolve the split over this oft-posed and important question, the answer to which can mean two prison terms – one of “15 years” plus a consecutive one of “30 years” – rather than one sentence of “not more than 15 years.” *Lora v. United States*, 599 U.S. 453, 459-60 (2023).

The Court should also answer the “question left open after *Taylor*,” which is whether “Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A).”

United States v. Stoney, 62 F.4th 108, 113 (3d Cir. 2023). *Taylor* resolved a “5-1” circuit split over whether “attempted Hobbs Act robbery is a crime of violence.” Reply Brief for the Petitioner, 2021 WL 2385535, at *5-6. “The answer matters,” the Court said, as it can mean “years or decades of further imprisonment.” *United States v. Taylor*, 596 U.S. 845, 848 (2022). Likewise, labeling Hobbs Act robbery a § 924(c) “crime of violence” mandated an extra “ten years” behind bars for Petitioner and advised “life imprisonment” under the Sentencing Guidelines, which his “sentence of 50 years” effectively constitutes. Pet. App. 12a-13a.

But this Court clarified in *Taylor* that deciding whether a crime is a § 924(c) predicate is a “straightforward job: Look at the elements.” 596 U.S. at 860. And the elements of Hobbs Act robbery are such that it can be committed by threatening (1) harm to oneself or (2) nonphysical injury to property, neither of which entails “the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A). Notably, the Second Circuit did not disagree: it said it was “bound by” a case that “never considered” these points, Pet. App. 38a, and then it refused to consider them en banc. *Id.* at 71a.

The Government has all but conceded Petitioner’s first point is correct, *see infra* at 23-24, yet the circuits refuse to address it. And various judges have agreed with the second point, *see infra* at 25-26, but circuits have disagreed by deeming robbery and extortion mutually exclusive—something the Hobbs Act does not do.

The Court should settle this. If not, it should hold this petition for the forthcoming “crime of violence” ruling in *Delligatti v. United States*, No. 23-825.

STATEMENT OF THE CASE

1. Petitioner Dwayne Barrett was the driver for a robbery crew. On December 12, 2011, when he wasn't present, a co-defendant fatally shot a man for throwing a bag of cash out the window of a moving vehicle. *See* Pet. App. 6a.

For this, a jury convicted Barrett of: aiding a Hobbs Act robbery, by driving the co-defendant to the scene, in violation of 18 U.S.C. § 1951; aiding the use of a gun during that robbery, a “crime of violence,” in violation of § 924(c); and aiding the use of a gun used to kill during a “crime of violence,” in violation of § 924(j). The District Court (Sullivan, J.) sentenced Barrett to 90 years in prison, but that sentence was vacated after an appeal to this Court. *See* Pet. App. 10a-11a.

At resentencing, where Barrett's § 924(j) conviction meant his suggested sentence was life imprisonment, *see* U.S.S.G. §§ 1B1.2(a); 2A1.1; Appendix A, the judge imposed a sentence of 50 years, which included 20 years for the Hobbs Act robbery and a consecutive 25 years for the § 924(j) conviction. *See* 2d Cir. 21-1379, Docket Entry 70 at 268. The judge did not impose a sentence for the § 924(c) conviction, as that and the one under § 924(j) “merged into one sentence because one's a lesser included of the other.” *Id.* at 220. *See also id.* at 275 (Amended Judgment reflecting no sentence imposed for the § 924(c) conviction).

2. While Barrett's appeal of that new judgment was pending, this Court decided *Lora*. The Court overruled all the cases that held “§ 924(c)(1)(D)(ii)'s bar on concurrent sentences governs § 924(j) sentences” and that “a § 924(j) conviction is [] subject to the mandatory minimum sentences specified in § 924(c).” 599 U.S. at

456. In fact, “subsection (j) neither incorporates subsection (c)’s penalties nor triggers the consecutive-sentence mandate.” *Id.* at 462.

Barrett thus filed a supplemental brief, explaining why the District Court had misunderstood § 924(j)’s penalties. *See* 2d Cir. 21-1379, Docket Entry 127.

3. Also while his appeal was pending, this Court decided *Taylor*. Reversing all but one of the circuits that had weighed in, it held attempted Hobbs Act robbery is not a “crime of violence” under § 924(c). It also clarified the proper methodology for determining if a crime “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A). Previously, arguing a crime wasn’t a § 924(c) predicate required the defendant to show a “‘realistic probability’” the “‘statute at issue could be applied to conduct that does not constitute a crime of violence’ by establishing that ‘courts [have] in fact appl[ied] the statute in the manner for which he argues.’” *United States v. Nikolla*, 950 F.3d 51, 53-54 (2d Cir. 2020) (citation omitted).

But *Taylor* ended the “realistic probability” test in § 924(c) cases. That test had developed in the context of federal courts having to “make a judgment about the meaning of a state statute,” yet “no such federalism concern is in play here. The statute before us [§ 924(c)] asks only whether the elements of one federal law align with those prescribed in another.” 596 U.S. at 859. *See also* § 924(c)(1)(A) (limiting § 924(c) predicates to crimes “for which [a] person may be prosecuted in a court of the United States”). Section 924(c) does not “mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to

present proof about the government’s own prosecutorial habits. Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime.” *Taylor*, 596 U.S. at 860.

“The only relevant question is whether the federal felony at issue always requires the government to prove,” *id.* at 850, the “use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A). And a “hypothetical” can “illustrate” why the answer is no. *Taylor*, 596 U.S. at 851. *See also, e.g., United States v. McDaniel*, 85 F.4th 176, 186 n.13 (4th Cir. 2023) (*Taylor* “clarified that . . . the ‘realistic probability’ test only applies when a federal court is interpreting state law.”).

Barrett thus filed another supplemental brief, setting out two reasons why the elements of Hobbs Act robbery don’t require what § 924(c)(3)(A) demands. He also provided hypotheticals. *See* 2d Cir. 21-1379, Docket Entry 111.

4. The Second Circuit (per Raggi, J.), agreed the District Court’s misunderstanding of § 924(j)’s penalties required resentencing. But it reversed the ruling that the § 924(c) and § 924(j) counts “merged into one sentence.” Pet. App. 49a (quoting District Court). “As construed in *Lora*, § 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments.” *Id.* at 52a. “Accordingly, on remand, the district court should sentence Barrett on each of these two counts of conviction.” *Id.*

As to whether Hobbs Act robbery is a § 924(c) predicate, the Second Circuit acknowledged Barrett presented “two hypotheticals” showing “Hobbs Act robbery,

like attempted Hobbs Act robbery, can be committed without ‘the use, attempted use, or threatened use of physical force against the person or property of another.’” *Id.* at 36a (quoting § 924(c)(3)(A)). But while Barrett’s appeal was pending, the circuit decided *United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023) (per curiam).

McCoy held Hobbs Act robbery is a § 924(c) predicate: “unlike in *Taylor*, Defendants here have presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property.” *Id.* at 74.

Barrett argued *McCoy* shouldn’t control, as he – unlike those defendants – had indeed identified hypothetical robberies not fitting within § 924(c)(3)(A). But the circuit concluded it was “bound by *McCoy*” even though “the court there never considered the hypothetical Hobbs Act robberies he posits.” Pet. App. 38a.

5. Barrett sought en banc review: *McCoy* “didn’t analyze [the “crime of violence”] question as required by the Supreme Court’s decision in *United States v. Taylor*.” 2d Cir. 21-1379, Docket Entry 161-1 at 1. *McCoy* “neither identified the elements of Hobbs Act robbery nor examined whether they invariably require proof of what § 924(c)(3)(A) demands.” *Id.* It thus “didn’t address [this] question as the Supreme Court requires— and [] consequently got the wrong answer.” *Id.* at 2.

As for the panel’s *Lora* ruling, *Lora* “says nothing about whether a defendant may be sentenced under both § 924(c) and § 924(j) for the same conduct.” *Id.* at 3. “And to the extent this question surfaced, the government sided with Barrett.” *Id.*

The Second Circuit denied en banc review without dissent. Pet. App. 71a.

REASONS FOR GRANTING THE PETITION

I. The Double Jeopardy Question Merits an Answer

The Second Circuit’s ruling that the Double Jeopardy Clause permits sentences under both § 924(c) and § 924(j) for the same act is “in conflict with” rulings of other “United States court[s] of appeals on the same important matter.” Sup. Ct. R. 10(a). This circuit split will only deepen absent review, and the jurisdictions in the minority allow what the Solicitor General and five circuits consider unconstitutional double punishment. The Court should resolve this dispute by holding “a defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*.” *Lora*, 599 U.S. at 461 (emphasis in *Lora*; quoting Brief for the United States).

A. The Circuits Are Split

In *United States v. Garcia-Ortiz*, 657 F.3d 25 (1st Cir. 2011), the First Circuit held that imposing two sentences for § 924(c) and § 924(j) convictions stemming from the same conduct “transgressed the Double Jeopardy Clause.” *Id.* at 27. A “conviction under section 924(j) necessarily includes a finding that the defendant violated section 924(c). The only meaningful difference is that section 924(j) requires proof of one additional fact: the death. Accordingly, section 924(c) is a lesser included offense of section 924(j). The government now concedes as much, and the case law amply supports this concession.” *Id.* at 28 (citations omitted). “Congress could have authorized cumulative punishments for convictions under sections 924(c) and 924(j) had it chosen to do so. But the plain language of section 924(j) indicates no such desire.” *Id.* (citation omitted).

The Fourth Circuit agrees. Section “924(c) is a lesser-included offense of § 924(j). The Government has not suggested that Congress intended to authorize cumulative punishments for convictions under these two statutes. And we can find no evidence of such congressional intent.” *United States v. Palacios*, 982 F.3d 920, 924-25 (4th Cir. 2020) (citations omitted). Thus, “the Double Jeopardy Clause prohibits imposition of cumulative punishments for § 924(c) and § 924(j) convictions based on the same conduct.” *Id.* at 925. *See also United States v. Ortiz-Orellana*, 90 F.4th 689, 705 (4th Cir. 2024) (same).

The Fifth Circuit also agrees. It reversed a judge who held (like the Second Circuit here) that “section 924(c) and section 924(j) are ‘distinct offenses, which Congress intended to punish in separate and consecutive fashions.’” *United States v. Gonzales*, 841 F.3d 339, 355 (5th Cir. 2016). “Every element of section 924(c) is also an element of section 924(j),” the court noted; “therefore, a person who violates section 924(j) necessarily violates section 924(c). As such, section 924(j) amounts to the ‘same offense’ as section 924(c) for purposes of the Double Jeopardy Clause.” *Id.* at 356. “We recognize, though, that . . . ‘a legislature [may] specifically authorize[] cumulative punishment under two statutes.’” *Id.* (citation omitted). But we “do not see an intent by Congress to impose cumulative punishment under both subsections for the same conduct.” *Id.* at 357. “We thus follow the majority view in the courts of appeal (and the government’s view) that there is insufficient indication that Congress intended sentences to be imposed under both subsection 924(j) and the lesser included offense of subsection 924(c).” *Id.* at 358.

The Sixth Circuit agrees too. “Every element of § 924(c) is also an element of § 924(j). Thus, § 924(c) is a lesser-included offense of § 924(j)— which means that, for purposes of the Double Jeopardy Clause, § 924(c) counts as the ‘same offense’ as § 924(j). Moreover, there is no indication that Congress authorized multiple punishments.” *United States v. Wilson*, 579 F. App’x 338, 348 (6th Cir. 2014).

The Ninth Circuit agrees as well. “Because § 924(c) is a lesser-included offense of § 924(j), and because both counts here were based on the same underlying murder [], convictions and sentences on both counts violate ‘the aspect of the Double Jeopardy Clause that protects against multiple punishments.’” *United States v. Cervantes*, 2021 WL 2666684, at *7 (9th Cir. 2021) (quoting *United States v. Kuzma*, 967 F.3d 959, 977 (9th Cir. 2020)).

The Second Circuit disagrees with all the courts above: “§ 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments.” Pet. App. 52a. The circuit acknowledged “Barrett’s § 924(c) crime is [] a lesser-included offense of his § 924(j) crime,” *id.* at 54a, but decided that “Congress intended to authorize cumulative sentences for a defendant convicted on related § 924(c) and § 924(j) counts of conviction.” *Id.* at 61a.

The Second Circuit noted the split on this: “for some time, courts, including our own, . . . concluded that cumulative § 924(c) and § 924(j) sentences were not authorized.” *Id.* at 56a & n.29 (citing cases). *See also id.* at 58a n.31 (“After *Lora*, the Fourth Circuit reiterated its *Palacios* holding that cumulative punishments under § 924(c) and § 924(j) violate double jeopardy.”) (citing *Ortiz-Orellana*).

The Eleventh Circuit agrees with the Second Circuit. “Our interpretation of section 924(j) does not prevent a district court from imposing a sentence under section 924(c) that must run consecutive to a separate sentence imposed under section 924(j).” *United States v. Julian*, 633 F.3d 1250, 1256 (11th Cir. 2011). “We are unpersuaded by the argument of the United States that the imposition of sentences under both section 924(c) and section 924(j) would violate the Double Jeopardy Clause of the Fifth Amendment.” *Id.*

Though the § 924(c) and § 924(j) charges in *Julian* were in the same rather than separate counts, *see id.* at 1252, the Government has explained that *Julian*’s double jeopardy “discussion was not dicta,” as “it related directly to the panel’s holding that §§ 924(c) and 924(j) create separate offenses, and was necessary to dispense with the appellee’s express argument in that case that the Double Jeopardy Clause barred this interpretation.” *United States v. Campo* (11th Cir.), Brief for the United States, 2016 WL 1295538, at *51-*52. *Julian* “rejected the idea that ‘the imposition of sentences under both section 924(c) and section 924(j) would violate the Double Jeopardy Clause.’” *Id.* at *51 (quoting *Julian*, 633 F.3d at 1256).

And dicta or not, the Eleventh Circuit has cited *Julian* in “affirm[ing] [the] imposition of separate sentences” for § 924(c) and § 924(j) counts stemming from the same conduct. *United States v. Campo*, 840 F.3d 1249, 1268 (11th Cir. 2016).

In sum, the circuits are split over this important question of statutory and constitutional interpretation. And though the Second Circuit could have lessened the split its panel ruling exacerbated, it refused to go en banc. Pet. App. 71a.

B. The Government Agrees with Petitioner

The “Double Jeopardy Clause,” the Solicitor General noted in *Lora*, precludes “multiple punishments for the same offense.” Brief for the United States, 2023 WL 2186455, at *22 (citation omitted). “[T]wo offenses are presumptively ‘distinct’ (and thus not the ‘same’) if and only if ‘each statute requires proof of an additional fact which the other does not.’” *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). “The legislature may ‘specifically authorize[] cumulative punishment under two statutes, regardless of whether those two statutes proscribe the “same” [offense] under *Blockburger*.’ But the absence of a distinction under *Blockburger* creates a ‘presumption’ that Congress intended only one conviction and one punishment.” *Id.* at *22-*23 (brackets in brief; citations omitted).

“That presumption applies with full force here, because Sections 924(c) and (j) do not have distinct elements. Section 924(j) ‘requires proof of a fact’ – a firearm-related death – ‘which [Section 924(c)] does not.’ But Section 924(c) does not require proof of any element that Section 924(j) does not also require.” *Id.* at *23 (brackets in brief; quoting *Blockburger*, 284 U.S. at 304). And “Congress has not authorized separate convictions and punishments based on Sections 924(c) and (j) for a single homicide.” *Id.* Accordingly, “the government’s longstanding position has been that a defendant may not be sentenced to cumulative punishments for Section 924(c) and (j) offenses arising out of the same conduct.” *Id.* at *24. Indeed, the claim that “Congress intended ‘that a defendant could be convicted and sentenced under (c) and (j) at the same time’ . . . is insupportable.” *Id.* at *25-*26 (citation omitted).

C. The Government Is Right, and the Second Circuit Is Wrong

When “two statutory provisions proscribe the “same offense,”” courts may not “impose two punishments for that offense.” *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (quoting *Whalen v. United States*, 445 U.S. 684, 692 (1980)). The only exception is if “Congress clearly indicates that it intended to allow courts to impose them.” *Id.* at 303. Congress didn’t do so here.

The Court effectively decided this question in *Whalen*, where it explained that “rape and the killing of a person in the course of rape in the District of Columbia are separate statutory offenses for which punishments are separately provided. Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode.” 445 U.S. at 690. Thus, “Congress did not authorize consecutive sentences . . . , since it is plainly not the case that ‘each provision requires proof of a fact which the other does not.’ A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape.” *Id.* at 693-94 (quoting *Blockburger*, 284 U.S. at 304). And a directive to impose two punishments “nowhere clearly appears.” *Id.* at 695.

Likewise, armed robbery and fatally shooting a person in the course of such robbery are “separate statutory offenses for which punishments are separately provided” under § 924(c) and § 924(j). *Id.* at 690. “Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode.” *Id.* Thus, “Congress did not

authorize consecutive sentences . . . , since it is plainly not the case that ‘each provision requires proof of a fact which the other does not.’ A conviction for killing in the course of [armed robbery] cannot be had without proving all the elements of [armed robbery].” *Id.* at 693-94 (quoting *Blockburger*, 284 U.S. at 304). And a directive to impose two punishments “nowhere clearly appears.” *Id.* at 695.

The Second Circuit’s opinion ignores *Whalen*. “As construed in *Lora*,” it asserts instead, “§ 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments.” Pet. App. 52a.

Nothing in *Lora* supports that. *Lora* was convicted of violating § 924(j) but not § 924(c), *see* 599 U.S. at 455, so the Court wasn’t presented with the question whether two sentences are constitutional. And it declined to speculate: citing the Government’s opinion that a “defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*,” *id.* at 461 (emphasis in *Lora*; citation omitted), the Court took “no position on the Government’s view.” *Id.* Obviously, the Court did not hold (or imply) two sentences may be imposed.

Per the Second Circuit, however, “Congress intended to authorize cumulative sentences for a defendant convicted on related § 924(c) and § 924(j) counts of conviction.” Pet. App. 61a. The court cited two clauses of § 924(c) in support of its claim: “Congress authorized – indeed, mandated – that sentences imposed under [§ 924(c)] (1) cannot be less than prescribed minimums, *see* 18 U.S.C. § 924(c)(1)(A), and (2) must run consecutively to any other sentences imposed on a defendant, *see id.* § 924(c)(1)(D)(ii).” Pet. App. 55a.

Yet all § 924(c)(1)(A) says is a § 924(c) sentence must be a certain “minimum” (depending on the facts of the case) and “in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime.” As the Government explained in *Lora*, this simply “makes clear that a violation of Section 924(c) is not the same offense for punishment purposes as the predicate [violent or drug] crime, even though *Blockburger* would presumptively classify it as such.” Brief for the United States, 2023 WL 2186455, at *26. The Fifth Circuit agrees: § 924(c)(1)(A) “says nothing [] about a section 924(c) sentence running consecutively to a sentence for a section 924(j) conviction.” *Gonzales*, 841 F.3d at 357.

Nor does § 924(c)(1)(D)(ii). It says “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment.” It thus applies only if a § 924(c) sentence is “imposed on a person.” But that just begs the question: *May* a § 924(c) sentence be “imposed on a person” sentenced under § 924(j) for the same conduct? The clause doesn’t say.

And that silence is deafening compared to § 924(c)(1)(A), which directs that a person who commits a crime of violence or drug trafficking crime with a gun “shall, in addition to the punishment provided for such crime of violence or drug trafficking crime[,] be sentenced” under § 924(c). But § 924(c)(1)(D)(ii), in contrast, does not say a person who commits a crime of violence or drug trafficking crime with a gun and kills someone with that gun “shall, in addition to the punishment provided for such killing, be sentenced” under § 924(c). And “where Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally.”
Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted).

The Fifth Circuit thus finds § 924(c)(1)(D)(ii) an exceptionally “weak[] basis from which to discern legislative intent to impose multiple punishments,” as it, unlike § 924(c)(1)(A), is not a “statutory command[]” to do that. *Gonzales*, 841 F.3d at 357. “If a defendant receives a sentence under subsection (j),” moreover, “he does *not* receive a sentence ‘imposed . . . under [subsection (c)].” *Lora*, 599 U.S. at 461 (emphasis and brackets in *Lora*; quoting § 924(c)(1)(D)(ii)). And this “aligns with” the “Government’s view” that a “defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*.” *Id.* (emphasis in *Lora*).¹

In sum, the Government considers the Second Circuit’s view “insupportable” for good reason. *Lora*, Brief for the United States, 2023 WL 2186455, at *26. Nothing “clearly indicates,” *Rutledge*, 517 U.S. at 303, a person may be sentenced under § 924(c) and § 924(j) for the same conduct. The Double Jeopardy Clause thus precludes such double punishment.

¹ The Second Circuit also invoked *United States v. Gonzales*, 520 U.S. 1 (1997), but that case posed a different question: whether a § 924(c) sentence may “run concurrently with a state-imposed sentence.” *Id.* at 2. The Court said no, citing what is now § 924(c)(1)(D)(ii). It emphasized that it was “hesitant to reach beyond the facts of this case to decide a question that is not squarely presented.” *Id.* at 11.

It reiterated, moreover, that a judge “could not (for double jeopardy reasons) sentence a person to two consecutive federal prison terms for a single violation of a federal criminal statute, such as § 924(c).” *Id.* at 9. This favors Petitioner, as “section 924(j) amounts to the ‘same offense’ as section 924(c) for purposes of the Double Jeopardy Clause,” *Gonzales*, 841 F.3d at 356, and when “two statutory provisions proscribe the ‘same offense,’” courts may not “impose two punishments.” *Rutledge*, 517 U.S. at 297 (quoting *Whalen*, 445 U.S. at 692). The only exception is if “Congress clearly indicates” otherwise, *id.* at 303, which it didn’t do here.

II. The “Crime of Violence” Question Merits an Answer

Whether Hobbs Act robbery is a § 924(c) “crime of violence” is “an important question of federal law that has not been, but should be, settled by this Court,” especially as lower courts have decided it “in a way that conflicts with relevant decisions of this Court” and accordingly gotten the wrong answer. Sup. Ct. R. 10(c).

A. This Question Is Recurring and Immensely Consequential, But the Circuits Have Refused to Address It Correctly

“As the government points out,” Hobbs Act “robbery frequently serv[es] as a predicate offense for § 924(c) counts.” *United States v. Thomas*, 2019 WL 1590101, at *2 (D.D.C. 2019) (citation omitted). And 2,864 people were sentenced for violating § 924(c) in the last fiscal year. See <https://www.ussc.gov/research/quick-facts/section-924c-firearms>. The average sentence was 145 months, *id.*, reflecting § 924(c)’s mandate that a consecutive term of at least 5, 7, 10, 25 or 30 years – or life imprisonment – be imposed. See § 924(c)(1).

The issue here is at least as weighty as the one in *Taylor*, which asked: “Does attempted Hobbs Act robbery qualify as a ‘crime of violence’ under 18 U.S.C. § 924(c)(3)(A)? The answer matters because a person convicted of attempted Hobbs Act robbery alone normally faces up to 20 years in prison. But if that offense qualifies as a ‘crime of violence’ under § 924(c)(3)(A), the same individual may face a second felony conviction and years or decades of further imprisonment.” 596 U.S. at 848. Strike the word “attempted” from this passage, and that describes this case. And as *Taylor* held as to attempted Hobbs Act robbery, completed robbery is not a “crime of violence” under § 924(c).

Taylor clarified that deciding whether an offense is a § 924(c) predicate is a “straightforward job: Look at the elements.” *Id.* at 860. “The only relevant question is whether the federal felony at issue always requires the government to prove,” *id.* at 850, the “use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A). And a “hypothetical” can “illustrate” why the answer is no. *Taylor*, 596 U.S. at 851.

The Second Circuit acknowledged Petitioner presented “two hypotheticals” illustrating how “Hobbs Act robbery, like attempted Hobbs Act robbery, can be committed without ‘the use, attempted use, or threatened use of physical force against the person or property of another.’” Pet. App. 36a (quoting § 924(c)(3)(A)). But it concluded it was “bound by *McCoy*” even though “the court there never considered the hypothetical Hobbs Act robberies he posits.” *Id.* at 38a.

Worse than not considering his hypotheticals, *McCoy* did not analyze this question as *Taylor* requires: it did not “[l]ook at the elements” of Hobbs Act robbery, 596 U.S. at 860, or discuss whether they “always require[] the government to prove” what § 924(c)(3)(A) demands. *Id.* at 850. Rather, *McCoy* just said the defendants “presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property.” 58 F.4th at 74. So the court ruled against them, deferring to the Second Circuit’s “settled understanding that completed Hobbs Act robberies are categorically crimes of violence pursuant to section 924(c)(3)(A). *See, e.g., United States v. Hill*, 890 F.3d 51, 56-60 (2d Cir. 2018).” *McCoy*, 58 F.4th at 74.

But *Hill*'s reason for rejecting an argument that Hobbs Act robbery can be committed "without the use of physical force" was that Hill relied on "hypotheticals, not actual cases," and therefore "failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits." 890 F.3d at 57 n.9. *Taylor* later made clear, however, the "realistic probability" test doesn't apply here: a "hypothetical" can suffice to show a crime is not a § 924(c) predicate. 596 U.S. at 851. *See also McDaniel*, 85 F.4th at 186 n.13 (*Taylor* "clarified that . . . the 'realistic probability' test only applies when a federal court is interpreting state law.").

Thus, to summarize the circuit's ruling against Petitioner, it's based on a case (*McCoy*) that never considered his arguments, didn't perform the analysis *Taylor* requires, and deferred to a ruling (*Hill*) that employed the "realistic probability" test this Court jettisoned in *Taylor*.

That's no way to run a railroad, and the Second Circuit is not alone. In another post-*Taylor* challenge to a § 924(c) count premised on Hobbs Act robbery, the First Circuit also refused to identify robbery's elements or discuss whether they invariably require what § 924(c)(3)(A) demands. It just said the challenge was "inconsistent with this court's precedent. *See United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018)." *Diaz-Rodriguez v. United States*, 2023 WL 5355224, at *1 (1st Cir. 2023). But *Garcia-Ortiz* was based, like *Hill*, on the defendant's citing "no actual convictions for Hobbs Act robbery matching or approximating his theorized [nonviolent] scenario" and consequently showing no "realistic probability" that courts would apply the law to find an offense in such a scenario." 904 F.3d at 107.

The Sixth Circuit also believes “*Taylor* did not disturb our caselaw that completed Hobbs Act robbery qualifies as a crime of violence,” citing “*United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017).” *Varner v. United States*, 2024 WL 2830657, at *2 (6th Cir. 2024). Yet *Gooch* held, like the cases above, “a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a ‘realistic probability’ that Hobbs Act robbery could encompass nonviolent conduct.” 850 F.3d at 292.

The other circuits have also made clear they’re not interested in reconsidering this question as *Taylor* now requires. As the Tenth Circuit has said: “Not only have we held that ‘Hobbs Act robbery is a crime of violence under the elements clause,’ but we have also rejected an attempt to get around that holding by raising new arguments against it.” *United States v. Crocker*, 2023 WL 4247255, at *3 (10th Cir. 2023) (citation omitted). The Second Circuit did exactly that here, saying it was “bound by *McCoy* to reject Barrett’s argument that substantive Hobbs Act robbery is not a categorical crime of violence” even though *McCoy* “never considered the hypothetical Hobbs Act robberies he posits.” Pet. App. 38a. The circuit then refused to consider his arguments en banc. *Id.* at 71a. *See also, e.g., United States v. Stallings*, 2022 WL 521723, at *1 (4th Cir. 2022) (The argument that “Hobbs Act robbery does not qualify as a proper predicate for [a] § 924(c) charge . . . is foreclosed by binding precedent.”); *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023) (“Our precedents establish that Hobbs Act robbery is a crime of violence.”); *United States v. Worthen*, 60 F.4th 1066, 1068-69 (7th Cir. 2023) (“We

have determined many times that” Hobbs Act robbery “requires using or threatening force” against the person or property of another. . . . We follow the course here.”); *Wade v. United States*, 2023 WL 3592112, at *1 (9th Cir. 2023) (The “claim that Hobbs Act robbery does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c) is foreclosed by this court’s precedent.”); *United States v. Wiley*, 78 F.4th 1355, 1363-64 (11th Cir. 2023) (“Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)”; the contrary “argument is foreclosed by our precedent.”).

As the circuits will not budge, it falls to this Court to correctly answer the “question left open after *Taylor*.” *Stoney*, 62 F.4th at 113.

B. Hobbs Act Robbery Is Not a “Crime of Violence”

Deciding whether a crime is a § 924(c) predicate is a “straightforward job: Look at the elements.” *Taylor*, 596 U.S. at 860. The only question is “whether the ‘least culpable’ conduct that could satisfy the offense elements in a hypothetical case would ‘necessarily involve[]’ the ‘use, attempted use, or threatened use of physical force against the person or property of another.’” *Delligatti v. United States*, No. 23-825, Brief for the United States, 2024 WL 4374209, at *6 (citations omitted).

1. Hobbs Act Robbery Can Be Committed by Threatening Harm to Oneself

The Hobbs Act, at 18 U.S.C. § 1951(b)(1), defines robbery as

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the

person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Robbery is thus committed when there's a taking from a person "by means of actual or threatened force . . . to . . . a relative or member of his family." *Id.* So when someone takes from a relative by threatening harm to himself, that's robbery.

Picture a man confronting his cousin, who's just leaving her restaurant with the day's proceeds. The man puts a gun to his own head: "Give me the cash, or I'll pull the trigger." She complies. That's robbery, yet there's no actual, attempted or threatened force "against the person or property of another." § 924(c)(3)(A).

The Government has said this "is simply not robbery." 2d Cir. 21-1379, Docket Entry 113 at 14. But it tracks robbery's definition: the man succeeds in "obtaining" the cash "from the person" of his cousin "by means of . . . threatened force . . . to . . . a relative." § 1951(b)(1). In passing the "Hobbs Act," moreover, "Congress intended to make criminal all conduct within the reach of the statutory language." *United States v. Culbert*, 435 U.S. 371, 380 (1978). "The language of the Hobbs Act is unmistakably broad," *Taylor v. United States*, 579 U.S. 301, 305 (2016), and the conduct above is plainly "within [its] reach." *Culbert*, 435 U.S. at 380.

The Government has claimed "relative" means one "other than the robber." 2d Cir. 21-1379, Docket Entry 113 at 16. But the Act doesn't say that. It says robbery can be committed by threatening the victim's "relative." § 1951(b)(1). And "relative" means "relative." The Act's "words do not lend themselves to restrictive interpretation." *Culbert*, 435 U.S. at 373. "Hobbs Act robbery reaches" threats to the victim's relative "because the statute specifically says so. We cannot ignore the

statutory text and construct a narrower statute than the plain language supports.” *United States v. O’Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017) (citation omitted).

Indeed, the Hobbs Act says obtaining property by threatening force against “*anyone* in [the victim’s] company” is robbery. § 1951(b)(1) (emphasis added). So picture the robbery above, but this time the restaurateur’s employee threatens self-harm as the two leave the restaurant together. Different hypothetical, same result: robbery can be committed without any actual, attempted or threatened force “against the person or property of another.” § 924(c)(3)(A).

The Government has, in fact, all but conceded this point. Besides robbers, the Hobbs Act punishes someone who “commits or threatens physical violence to *any person* or property in furtherance of a plan” to violate the Act. § 1951(a) (emphasis added). Before *Taylor*, the Second Circuit held this offense “qualifies categorically as a ‘crime of violence.’” *Nikolla*, 950 F.3d at 52. *Nikolla* disagreed, saying a threat to “any person” included a “threat of violence to the defendant himself,” but he did “not cite to any case that applied the Hobbs Act in this way.” *Id.* at 54. He thus failed the “realistic probability” test. *Id.* at 53.

Yet now that *Taylor* has discarded that test in § 924(c) cases, telling courts to simply “[l]ook at the elements” of the federal crime at issue, 596 U.S. at 860, the “Government agrees that violation of this provision does not constitute a crime of violence in light of *Taylor*.” 2d Cir. 21-1379, Docket Entry 113 at 17. That’s because, given the “any person” language, the Hobbs Act can “be plausibly read to criminalize the use or threat of violence against oneself . . . , which lays outside of

the boundaries of the conduct recognized by the elements clause of § 924(c).” *Seale v. United States*, 2022 WL 18024217, at *3 (D.N.J. 2022).

And just as “any person” might be the defendant himself, so too might a robbery victim’s “relative” or “anyone in h[er] company” be the defendant himself. But threatening to harm oneself is no threat “against . . . another.” § 924(c)(3)(A). Thus, neither the “violence to any person” crime nor robbery is a “crime of violence.”

Finally, the Government has said threatening to harm oneself “more closely resembles extortion.” 2d Cir. 21-1379, Docket Entry 113 at 15 n.8. If true, however, that is “beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct.” *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005). Even if the scenarios above “describe[] classic extortion . . . such conduct also satisfies the basic elements of Hobbs Act robbery,” *O’Connor*, 874 F.3d at 1153, as the cash is obtained from the restaurateur “by means of . . . threatened force . . . to . . . a relative or . . . anyone in h[er] company.” § 1951(b)(1).

Because Hobbs Act robbery can be committed by threatening to harm oneself, it does not have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A).

2. Hobbs Act Robbery Can Be Committed by Threatening Nonphysical Injury to Property

Hobbs Act robbery can also be committed by putting someone in “fear of injury, immediate or future, to his . . . property.” § 1951(b)(1). And the “cases interpreting the Hobbs Act have repeatedly stressed that the element of “fear” required by the Act can be satisfied by putting the victim in fear of economic loss.”

United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987) (en banc; citation omitted).

The model jury instructions on Hobbs Act robbery therefore say: “Fear exists if a victim experiences anxiety, concern, or worry over . . . business loss.” 3 Leonard B. Sand et al., *Modern Federal Jury Instructions*, Instr. 50-6.

So picture the restaurateur again, but this time her cousin or employee says: “Give me the cash, or I’ll flood the internet with claims your food made me sick.” This creates a “fear of injury” in the “future” to the victim’s “property,” § 1951(b)(1), without the “use, attempted use, or threatened use of physical force.” § 924(c)(3)(A). As this hypothetical illustrates, the “plain language of the statute provides that a Hobbs Act robbery can be accomplished by causing a victim to have ‘fear of injury’ to property” – loss of business for the restaurant – “without any force whatsoever.” *Haynes v. United States*, 237 F. Supp. 3d 816, 826 (C.D. Ill. 2017).

The judge in *Haynes* was required to rule against the defendant, however, citing a case “in which the Seventh Circuit squarely held that a Hobbs Act robbery qualifies as a ‘crime of violence’ under 18 U.S.C. § 924(c)(3)(A).” *Id.* at 827.

Likewise, a judge in the Second Circuit has considered this argument, in the context of a “threat to injure ‘intangible’ property (e.g., shares of stock),” and said it “seems possible to commit Hobbs Act robbery without simultaneously committing a ‘crime of violence’ pursuant to section 924(c).” *United States v. Tejada*, 2024 WL 3302491, at *6 (E.D.N.Y. 2024). *See also United States v. Loc. 560 of Int’l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (The circuits are “unanimous” that the Hobbs Act applies to “intangible, as well as tangible, property.”). But the judge was

“bound by controlling Second Circuit precedent.” *Tejada*, 2024 WL 3302491, at *4.

The judge in *United States v. Chea*, 2019 WL 5061085 (N.D. Cal. 2019), held “Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which does not require ‘physical force.’” *Id.* at *1. “Where the property in question is intangible, it can be injured without the use of any physical contact at all.” *Id.* at *8. “If Congress had intended ‘fear of injury’ to mean ‘fear of violence or violent force,’ it could have said so expressly. It did not.” *Id.* at *9.

The Ninth Circuit abrogated this ruling in a later case, but only because that defendant “fail[ed] to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest.” *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020).

After *Taylor*, the Ninth Circuit acknowledged the “realistic probability test [i]s not implicated” when “comparing two federal statutes.” *United States v. Eckford*, 77 F.4th 1228, 1235 (9th Cir. 2023). But it said, quoting a First Circuit case, that a “threat to injure intangible property . . . ‘sounds to us like Hobbs Act *extortion*’” rather than robbery. *Id.* (quoting *García-Ortiz*, 904 F.3d at 107; emphasis in *García-Ortiz*).

Yet neither circuit recognized the U.S. Code is “replete with provisions that criminalize overlapping conduct.” *Pasquantino*, 544 U.S. at 358 n.4. “‘Robbery’ reaches the act of taking property by threatening future injury to [] property” even though, “[t]raditionally, that degree of attenuation is characteristic of extortion.”

United States v. Lynch, 268 F. Supp. 3d 1099, 1106 (D. Mont. 2017). This reflects the “overlap between the Hobbs Act’s definitions of traditionally violent robbery and traditionally non-violent or less-violent extortion.” *Id.* The Act’s crimes are not mutually exclusive: even if obtaining business proceeds by threatening to disparage the business “describes classic extortion . . . such conduct also satisfies the basic elements of Hobbs Act robbery,” *O’Connor*, 874 F.3d at 1153, as the proceeds are obtained “by means of . . . fear of injury . . . to . . . property.” § 1951(b)(1). “We cannot ignore the statutory text and construct a narrower statute than the plain language supports.” *O’Connor*, 874 F.3d at 1154.

“The language of the Hobbs Act is unmistakably broad,” *Taylor*, 579 U.S. at 305, and defies “restrictive interpretation.” *Culbert*, 435 U.S. at 373. “The plain text of the Hobbs Act robbery definition makes clear that it will apply to force or threats against property,” *United States v. Chappelle*, 41 F.4th 102, 109 (2d Cir. 2022), and “fear of injury . . . to . . . property” is “broad enough to encompass instances of the loss of economic value rather than only a physical destruction.” *Haynes*, 237 F. Supp. 3d at 826. One may therefore “commit Hobbs Act robbery without simultaneously committing a ‘crime of violence,’” *Tejada*, 2024 WL 3302491, at *6, as “causing fear of future injury to property [] does not require ‘physical force.’” *Chea*, 2019 WL 5061085, at *1.

In sum, for either of the reasons above or both, Hobbs Act robbery “does not require proof of *any* of the elements § 924(c)(3)(A) demands. That ends the inquiry.” *Taylor*, 596 U.S. at 859 (emphasis in original).

III. This Case Is an Ideal Vehicle for Answering These Questions

The double jeopardy and “crime of violence” questions were cleanly presented and squarely decided in the court below, and each is outcome-determinative: the Second Circuit concluded Petitioner must receive prison terms he cannot receive if this Court rules for him.

Holding that “Double Jeopardy Does Not Bar Separate Sentences” for an act that violates § 924(c) and § 924(j), the circuit ordered Petitioner’s judge to “sentence [him] on each of these two counts of conviction.” Pet. App. 52a. He therefore stands to receive one prison term under § 924(j), and then a consecutive one under § 924(c). Per the Solicitor General and five circuits, however, such double punishment for “the same offence” is unconstitutional. U.S. Const., Amend. V.

Petitioner was also convicted of Hobbs Act robbery and “faces up to 20 years in prison” for that. *Taylor*, 596 U.S. at 848. “But if that offense qualifies as a ‘crime of violence’ under § 924(c)(3)(A),” *id.*, as the Second Circuit held it does, he must receive a consecutive prison term of at least “ten years.” Pet. App. 12a. By detailing why Hobbs Act robbery is not § 924(c) predicate, however, he has shown “Congress has not authorized courts to convict and sentence him to a decade of further imprisonment under § 924(c)(3)(A).” *Taylor*, 596 U.S. at 852.

This case is an ideal vehicle for determining the lawfulness of these additional punishments.

IV. If Nothing Else, This Petition Should Be Held for *Delligatti*

The Court will decide this Term if a crime that “can be committed by failing to take action” is a “crime of violence” under § 924(c). *Delligatti v. United States*,

No. 23-825, Petition for a Writ of Certiorari, 2024 WL 382517, at *i. In doing so, the Court will provide further guidance on how to decide “crime of violence” questions and potentially grounds for judges to reassess the “crime of violence” question here.

As the Solicitor General said in a similar situation, “although this Court’s decision in [*United States v.*] *Rahimi* may not definitively resolve the question presented here, it is likely to shed substantial light on the proper analysis of that question. Under the Court’s usual practice, such overlap justifies holding the petition for a writ of certiorari pending the resolution of *Rahimi*.” *Garland v. Range*, No. 23-374, Reply Brief for the Petitioners, 2023 WL 7276461, at *9.

The Court did indeed hold that petition for *Rahimi*, which it then granted, even though the petition did not pose the precise question presented in *Rahimi*. *See Garland v. Range*, 144 S. Ct. 2706 (2024). This reflects that the “Court often ‘GVRs’ a case – that is, grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court – when we believe that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision.” *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting).

Thus, if nothing else, the Court should hold this petition for *Delligatti* and then grant it, vacate the Second Circuit’s judgment and remand the case for further consideration. *See also, e.g., Jackson v. United States*, 144 S. Ct. 2710 (2024) (GVR in light of *Rahimi*); *Vincent v. Garland*, 144 S. Ct. 2708 (2024) (same).

CONCLUSION

The petition for a writ of certiorari should be granted. Failing that, the petition should be held for the opinion in *Delligatti v. United States*, No. 23-825.

Respectfully submitted,

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October 15, 2024

No. _____

In the Supreme Court of the United States

JOHNNIE MARKEL CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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February 7, 2025

QUESTION PRESENTED

Congress empowered district courts to reduce sentences of federal prisoners for “extraordinary and compelling reasons.” Congress did not define the terms “extraordinary and compelling” but instead expressly delegated to the United States Sentencing Commission the authority to describe what types of circumstances qualify. Exercising that authority, the Sentencing Commission adopted a provision, Section 1B1.13(b)(6), that permits district courts to consider a sentence reduction where, among other things, the defendant has served at least ten years of an unusually long sentence and a nonretroactive change in law produces a “gross disparity” between that sentence and the one likely to be imposed at the time of the motion. The Courts of Appeals are divided on the question presented here:

Whether the Sentencing Commission acted within its expressly delegated authority by permitting district courts to consider, in narrowly cabined circumstances, a nonretroactive change in law in determining whether “extraordinary and compelling reasons” warrant a sentence reduction.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States Court of Appeals (3d Cir.):

United States v. Carter, No. 24-1115 (Dec. 2, 2024)

United States v. Griffin, No. 21-2010 (Oct. 27, 2021)

United States v. Carter, No. 11-3377 (Mar. 3, 2014)

United States v. Griffin, No. 12-1604 (Nov. 26, 2012)

United States District Court (E.D. Pa.):

United States v. Carter, No. 2:07-cr-00374 (Jan. 12, 2024)

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported. The decision of the district court (Pet. App. 3a-34a) is reported and available at 711 F. Supp. 3d 428.

JURISDICTION

The decision of the court of appeals was entered on December 2, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant sections of 18 U.S.C. § 3582, 28 U.S.C. § 994, U.S.S.G. § 1B1.13, and the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 are reprinted in the appendix. Pet. App. 35a-41a.

INTRODUCTION

This case squarely presents an issue of national importance on which the courts of appeals are irreconcilably divided. For years, circuit courts disagreed about whether district courts may consider nonretroactive changes in law when deciding if a prisoner presents “extraordinary and compelling reasons” for a sentence reduction. The Department of Justice successfully opposed certiorari review of that conflict on the ground that the Sentencing Commission—the entity Congress expressly empowered to give concrete meaning to the terms “extraordinary and compelling”—should address the issue in the first instance.

In response, the Commission fulfilled its statutory duty by adopting new guidance, U.S.S.G. § 1B1.13(b)(6) (the “Policy Statement” or “Section (b)(6)”), that permits consideration of nonretroactive changes in the law, but only when the prisoner has served at least ten years of an unusually long sentence that is grossly disproportionate to the one that would likely be imposed today. That guidance, however, has given rise to a new conflict. The Third Circuit has now held that the Commission lacked authority to adopt the Policy Statement, and other courts of appeals continue to disagree—both with one another and within the same circuit—about whether Section (b)(6) was a valid exercise of the Commission’s delegated authority. Resolution of that conflict will require this Court’s review. The only questions are when and in what case.

The answers strongly favor granting certiorari in this case. This is the time for review. Because numerous federal decisions have extensively ventilated the underlying issues and arguments, further percolation is unnecessary. Delay would only consume further judicial resources and prolong the current situation in which outcomes of sentence-reduction motions often depend entirely on the jurisdiction in which a conviction was obtained. For Petitioner and the hundreds of other defendants Congress permitted to seek relief from excessively long sentences, decades in prison hang in the balance.

And this is the right case. It provides this Court a clear and unobstructed path to resolution of the merits. Because Petitioner moved for a sentence reduction in reliance on Section (b)(6) and after it became effective, the district court squarely addressed whether and how that provision applied in his

circumstances. That is not true of the other pending petition, Pet. for Writ of Cert., *Rutherford v. United States*, No. 24-820 (Jan. 30, 2025), which arises from a motion that was filed before Section (b)(6) was adopted. In that case, this Court could not reach the merits unless it first cleared the threshold procedural obstacle of determining whether Section (b)(6) even applies—an issue the Government disputed below. This case suffers from no such vehicle flaw.

Equally important, a decision by this Court would resolve Petitioner’s motion. In a thorough opinion, the district court indicated that it would reduce Petitioner’s sentence if it had the authority to do so. Noting Petitioner’s “laudable” and “remarkable” record, the district court observed that “[Petitioner] does not deserve to spend his life behind bars” under the 18 U.S.C. § 3553(a) factors. Pet. App. 26a, 33a, 24a. The district court also concluded that Petitioner “indisputably” qualifies for relief under Section (b)(6) because he is serving a sentence that is “both unduly long and grossly disproportionate to the sentence a similarly situated defendant would receive today.” Pet. App. 34a. In the other pending petition, by contrast, the district court has never evaluated whether Petitioner’s circumstances would warrant relief under the 18 U.S.C. § 3553(a) factors, much less under Section (b)(6). A decision in that case could therefore have no effect because the district court may deny relief on different grounds. The posture of this case ensures that the Court is resolving a dispositive issue.

STATEMENT

1. The Sentencing Reform Act of 1984 established the structure of the modern federal sentencing

system. *See* Pub. L. No. 98-473, §§ 211–39, 98 Stat. 1837, 1987–2040 (1984). As part of that law, Congress created the United States Sentencing Commission and directed it to “formulate and constantly refine national sentencing standards.” *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

The Sentencing Reform Act abolished parole at the federal level, but Congress recognized that there would be “unusual cases” in which “changed circumstances” justify reducing “unusually long sentence[s].” S. Rep. No. 98-225, at 55 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 3182, 3238–39. Section 3582(c)(1)(A) is one of the ways in which Congress empowered courts to reduce a sentence once imposed. Sometimes referred to as the “compassionate release” statute—a term that nowhere appears in its text—this provision allows a district court to reduce a prisoner’s sentence if (1) “extraordinary and compelling reasons warrant such a reduction” and (2) the “factors set forth in [18 U.S.C. §] 3553(a)” support the reduction. 18 U.S.C. § 3582(c)(1)(A). The reduction also must be “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.*

Congress did not define the phrase “extraordinary and compelling reasons.” Instead, it expressly delegated that authority to the Sentencing Commission, instructing the Commission to “promulgat[e] general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A)” that “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 28 U.S.C. § 994(t). Congress imposed a single limitation: “[r]ehabilitation of the defendant alone

shall not be considered an extraordinary and compelling reason.” *Id.*

The Commission’s standards for sentence-reduction proceedings “bind the courts.” *Dillon v. United States*, 560 U.S. 817, 830 (2010) (holding that this Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), did not affect guidelines provisions applicable to sentence modification proceedings).

Under the Sentencing Reform Act, only the Bureau of Prisons (“BOP”) had the authority to file a sentence-reduction motion under Section 3582(c)(1)(A)(i). BOP rarely did so, and there was heavy criticism of its parsimonious use of the provision in its role as “gate-keep[er]” for relief from grossly excessive sentences. *United States v. Booker*, 976 F.3d 228, 231–32 (2d Cir. 2020). As a result of BOP’s practices, few such motions were litigated from 1984 to 2018, and scant precedent developed to address what qualifies as an “extraordinary and compelling reason.” The Commission’s policy statements during that time addressed only what constituted such reasons in the context of motions filed by BOP.

2. In 2018, Congress passed and President Trump signed into law the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (the “First Step Act”), a landmark federal sentencing measure that, as the Department of Justice has noted, “was the culmination of a bipartisan effort to improve criminal justice outcomes and reduce the size of the federal prison population, while maintaining public safety.” U.S. DEP’T OF JUST., *First Step Act Annual Report 4* (Apr. 2023). That law effected two significant changes that are relevant here.

First, Congress amended the sentencing regime set forth in 18 U.S.C. § 924(c). Prior to the First Step

Act, “second or subsequent” convictions under that law each resulted in a mandatory (and consecutive) minimum sentence of 25 years, even if they were obtained in the same proceeding as the first such conviction. *See Deal v. United States*, 508 U.S. 129, 132 (1993).

The 2018 First Step Act clarified that the dramatically enhanced sentences for second or successive Section 924(c) convictions were never intended to apply in a defendant’s first Section 924(c) prosecution. Pub. L. No. § 403(a)-(b), 132 Stat. at 5221–22. Congress therefore amended the law to make such enhanced sentences applicable only when a defendant already has a final Section 924(c) conviction from a prior proceeding at the time he commits the second or subsequent such offense. *Id.* The amendment was made applicable to offenses committed prior to enactment, but only if the defendant had not yet been sentenced.

Second, the First Step Act removed BOP as the gatekeeper for sentence-reduction motions under Section 3582(c)(1)(A)(i) and, for the first time, permitted prisoners themselves to seek such relief. *Id.* § 603(b), 132 Stat. at 5239.

3.a. Shortly after the First Step Act became law, the Commission lost its quorum and could not fulfill its statutory duty to issue a policy statement defining “extraordinary and compelling reasons” for purposes of the prisoner-filed motions Congress had newly authorized. Courts almost uniformly concluded that the Commission’s then-existing policy statement did not apply to such motions because it addressed only sentence-reduction motions filed by BOP. *See United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (collecting cases).

Without binding guidance from the Commission, the courts of appeals diverged on whether nonretroactive changes in sentencing law, such as the amendment to Section 924(c)’s sentencing regime, constitute “extraordinary and compelling reasons” for granting a prisoner-filed motion. The First, Second, Fourth, Ninth, and Tenth Circuits said yes; the Third Circuit, as well as the Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, said no.¹

The circuit split resulted in a number of petitions for certiorari in this Court, all filed by inmates in the circuits that had deemed nonretroactive changes in law an impermissible basis to reduce sentences under Section 3582(c)(1)(A). The Government successfully opposed those petitions on the ground that the Sentencing Commission, not this Court, should resolve the split. Citing the statutory mandate to the Commission to provide guidance to judges considering sentence reduction motions, the Department of Justice wrote: “Nobody disputes . . . that the Commission has the power—indeed, the statutory duty—to promulgate a policy statement that applies to prisoner-filed motions, or that it could resolve this particular issue.”

¹ See *United States v. Ruvalcaba*, 26 F.4th 14, 24–26 (1st Cir. 2022) (holding that changes in the law could be considered “extraordinary and compelling reason” for a sentence-reduction motion); *Brooker*, 976 F.3d at 237–38; *United States v. McCoy*, 981 F.3d 271, 286–88 (4th Cir. 2020); *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021). But see *Andrews*, 12 F.4th at 260–61; *United States v. McMaryion*, No. 21-50450, 2023 WL 4118015, at *2 (5th Cir. June 22, 2023) (per curiam); *United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc); *United States v. Thacker*, 4 F.4th 569, 573–75 (7th Cir. 2021); *United States v. Crandall*, 25 F.4th 582, 585–86 (8th Cir. 2022); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022).

Br. for the U.S. in Opp’n at 17, *Jarvis v. United States*, No. 21-568, 2021 WL 5864543 (U.S. Dec. 8, 2021). According to the Department of Justice, the statutory scheme vested that decision in the Commission, not the federal courts.

b. When the Commission achieved a quorum in 2022, it set out to formulate a policy statement that would provide the necessary guidance for prisoner-filed motions under Section 3582(c)(1)(A)(i), as required by 28 U.S.C. § 994(t). *See* Proposed Priorities for Amendment Cycle, 87 Fed. Reg. 60438, 60439 (Oct. 5, 2022). Noting that “on several occasions the Department of Justice successfully opposed Supreme Court review of the issue on the ground that it should be addressed first by the Commission,” Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28258 (May 3, 2023), the Commission held hearings and took public comment from a wide range of stakeholders.

The resulting amendment to the Commission’s Policy Statement became effective on November 1, 2023. That amendment expanded on previous guidance regarding what constitutes “extraordinary and compelling reasons” by, among other things, adding a new ground, called “Unusually Long Sentence.” U.S.S.G. § 1B1.13(b)(6).

This provision struck a middle path between the two opposing sides of the circuit split. Instead of always or never permitting district courts to consider nonretroactive changes in the law, Section (b)(6) permits such consideration only in narrow and well-defined circumstances. Specifically, the Commission directed that “extraordinary and compelling reasons” could be found to exist in this context only if four conditions are met: (i) the defendant is serving an

unusually long sentence; (ii) the defendant has served at least ten years of that sentence; (iii) an intervening, nonretroactive change in the law has produced a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed; and (iv) the court has fully considered the particularized circumstances of the defendant. U.S.S.G. § 1B1.13(b)(6). In its “Reason for Amendment,” the Commission noted legislative history for the Sentencing Reform Act indicating that “unusually long sentences” may be a circumstance warranting a reduction in sentence. S. Rep. No. 98-225, at 55–56, *as reprinted* in 1983 U.S.C.C.A.N. at 3238–39.

4. Petitioner was charged along with several others for participating in bank robberies in 2007. Pet. App. 4a-5a. Although the Government initially filed only one Section 924(c) count, it added a second after Petitioner moved to suppress evidence. After his first trial resulted in a partial mistrial, the Government lodged a third such count. As a result, following his second trial, Petitioner was convicted of a total of three bank robberies and three counts of violating Section 924(c).

Although no one was physically injured and no shots were fired during the robberies, Petitioner was sentenced to a 70-year term of imprisonment. Three of his co-conspirators accepted plea offers; two have been released after each receiving 10-year sentences, while the last co-defendant that pleaded guilty was sentenced to 23 years and will be released next year.² Pet. App. 5a.

² Nathaniel Griffin, BOP Find an Inmate, <https://www.bop.gov/inmateloc/>.

For Petitioner, then 29 years old, the 70 years of imprisonment was a *de facto* life sentence. At the time of his sentencing, the trial judge stated that the sentence was “high and probably longer than necessary to accomplish the legitimate purposes of federal sentencing.” Pet. App. 30a. Only 13 years of the unusually long sentence were based on the robberies. The remaining 57 years resulted from the consecutive terms of imprisonment that the three Section 924(c) counts mandated. Two 25-year mandatory consecutive sentences were required by Petitioner’s “second” and “third” Section 924(c) convictions, even though they occurred in the same case as his first. If Petitioner had been sentenced under current law, he would have faced just 21 years of mandatory time on the three Section 924(c) convictions and, because of yet another intervening change in law, he could have received as little as one day on the other substantive counts. *See Dean v. United States*, 581 U.S. 62, 64 (2017) (“[N]othing in the requirement of consecutive sentences prevents a district court from imposing a 30-year mandatory minimum sentence under § 924(c) and a one-day sentence for the predicate crime.”). He has already served over 16 years in prison. Pet. App. 25a.

5.a. Petitioner moved for a sentence reduction under Section 3582(c)(1)(A)(i) based on the Policy Statement. Pet. App. 4a. He emphasized his strong family ties and good conduct while in prison, and he contended that because his sentence was unusually long and grossly disparate to the sentence he would likely receive today, the court could consider a sentence reduction pursuant to the binding authority of Section (b)(6). Pet. App. 4a.

The Government agreed that Carter is serving “a long sentence that would be significantly lower if imposed under current law, given the amendment to Section 924(c).” Pet. App. 3a. It also did not seriously contend that the sentencing goals of Section 3553(a) weighed against relief. Instead, the Government opposed the motion on the ground that the Commission lacked authority to issue the Policy Statement. Pet. App. 4a.

b. The district court denied Petitioner’s motion after briefing and oral argument. Pet. App. 34a. It agreed that the Section (b)(6) “indisputably covers” Petitioner and that “it is undisputed” he identified an “extraordinary and compelling reason” for a sentence reduction under Section (b)(6). Pet. App. 14a, 16a. The court also went out of its way to carefully assess the Section 3553(a) factors and to emphasize that, if authorized to do so, it would grant relief because a “shorter sentence would be ‘sufficient, but not greater than necessary, to comply with the purposes’ of federal sentencing.” Pet. App. 33a (citing 18 U.S.C. § 3553(a)). In the district court’s words, Petitioner’s “progress towards rehabilitation has been laudable, and the sentence he is serving is both unduly long and grossly disproportionate to the sentence a similarly situated defendant would receive today.” Pet. App. 33a. Petitioner’s “remarkable record,” “inspired by his deepened religious faith,” “paint[s] a clear picture of a defendant who . . . does not deserve to spend his life behind bars.” Pet. App. 33a.

The court nevertheless held that it could not reduce Petitioner’s sentence because of the Third Circuit’s pre-Section (b)(6) decision in *Andrews*. Pet. App. 11a. That case barred relief based on any consideration of nonretroactive changes in the law on the

ground that neither the length of a defendant’s sentence nor changes in the law constitute “extraordinary and compelling reasons” described by the statute.” 12 F.4th at 260. The district court recognized that the Third Circuit had decided *Andrews* “before the Sentencing Commission had issued its policy statement regarding prisoner-initiated compassionate-release motions.” Pet. App. 15a. The court reasoned, however, that the Third Circuit’s ruling “can only be understood as a decision interpreting the text of the compassionate-release statute itself” and therefore that the Sentencing Commission could not abrogate it.

c. While Petitioner’s appeal was pending, the Third Circuit adopted the district court’s reasoning by concluding in a separate case that its previous decision in *Andrews* foreclosed the Commission’s ability to adopt a different reading of the relevant statutes. Pet. App. 1a–2a; see *United States v. Rutherford*, 120 F.4th 360, 376 (2024). Based on that conclusion, the Third Circuit affirmed the denial of Petitioner’s motion. Pet. App. 1a–2a.

REASONS FOR GRANTING THE WRIT

This Court’s review is necessary to resolve an entrenched circuit split on an important question of federal sentencing law. The answer to that question will determine whether hundreds of federal inmates must serve the entirety of excessive and unusually long prison sentences—often as long as the rest of their lives—or instead have an opportunity to seek a meaningful reduction of their sentences. Until this Court addresses the issue, federal sentences will differ based solely on the geographic happenstance of where any

particular conviction was obtained. There is no reason for further percolation: the arguments on both sides of the dispute have been fully aired in dozens of opinions by the courts of appeals. The decision below is incorrect and cannot be reconciled with the plain text of Section 3582(c)(1)(A)(i), the long tradition of district court discretion at sentencing, and the authority Congress explicitly granted the Commission to describe what circumstances qualify as “extraordinary and compelling.”

Finally, this case is the right vehicle. Because Petitioner sought a sentence reduction after Section (b)(6) became effective, this case is not obscured by the threshold procedural obstacle of determining whether that provision applies. And because the district court carefully considered Petitioner’s circumstances under both Section (b)(6) and 18 U.S.C. § 3553(a), concluding that it would grant him a sentence reduction if Section (b)(6) were valid, the Court’s decision in this case would be dispositive.

A. The Decision Below Solidified an Intractable Circuit Split.

The question presented implicates a deep circuit split that will not resolve without this Court’s intervention.

Between the passage of the First Step Act and the Sentencing Commission’s adoption of Section (b)(6), eleven courts of appeals considered whether nonretroactive changes in law, such as the amendment of Section 924(c)’s mandated sentences, could be considered in determining whether “extraordinary and compelling reasons” warrant a reduction in sentence. Those

decisions produced a 6-5 circuit split.³ After the government successfully opposed certiorari review on the ground that the Commission should address the issue in the first instance, *see* Br. for the U.S. in Opp’n at 17, *Jarvis v. United States*, No. 21-568, 2021 WL 5864543 (U.S. Dec. 8, 2021), the Commission amended the relevant policy statement to permit consideration of nonretroactive legal changes in carefully limited circumstances. But that guidance did not end the conflict among the courts of appeals. Disagreement has now developed over whether the Commission’s inclusion of Section (b)(6) in the amended guidance exceeded the bounds of its expressly delegated authority. Only this Court can resolve that question.

a. In the several-year period after the First Step Act permitted prisoner-filed motions but before the Commission regained a quorum and amended the applicable policy statement, the courts of appeals considered whether changes in sentencing law that Congress did not make categorically retroactive could support a sentence reduction in particular cases. Six courts said they could not, concluding that such changes in law were never “extraordinary and

³ The Eleventh Circuit was not part of the split; it concluded that it was bound by the pre-amendment BOP policy statement, even for prisoner-filed motions, and that nonretroactive changes to Section 924(c) did not qualify as extraordinary and compelling under that guidance. *United States v. Bryant*, 996 F.3d 1243, 1264–65 (11th Cir. 2024). In doing so, the Eleventh Circuit “recogniz[ed] that district courts are bound by the Commission’s definition of ‘extraordinary and compelling reasons’ found in 1B1.13.” *Id.* at 1262.

compelling.”⁴ Five held otherwise, concluding that district courts may consider such changes in law in deciding whether “extraordinary and compelling reasons” warrant a reduction.⁵

b. Since the Commission amended its Policy Statement to add Section (b)(6), the circuit split has emerged in a new and entrenched form. Courts of appeals that had previously deemed changes in the law a valid consideration in the “extraordinary and compelling” analysis have logically found Section (b)(6) to be a valid exercise of the Commission’s authority. The Fourth Circuit, for example, stated that “the latest policy statement serve[s] to confirm and amplify this Court’s earlier ruling” that “[n]onretroactive changes in law remain relevant when a court has to decide when and how to modify a sentence.” *United States v. Davis*, 99 F.4th 647, 658 (4th Cir. 2024).

Although not all courts that were aligned with the Fourth Circuit in the pre-Section (b)(6) split have addressed the issue, district courts in the Second, Ninth, and Tenth Circuits have confirmed that the Policy Statement comports with existing law in their circuits. *See, e.g., United States v. Chavez*, No. 02-cr-1301, 2024 WL 4850808, at *3 (S.D.N.Y. Nov. 21, 2024) (concluding that “the Sentencing Commission had ample congressional authority to promulgate subsection (b)(6)” under Second Circuit law); *United States v. Brooks*, 717 F. Supp. 3d 1087, 1095 (N.D. Okla. 2024) (relying on the Tenth Circuit’s pre-

⁴ *See Andrews*, 12 F.4th 255 at 260–61; *McMaryion*, 2023 WL 4118015, at *2; *McCall*, 56 F.4th at 1065–66; *Thacker*, 4 F.4th at 573–75; *Crandall*, 25 F.4th at 585–86; *Jenkins*, 50 F.4th at 1198.

⁵ *See Ruvalcaba*, 26 F.4th at 24–26; *Brooker*, 976 F.3d at 237; *McCoy*, 981 at 286; *Chen*, 48 F.4th at 1098; *Maumau*, 993 F.3d at 837.

amendment decision to reject the government’s challenge to the validity of Section (b)(6)).

In the circuits on the other side of the pre-amendment split, courts have divided on whether Section (b)(6) displaces prior circuit precedent. Even in these circuits, numerous district courts have upheld the validity of Section (b)(6) and granted reductions of unusually long sentences in reliance on it. *See, e.g., United States v. Reedy*, 678 F. Supp. 3d 859, 869 (N.D. Tex. 2024); *United States v. Bailey*, No. 97-cr-118, 2024 WL 2291497, at *3 (S.D. Ind. May 20, 2024). As for the Eleventh Circuit, at least one district court has roundly rejected the government’s attack on Section (b)(6), concluding (consistent with that circuit’s pre-amendment precedent) that the Commission properly exercised the authority vested in it by statute.⁶

Other courts, including the district court below, have held that pre-amendment circuit precedent prevents consideration of nonretroactive changes under Section (b)(6). Pet. App. 34a; *see, e.g., United States v. Loggins*, No. 3:02-cr-00142-SMR-SBJ, ECF No. 197 at 8 (S.D. Iowa Mar. 4, 2024) (“[B]ut for *Crandall*, the Court would grant compassionate release.”). These and other district court decisions illustrate the deeply divided views on this issue. *See Allen*, 717 F. Supp.

⁶ *See United States v. Allen*, 717 F. Supp. 3d 1308, 1314 (N.D. Ga. Feb. 12, 2024) (“Further, the Government’s argument contradicts itself. The Department of Justice has previously argued that courts should refrain from addressing the retroactivity question because ‘it should be addressed first by the Commission.’ . . . The Commission has now addressed the issue. How can the Commission have the authority to address the question but exceed that authority by addressing the question? This argument lacks merit.”).

3d at 1314 (“[D]istrict courts that have considered the question have sided both ways[.]”).

Even at the court of appeals level, disagreement has emerged within the same circuit in published opinions from different panels. The Fifth Circuit had rejected consideration of changes in the law in a pre-Section (b)(6) decision, *McMaryion*, 2023 WL 4118015, at *2, but a panel of that court recently affirmed the district court’s grant of a defendant’s motion for a sentence reduction predicated in part on non-retroactive changes in sentencing law, *United States v. Jean*, 108 F.4th 274, 290 (5th Cir. 2024). That Fifth Circuit panel observed that Section (b)(6) was a “reasoned, middle-ground approach” and emphasized that Congress unequivocally “charged the Sentencing Commission with periodically reviewing and revising the [Sentencing] Guidelines[.]” particularly in light of “conflicting judicial decisions.” *Id.* at 288. Adding to the confusion, yet another Fifth Circuit panel reached the opposite conclusion just a few months later, reasoning that courts could not consider nonretroactive changes as “extraordinary and compelling reasons” and that the panel’s “later decision in [*Jean*] was wrong to say otherwise.” *United States v. Austin*, 125 F.4th 688, 693 (5th Cir. 2025).

Cases presenting the question of the validity of Section (b)(6) are currently pending in the Sixth, Seventh, and Eighth Circuits. See *United States v. Bricker*, No. 24-3286 (6th Cir.); *United States v. Black* No. 24-1191 (7th Cir.); *United States v. Loggins* No. 24-1488 (8th Cir.); *United States v. Crandall* No. 24-1569 (8th Cir.). But whatever the outcome of those pending cases, the circuit split has solidified. The Third Circuit has now rejected the Sentencing Commission’s effort to provide uniform national

guidance on the ground that Section (b)(6) conflicts with federal statutes. As a result, this Court’s guidance is needed on whether Section (b)(6) is a valid exercise of the Commission’s statutory duty. And given the large number of inmates whose liberty interests depend directly on the outcome, that guidance is best provided now.

B. The Question Presented is Important and Ripe for this Court’s Review.

The validity of the Sentencing Commission’s guidance in Section (b)(6) is an important and recurring issue. Hundreds of prisoners have sought sentence reductions on the basis of that guidance, and if this Court deems Section (b)(6) a permissible exercise of expressly delegated authority, scores of those prisoners may be spared decades of unnecessary imprisonment on sentences that are grossly excessive.⁷

⁷ Other district courts have also explicitly stated that they would grant sentence reductions under Section (b)(6) if authorized to do so. *See, e.g., Loggins*, No. 3:02-cr-00142-SMR-SBJ, ECF No. 197, at 7–8 (“Under *Crandall*, nonretroactive changes in law cannot serve as extraordinary and compelling reason for compassionate release. . . . [B]ut for *Crandall*, the Court would grant compassionate release to Loggins.”); *United States v. McHenry*, No. 1:93-cr-84, 2024 WL 1363448, at *12 (N.D. Ohio Mar. 29, 2024) (“[B]ut for the holding in *McCall* which remains binding precedent, this Court could exercise its discretion to reduce Mr. McHenry’s sentence.”). Indeed, the government has said that it believes there should be authority to reduce sentences in these circumstances. *See* Br. for the U.S. in Opp’n at 7, *United States v. Andrews*, 2:05-cr-00280-GJP, ECF No. 287 (E.D. Pa. Nov. 16, 2023) (“[T]he government recognizes the inequity here. The Administration has made clear its support for legislation making Section 403 retroactive, to permit courts to afford the relief the defendant seeks. The Department’s view is that

At the moment, the outcome of a Section (b)(6) motion often depends entirely on the circuit in which a defendant was convicted. In the First, Second, Fourth, Ninth, and Tenth Circuits, district courts are reducing indefensible sentences by decades or centuries and prisoners are being released from custody. Yet in the Third Circuit, defendants like Petitioner will likely die in prison unless this Court grants review. The permanent circuit split has created life-altering disparities for defendants and frustrates the explicit goal of national uniformity that drove the creation of the modern federal sentencing system.

There is no reason to delay review. The relevant arguments have been extensively ventilated in numerous opinions articulating the full range of reasoning. Further percolation would serve only to exacerbate the geographic disparity and consume judicial resources on an issue that the courts of appeals themselves recognize this Court will ultimately resolve.⁸

C. The Decision Below is Incorrect.

The Third Circuit’s resolution of this issue rests on an erroneous understanding of the authority Congress expressly delegated to the Commission, an incorrect reading of statutory text, and an inadequate appreciation of how narrowly the Commission cabined the authority granted in Section (b)(6).

1. “Congress placed the Commission in the Judicial Branch precisely because of the Judiciary’s

only Congress has the authority to provide this remedy, and that Congress should act accordingly.”).

⁸ See Oral Arg. at 59:09–59:11, *United States v. Bricker*, No. 24-3286 (6th Cir. Oct. 31, 2024) (“I assume this issue is eventually going to go to the Supreme Court.”).

special knowledge and expertise” in “the unique context of sentencing.” *Mistretta v. United States*, 488 U.S. 361, 395–96 (1989). And Congress specifically chose to make the Commission the primary entity responsible for determining when sentence reductions are appropriate.

Under the Sentencing Reform Act, district courts may reduce a defendant’s sentence for “extraordinary and compelling reasons,” but only if the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A). Congress did not define the phrase “extraordinary and compelling reasons.” Instead, it directed the Commission to do so, instructing the Commission to “promulgat[e] general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A)” that “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 28 U.S.C. § 994(t).

When Congress “expressly delegate[s] to an agency the authority to give meaning to a particular statutory term,” “the agency is authorized to exercise a degree of discretion.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024) (cleaned up). Congress’s grant of authority to the Sentencing Commission is the paradigmatic example of such an express delegation. As this Court has repeatedly recognized, the delegation renders the Commission’s guidance binding. *See Concepcion v. United States*, 597 U.S. 481, 495 (2022) (“Congress expressly cabined district courts’ discretion by requiring courts to abide by the Sentencing Commission’s policy statements.”); *Dillon*, 560 U.S. at 819 (courts are “require[d]” to

“follow the Commission’s instructions . . . to determine the prisoner’s eligibility for a sentence modification”); *see also Mistretta*, 488 U.S. at 391–93 (the Commission has “rulemaking power” sufficient to “bind judges and courts”).

To be sure, express delegations are not—and cannot be—unlimited. A reviewing court must “ensur[e]” that the agency has acted “within those boundaries” set by Congress. *Loper Bright Enters.*, 603 U.S. at 395. An agency action taken pursuant to such an express delegation is valid unless it constitutes an abuse of discretion. *Batterton v. Francis*, 432 U.S. 416, 425 (1977); *Loper Bright Enters.*, 603 U.S. at 394–95.

Section (b)(6) fits comfortably within the broad boundaries set by Congress. By framing district court authority in the expansive terms “extraordinary and compelling,” Congress chose words that are “comprehensive and flexible in meaning,” *Extraordinary*, *Black’s Law Dictionary* 527 (5th ed. 1979), and capable of encompassing a “combination of circumstances,” *Extraordinary*, *Webster’s Third New Int’l Dictionary* 807 (1981). Courts interpreting general language of this kind may not create limits according to their policy preferences. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) (“Without some indication to the contrary, general words . . . are to be accorded their full and fair scope. They are not to be arbitrarily limited. . . . [T]he presumed point of using general rules is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions.”).

As the Third Circuit itself acknowledged before the Commission adopted Section (b)(6), the phrase “extraordinary and compelling” is “amorphous” and “ambiguous.” *Andrews*, 12 F.4th at 260. The

Commission’s resolution of that ambiguity falls well within the discretion Congress granted to it as the “expert body” that “review[s] and revise[s]” the guidelines to provide national guidance with the benefit of data, experience, and stakeholder feedback. *Mistretta*, 488 U.S. at 369, 379 (quoting 28 U.S.C. § 994(o)).

2. The Commission’s interpretation of “extraordinary and compelling” is consistent with the traditional discretion that federal judges exercise at sentencing and with this Court’s decisions concerning the scope of that discretion. *See Concepcion*, 597 U.S. at 495 (noting the presumption that Congress incorporates well-established traditions and background principles of sentencing law).

“From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.” *Id.* at 490–91 (quoting K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9 (1998) (Stith & Cabranes)); *see Dean*, 581 U.S. at 66 (explaining “long” and “durable” tradition of sentencing judges exercising “discretion in the sort of information they may consider”). That discretion “carries forward to later proceedings that may modify an original sentence,” which can include the discretion to consider intervening changes of law. *Concepcion*, 597 U.S. at 491, 493–94. Sentencing judges are limited in this discretion “only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.” *Id.* at 491.

“Congress is not shy about placing such limits where it deems them appropriate.” *Id.* at 494. Indeed, Congress made an express limitation here, specifically instructing that “[r]ehabilitation of the

defendant alone shall not be considered an extraordinary and compelling reason” for a Section 3582(c)(1)(A) motion. 28 U.S.C. § 994(t). That provision shows that Congress knew how to speak clearly when it wanted to exclude topics from consideration. There is no basis to infer some other, implied, categorical limitation on what courts may consider. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.”). This Court has repeatedly cautioned against reading an “implicit directive into [] congressional silence.” *Kimbrough*, 552 U.S. at 103; *see Jama v. Immigr. & Customs Enft*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply”). “Drawing meaning from silence is particularly inappropriate” in the sentencing contexts, “for Congress has shown that it knows how to direct sentencing practices in express terms.” *Kimbrough*, 552 U.S. at 103.

Section 994(t) also underscores the reasonableness of the Commission’s interpretation because that provision demonstrates Congress’s expectation that, consistent with Section (b)(6), the analysis would involve consideration of a *combination* of circumstances. Even when Congress expressly prohibited a consideration (rehabilitation), it chose not to do so categorically. Instead, Congress provided that “[r]ehabilitation . . . *alone*” cannot suffice. 28 U.S.C. § 994(t) (emphasis added). Unless the word “alone” has no meaning, Congress must have intended to permit

consideration of rehabilitation alongside other factors. *See Brooker*, 976 F.3d at 237–38 (permitting consideration of rehabilitation when the defendant “does not rely *solely*” on it). So even though Congress was clear in its disdain for rehabilitation standing alone as a valid consideration when a sentence is imposed, *see Tapia v. United States*, 564 U.S. 319, 324–27 (2011), Congress still allowed courts to consider rehabilitation as part of the holistic determination of whether a particular case presented “extraordinary and compelling” circumstances when a defendant seeks a sentence reduction. It would be anomalous to conclude that Congress intended implicitly to prohibit any and all consideration of changes in law even though it did not impose such a categorical bar with respect to the one factor, rehabilitation, that it explicitly identified.

3. Contrary to the Third Circuit’s reasoning, the First Step Act does not preclude the Sentencing Commission’s guidance. Properly construed, that law squarely supports the approach the Commission adopted.

Nothing in the First Step Act mentions—let alone expressly limits—what may suffice to support a sentence reduction under Section 3582(c)(1)(A). The Third Circuit nevertheless inferred such a limit from Congress’s decision to make its amendment to Section 924(c)’s sentencing provisions only partially retroactive, that is, retroactive only to cases in which a sentence had not yet been imposed. That inference conflates two fundamentally different concepts. Congress did not require automatic and categorical resentencing for *every* defendant who had been subjected to the ultra-harsh sentences for “second or successive” Section 924(c) convictions, but neither did it prohibit *any* defendant from invoking those changes as the basis

for a reduction in sentence pursuant to a different statutory vehicle that the same Congress, in the same statute, opened up for all inmates. There is “nothing inconsistent about Congress’s paired First Step Act judgments: that ‘not *all* defendants convicted under § 924(c) should receive new sentences,’ but that the courts should be empowered to ‘relieve *some* defendants of those sentences on a case-by-case basis.” *McCoy*, 981 F.3d at 287 (internal citations omitted).

This Court recently rejected a similar argument in *Concepcion*. There, the Court explained that sentencing “discretion is bounded only when Congress or the Constitution expressly limits” it, and “Congress is not shy about placing such limits.” 597 U.S. at 491, 494–95 (collecting examples of “express” limits). But “[n]othing in . . . the First Step Act” placed such a limit, because nothing in its terms “prohibit[s] district courts from considering any arguments in favor of, or against, sentence modification.” *Id.* at 495–96. “Had Congress intended to constrain district courts” during sentence modification, it “would have written” that limit into Section 404. *Id.* at 497.

The same is true here. Congress knows how to restrict the meaning of “extraordinary and compelling.” It did precisely that in Section 994(t) with respect to “rehabilitation . . . alone.” But the First Step Act “says nothing about” what justifies a sentence reduction under the compassionate release statute, “much less about what information a court may consider” in a compassionate release analysis. *Dean*, 581 U.S. at 69. Inferring from the First Step Act “that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor, which Congress itself has not done,” *Chen*, 48 F.4th at 1098, and this Court has made clear

can only be done expressly, *Concepcion*, 597 U.S. at 491.

In fact, far from introducing any tension into the application of the First Step Act, Section (b)(6) harmonizes its key provisions. Congress made two changes in that law that are central here. The first was to modify the unduly harsh mandatory sentences when multiple Section 924(c) convictions occur in a defendant's first such case. The second was to eliminate BOP's role as gatekeeper of sentence-reduction motions and for the first time to create a mechanism by which prisoners themselves could seek such relief. Congress made the first set of changes automatically applicable to every case in which a sentence had not yet imposed, and through the second, Congress provided a means for prisoners already serving an "unusually long sentence" to advocate for why their particular circumstances presented sufficiently "extraordinary and compelling reasons" to justify a reduction. Section (b)(6) bridges those two parts of the First Step Act, providing courts with "nationally uniform" guidance for the individualized, case-by-case consideration of prisoner-filed motions based, in part, on the changed sentencing landscape. And while Section (b)(6) permits district courts to consider the changed sentencing landscape under the First Step Act, it carefully limits the circumstances in which they can grant relief. The Third Circuit and the Government miscast the Commission's actions by failing to acknowledge that relief based upon changes to the First Step Act could be granted only in "extraordinary" cases after numerous threshold conditions are also met. Br. for the U.S. in Opp'n at 38, *United States v. Carter*, No. 24-1115, ECF No. 25 (3d Cir. Apr. 5,

2024) (arguing that Section (b)(6) “rests exclusively on a change in law”).

At a minimum, therefore, Section (b)(6) represents a reasonable interpretation of the statutory terms “extraordinary and compelling,” even if those terms are susceptible of multiple and competing constructions. Section (b)(6) is thus a valid exercise of the authority Congress expressly delegated the Sentencing Commission to describe the permissible reasons for a sentence reduction.

D. This Case Presents an Ideal Vehicle.

Petitioner’s case is the best vehicle to address this important question for three key reasons.

First, there are no threshold procedural issues that could prevent the Court from reaching the merits. Petitioner moved for a sentence reduction under Section (b)(6) after that provision became effective. In a thorough opinion following extensive briefing, the district court assessed the applicability of Section (b)(6) and applied it to Petitioner’s particular circumstances.

That is not true of the other pending petition implicating this issue. The petitioner in *Rutherford* sought a sentence reduction before the policy statement was amended to include Section (b)(6), and the district court did not consider whether, much less how, that provision might apply. *See United States v. Rutherford*, No. 05-cr-0126-JMY-1, 2023 WL 3136125, at *3–4 (E.D. Pa. Apr. 27, 2023). The government urged the Third Circuit not to consider Section (b)(6) for the first time on appeal. Br. for the U.S. in Opp’n at 12–15, *United States v. Rutherford*, No. 23-1904, ECF No. 36 (3d Cir. Feb. 20, 2024). Although the

Third Circuit ultimately concluded that it had the authority to do so, the Court acknowledged that two other courts of appeals had reached different conclusions on that point. *Rutherford*, 120 F.4th at 372 n.15. Petitioner’s case avoids this unnecessary threshold issue, which would consume briefing space at the merits stage and divert attention from the central question.

Second, a decision by this Court will be dispositive not just of the district court’s authority to grant Petitioner relief; it will actually determine whether his sentence will be reduced. The sole basis on which the district court declined to reduce Petitioner’s sentence was its belief that precedent rendered Section (b)(6) invalid. The district court indicated that if that belief were incorrect, it would grant Petitioner’s motion because the Section 3553(a) factors supported a shorter sentence and because Petitioner met all the Section (b)(6) criteria. The district court in *Rutherford* made no such determination. Addressing the question in the context of the *Rutherford* petition therefore could result in a decision with no effect because the district court may reject the motion for entirely different reasons. The Court’s decision in this case, by contrast, will resolve the litigation.

Third, Petitioner presents exactly the type of compelling circumstances that prompted Congress to create a new mechanism for prisoners to seek relief and the Commission to adopt Section (b)(6). The district court noted that Petitioner’s “remarkable record”—his “impressive and praiseworthy” efforts at improving himself and the lives of those around him—“paint a clear picture of a defendant who . . . does not deserve to spend his life behind bars.” Pet. App. 33a. The court noted that, since his incarceration, Petitioner has earned his GED and taken college classes,

extracurricular courses, and vocational training despite facing a *de facto* life sentence. He has married his long-time partner and maintained close ties to his family and community. Pet. App. 24a. Family members filed letters of support attesting to Petitioner's rehabilitation and their intent to provide him with employment and accommodations upon his release. As the district court explained, Petitioner "has become the kind of model prisoner that our system tries, but too often fails, to produce." Pet. App. 24a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 7, 2025

APPENDIX

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**APPENDIX A — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED DECEMBER 2, 2024**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ECO-015-E

No. 24-1115
(E.D. Pa. No. 2-07-cr-00374-001)

UNITED STATES OF AMERICA,

v.

JOHNNIE MARKEL CARTER,

Appellant.

Filed December 2, 2024

ORDER

Present: HARDIMAN, BIBAS and FISHER, *Circuit Judges*

1. Motion by Appellant for Expedited Decision with Response to June 5, 2024 Clerk Order.

Respectfully,
Clerk/pdb

2a

Appendix A

The foregoing Motion is GRANTED. The District Court's Order entered January 4, 2024 hereby is summarily affirmed. The Clerk is directed to enter the mandate forthwith.

By the Court,

s/ Thomas M. Hardiman
Circuit Judge

3a

**APPENDIX B — OPINION OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA,
FILED JANUARY 12, 2024**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION NO. 07-374-1.

UNITED STATES OF AMERICA,

v.

JOHNNIE MARKEL CARTER.

Filed January 12, 2024.

OPINION

WENDY BEETLESTONE, District Judge.

Johnnie Carter is currently serving a de facto life sentence—840 months, or 70 years—for a string of armed robberies he committed in 2007. The bulk of this sentence was the result of Carter’s conviction on three charges brought under 18 U.S.C. § 924(c), each of which earned him lengthy, mandatory terms of imprisonment that must be served consecutively. Congress has since enacted the First Step Act, Pub. L. 115-391, 132 Stat. 5222 (2018), which among its many provisions amended Section 924(c) to substantially lower these mandatory minimums going forward. As a result, the Government agrees that Carter “is serving a long sentence that would be significantly lower if imposed under current law.”

Appendix B

Carter now moves to reduce his sentence, pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). That statute, commonly referred to as the compassionate-release statute, authorizes district courts to reduce an imposed term of imprisonment upon a finding that “extraordinary and compelling reasons warrant such a reduction.” In support of his motion, Carter points to a recently promulgated policy statement from the U.S. Sentencing Commission, which states that an “unusually long sentence,” coupled with a non-retroactive change in the law, can constitute an extraordinary and compelling reason to modify a sentence. U.S.S.G. § 1B1.13(b)(6).¹ He further highlights his strong family ties, evidence of rehabilitation, and good conduct while incarcerated as “other circumstances” warranting a reduction. *Id.* § 1B1.13(b)(5). The Government opposes the motion, arguing that the Sentencing Commission’s recent policy statement exceeds its statutory authority, and that Carter’s circumstances do not otherwise warrant a reduction.

For the reasons that follow, Carter’s motion will be denied.

I. BACKGROUND**A. “Stacked” Sentences under Section 924(c)**

Between March and May of 2007, Carter participated in a series of armed bank robberies. No one was physically

1. Unless otherwise noted, all citations to the sentencing guidelines refer to the 2023 Guidelines Manual, effective November 1, 2023.

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hurt, but Carter and his accomplices were able to abscond with over a quarter-million dollars before finally being apprehended. These accomplices all accepted plea deals, each receiving a sentence of between 10- and 23-years imprisonment. Carter, however, exercised his right to a trial, where a jury convicted him of two counts of conspiracy, 18 U.S.C. § 371, three counts of armed bank robbery, *id.* § 2113(d), and three counts of carrying and using a firearm during a crime of violence, *id.* § 924(c).

Those final three convictions, and the sentences that resulted from them, lie at the heart of Carter’s motion. Section 924(c) provides that “any person who, during and in relation to any crime of violence or drug trafficking crime . . . or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime,” be sentenced to a mandatory term of imprisonment, and that this term “shall run concurrently with any other term of imprisonment imposed on the person.” 18 U.S.C. § 924(c)(1)(A), (D). For a first-time offender, the mandatory minimum sentence for a Section 924(c) conviction is either 5, 7, or 10 years, depending on whether the gun was possessed, brandished, or discharged. *Id.* § 924(c)(1)(A)(i)-(iii). For defendants with a prior Section 924(c) conviction, this mandatory minimum jumps to 25 years—a sentence that, again, is “stacked” with, and must be served consecutive to, any other term of incarceration resulting from that conviction. *Id.* § 924(c)(1)(C)(i).

At the time of Carter’s trial, Section 924(c) provided that this ratchet-up to a 25-year minimum sentence

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occurred “[i]n the case of a second or subsequent conviction under this subsection.” 18 U.S.C. § 924(c)(1) (C) (2006). Though lower courts had initially split on the meaning of this provision, the Supreme Court ultimately determined that “‘conviction’ refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction,” including convictions obtained by the Government during the same proceeding. *Deal v. United States*, 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993). Thus, when a jury convicted a defendant on multiple counts of violating Section 924(c), the first conviction would result in a 5-, 7-, or 10-year mandatory minimum sentence, as appropriate, while the rest would each result in a 25-year mandatory minimum sentence, all to run consecutively. *Id.* at 136, 113 S.Ct. 1993. That was the case for Carter, whose three Section 924(c) convictions resulted in 7-, 25-, and 25-year terms of incarceration (57 years in total), sentences that were “stacked” together and on top of the 13-year sentence he received for the bank robberies themselves.²

2. Because the statute only required that the sentences for Carter’s Section 924(c) convictions run consecutively, the sentencing judge could have made this additional 13-year sentence for the bank robbery and conspiracy charges run concurrently with that 57-year mandatory minimum. Indeed, at the sentencing hearing, Carter’s defense attorney argued for precisely this outcome. But the sentencing judge concluded that “[t]he defendant earned these convictions and the defendant earned the sentences that go along with these convictions.” Sentencing Hr’g Tr. at 22:17-18, *United States v. Carter*, No. 07-0374 (E.D. Pa. Jan. 5, 2012) (ECF No. 266). And he ultimately directed the 13-year sentence run consecutively to Carter’s Section 924(c) sentence.

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The harshness of the “stacked” sentences produced by this regime was widely criticized; as several members of the *Deal* court aptly put it, “punishing first offenders with twenty-five-year sentences does not deter crime as much as it ruins lives.” *Id.* at 146 n.10 (Stevens, J., dissenting) (quoting *United States v. Jones*, 965 F.2d 1507, 1521 (8th Cir. 1992)); see also U.S. Sentencing Comm’n, *2011 Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359 (2011) (“The ‘stacking’ of mandatory minimum penalties for multiple violations of section 924(c) results in excessively severe and unjust sentences in some cases.”). And Congress eventually took note. In 2018, as part of the First Step Act, it amended Section 924(c) to effectively abrogate the Supreme Court’s decision in *Deal*. As the revised statute makes clear, the ratchet-up to a 25-year mandatory minimum sentence occurs only “[i]n the case of a violation of this subsection that occurs *after* a prior conviction under this subsection has become final.” 18 U.S.C. § 924(c)(1)(C) (emphasis added). In other words, “Congress sought to ensure that stacking applied only to defendants who were truly recidivists.” *United States v. Henry*, 983 F.3d 214, 218 (6th Cir. 2020). Had this version of Section 924(c) been in effect at the time of Carter’s sentencing, his Section 924(c) convictions would have resulted in mandatory minimums of just 7 years each.

Yet Carter was sentenced under the prior version of Section 924(c), and so the changes wrought by First Step Act were cold comfort to him and others in his position. Though some of the reforms enacted in that statute were made retroactive, Congress expressly provided that its

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revision to Section 924(c) would apply to criminal acts predating the passage of the First Step Act only “if a sentence for the offense has not been imposed as of such date of enactment.” Pub. L. 115-391, § 403(b), 132 Stat. 5194, 5222. As the Third Circuit has explained, this legislation “spoke unequivocally”: the reduced Section 924(c) mandatory minimums do not apply retroactively to defendants like Carter, whose sentence was final at the time of the First Step Act’s enactment. *United States v. Hodge*, 948 F.3d 160, 163 (3d Cir. 2020).

B. Compassionate Release Post-First Step Act

The non-retroactivity of the Section 924(c) amendments is not the end of the story, though. In addition to revising Section 924(c) itself, the First Step Act also took steps to “Increas[e] the Use and Transparency of Compassionate Release.” Pub. L. 115-391, § 603, 132 Stat. 5194, 5221-22. By way of background, courts are generally powerless to “modify a term of imprisonment once it has been imposed,” but there has long been an exception for cases where “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(2)(A)(i). Prior to the passage of the First Step Act, a compassionate release motion could only be made by the Bureau of Prisons (“BOP”). *Id.* And Congress had tasked the Sentencing Commission with determining “what should be considered extraordinary and compelling reasons for sentence reduction,” limiting its discretion only with the proviso that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” 28 U.S.C. § 994(t). Consistent with this directive, the

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Commission had identified four circumstances it viewed as extraordinary and compelling reasons for a sentence modification: (1) the medical condition of the defendant; (2) the age of the defendant; (3) “family circumstances,” such as when a defendant is the sole caregiver to a spouse or minor child; and, (4) “other reasons,” as determined by the BOP. U.S.S.G. § 1B1.13, Application Note 1 (Nov. 2016).

With the BOP as the gatekeeper of compassionate release motions, access to this remedy was “inconsistent and infrequent.” *United States v. Spencer*, 519 F.Supp.3d 200, 203 (E.D. Pa. 2021); *see also United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (“BOP used this power sparingly, to say the least.”). The First Step Act sought to change that, and defendants may now move for a reduction of their own sentence once they have exhausted any available administrative remedies. 18 U.S.C. § 3582(c)(1) (A). Many have done so, including defendants sentenced under the prior version of Section 924(c) who argued that excessively long “stacked” sentences constituted an “extraordinary and compelling reason” for a reduction. But there was a hitch. As with BOP-initiated motions, Congress required that the determination of whether “extraordinary and compelling reasons” warrant a sentence reduction be “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* Yet almost immediately after the legislation took effect, the Sentencing Commission lost its quorum, leaving it “unable to update its preexisting policy statement concerning compassionate release to reflect the First Step Act’s changes.” *United States v. Long*, 997 F.3d 342, 348 (D.C. Cir. 2021). This “vexing, [] temporary anomaly” left

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judges to exercise their discretion in considering whether extraordinary circumstances were present. *United States v. Andrews*, 12 F.4th 255, 259 n.4 (3d Cir. 2021).

District courts around the country set about doing so, and absent guidance from the Sentencing Commission, they splintered on whether an excessively long sentence, such as a stacked sentence handed down under Section 924(c), could constitute an “extraordinary and compelling reason” for compassionate release. Some judges (including the undersigned) concluded that it could, reasoning that the excessive “stacked” sentences resulting from multiple Section 924(c) convictions, along with the disparity created when the First Step Act amended that statute, were “extraordinary”—*i.e.*, that they went “[b]eyond what is usual, customary, regular, or common.” *United States v. Pollard*, 2020 WL 4674126, at *7 (E.D. Pa. Aug. 12, 2020) (Beetlestone, J.); *accord, e.g., United States v. Clausen*, 2020 WL 4260795, at *8 (E.D. Pa. July 24, 2020) (Pappert, J.); *United States v. Ezell*, 518 F.Supp.3d 851, 857 (E.D. Pa. 2021) (DuBois, J.). Others took the opposite view, concluding that treating the length and disparity of a pre-First Step Act sentence as an “extraordinary and compelling reason” for compassionate release would inappropriately override Congress’s decision to make its revisions to Section 924(c) non-retroactive. *United States v. Andrews*, 480 F.Supp.3d 669, 679 (E.D. Pa. 2020) (Robreno, J.); *accord, e.g., United States v. Scott*, 508 F.Supp.3d 314, 319 (N.D. Ind. 2020); *United States v. Gashe*, 2020 WL 6276140, at *3 (N.D. Iowa Oct. 26, 2020).

The Third Circuit ultimately adopted that latter view, holding that “the duration of [a defendant’s] sentence and

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the nonretroactive changes to mandatory minimums could not be extraordinary and compelling reasons warranting sentence reduction.” *Andrews*, 12 F.4th at 260. As to the duration of a sentence mandated by Section 924(c), it reasoned that “there is nothing ‘extraordinary’ about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute.” *Id.* at 260-61 (quoting *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021)). And it echoed the concern that treating those mandatory sentences as extraordinary “would infringe on Congress’s authority to set penalties.” *Id.* at 261. As to the sentencing disparity created by Congress’s decision to make its changes to Section 924(c) non-retroactive, the court held that this too “cannot be a basis for compassionate release.” *Id.* It is standard practice that changes to federal sentencing practices do not apply to defendants already sentenced, and “[w]hat the Supreme Court views as the ‘ordinary practice’ cannot also be an ‘extraordinary and compelling reason’ to deviate from that practice.” *Id.* (quoting *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021)). “Thus, we will not construe Congress’s nonretroactivity directive [to Section 924(c)] as simultaneously creating an extraordinary and compelling reason for early release. Such an interpretation would sow conflict within the statute.” *Id.*

While *Andrews* closed the door on compassionate release for defendants in Carter’s position for a time, recent developments purport to pry it back open. About a year after that case was decided, the Sentencing Commission re-attained a quorum, and not long after it released new

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sentencing guidelines that included an updated policy statement for compassionate release motions. Unlike the prior version, this policy statement expressly applied to motions made both by the BOP and defendant themselves, and it expressly identified an “unusually long sentence” as an extraordinary and compelling reason warranting compassionate release. In full, that portion of the policy statement states:

UNUSUALLY LONG SENTENCE.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant’s individualized circumstances.

U.S.S.G. 1B1.13(b)(6). Additionally, as relevant here, the policy statement retained a catch-all provision, which now provides that “extraordinary and compelling reasons” for compassionate release exist when “any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons” enumerated by the policy statement, “are similar in gravity to those” enumerated reasons. *Id.* § 1B1.13(b)(5).

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Those revisions to the guideline manual took effect on November 1, 2023, and that same day, Carter filed this motion for compassionate release.

II. DISCUSSION

Because the compassionate release statute permits a court to modify an imposed term of imprisonment “after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that [] extraordinary and compelling reasons warrant such a reduction,” and if “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission,” 18 U.S.C. § 3582(c)(1)(A)(i), a motion for compassionate release raises three questions: (1) whether there are “extraordinary and compelling reasons” for modifying an imposed term of imprisonment; (2) whether a new sentence would be consistent with the factors set forth in 18 U.S.C. § 3553(a); and, (3) whether a new sentence would be consistent with any applicable policy statements. *United States v. Pawlowski*, 967 F.3d 327, 329 (3d Cir. 2020).

Here, there is no dispute regarding that third question. The Sentencing Commission’s revised policy statement expressly identifies an “unusually long sentence” as a basis for compassionate release, U.S.S.G. § 1B1.13(b)(6), and the Government acknowledges that “[t]his provision squarely applies to Carter’s situation.” It argues, however, that this policy statement exceeded the Sentencing Commission’s statutory authority; that no other “extraordinary and compelling reason” warrants

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a modification to Carter’s sentence; and that while the Section 3553(a) factors support some reduction to Carter’s sentence, they do not support the extent of the reduction he seeks (*i.e.*, a reduction of his term of incarceration to time served). These arguments will be considered in turn.

A. U.S.S.G. § 1B1.13(b)(6) is Inconsistent with Third Circuit Precedent

As discussed, it is undisputed Carter’s motion for a new sentence identifies an “extraordinary and compelling reason,” as defined by the Sentencing Commission: the “unusually long sentence” he received as a result of his “stacked” Section 924(c) convictions, along with the disparity between that sentence and one that would have been handed down today. By Carter’s telling, that is the end of the matter. Congress has expressly delegated the Sentencing Commission with the authority to “describe what should be considered extraordinary and compelling reasons for sentence reduction.” 28 U.S.C. § 994(t). And the only limitation it placed on this delegation was the proviso that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” *Id.* “As a familiar canon of construction states, *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of the other.” *United States v. Nasir*, 17 F.4th 459, 471-72 (3d Cir. 2021) (en banc). Thus, Carter argues, because Congress never placed nonretroactive changes in law that produce gross sentence disparities outside the remit of the compassionate release statute, the Sentencing Commission was acting comfortably within its discretion when it identified such changes as an “extraordinary and compelling reason” warranting early release.

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There is much to commend this argument; indeed, as noted above, this Court previously interpreted the compassionate release statute in much the same manner as the Sentencing Commission, concluding that an unduly long “stacked” sentences under the prior version of Section 924(c) was an “extraordinary and compelling reason” warranting compassionate release. *Pollard*, 2020 WL 4674126, at *6. But that decision, and others like it, were subsequently abrogated by the Third Circuit in *Andrews*, 12 F.4th at 260. And as the Government now correctly argues, this binding precedent forecloses relief via Section 1B1.13(b)(6) of the Sentencing Commission’s revised policy statement.

Recall that *Andrews* was decided after the First Step Act’s changes to Section 924(c)’s mandatory minimum provision but before the Sentencing Commission had issued its policy statement regarding prisoner-initiated compassionate-release motions. In that case, the district court had concluded that “[t]he length of the sentence cannot be an extraordinary and compelling reason to grant compassionate release.” 480 F.Supp.3d at 679. The Third Circuit affirmed. Regarding the length of “stacked” Section 924(c) sentences, it held that “the imposition of a sentence that was not only permissible but statutorily required at the time is neither an extraordinary nor a compelling reason to now reduce that same sentence.” *Andrews*, 12 F.4th at 261 (quoting *United States v. Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring)). And regarding the sentencing disparities created by Congress’s decision to make its amendments to Section 924(c) non-retroactive, the court

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noted that “the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.” *Id.* (quoting *Dorsey v. United States*, 567 U.S. 260, 280, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012)). “What the Supreme Court views as the ‘ordinary practice’ cannot also be an ‘extraordinary and compelling reason’ to deviate from that practice.” *Id.* (quoting *Wills*, 997 F.3d at 688). *But see United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020) (“[T]he very purpose of § 3582(c)(1)(A) is to provide a ‘safety valve’ that allows for sentence reductions when there is not a specific statute that already affords relief but ‘extraordinary and compelling reasons’ nevertheless justify a reduction.”).

Andrews remains binding law in this circuit, and it forecloses Carter’s argument that he is eligible for compassionate release pursuant to Section 1B1.13(b)(6) of the Sentencing Commission’s revised policy statement. As explained, Section 1B1.13(b)(6) states that an “unusually long sentence” may be deemed an “extraordinary and compelling reason” warranting compassionate release, provided that the defendant has served at least 10 years of their term of incarceration, and that a non-retroactive change in the law has produced a “gross disparity” between the sentences of otherwise similarly situated individuals. U.S.S.G. § 1B1.13(b)(6). That provision—which indisputably covers Carter and others in his position—is incompatible with *Andrews*’s interpretation of the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A) (i), and its holding that “the duration of [a defendant’s] sentence and the nonretroactive changes to mandatory minimums” is not one of the “extraordinary and

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compelling reasons” described by the statute. *Andrews*, 12 F.4th at 260.

Seeking to show otherwise, Carter primarily argues that because *Andrews* was decided in the absence of an applicable policy statement from the Sentencing Commission, its holding was effectively abrogated once such a policy statement was issued.³ But this has it exactly backwards. In the absence of an applicable policy statement from the Sentencing Commission, *Andrews* can only be understood as a decision interpreting the text of the compassionate-release statute itself. And after considering that statutory language, the Third Circuit concluded that a defendant’s unusually and disproportionately long sentence is not an “extraordinary and compelling reasons warrant[ing] [] a reduction.” 18 U.S.C. § 3582(c)(1)(A)(i). That holding may not now be

3. At oral argument, Carter took this a step further, contending that because Congress has expressly vested the Sentencing Commission with the authority to define “extraordinary and compelling,” *see* 28 U.S.C. § 994(t), courts *must* defer to whatever definition it ultimately adopts. But *Batterson v. Francis*—a nearly 50-year-old decision that served as Carter’s authority for this argument—held that while agency decisions following express delegations are “entitled to more than mere deference or weight,” they must nonetheless still be set aside where the agency “exceeded [its] statutory authority” or when its decision is “otherwise not in accordance with law.” 432 U.S. 416, 425, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977). Here, by issuing a revised policy statement that is inconsistent with the compassionate release statute, as interpreted by the Third Circuit in *Andrews*, the Sentencing Commission has done just that (at least as viewed through the lens of Third Circuit precedent).

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overridden by the Sentencing Commission, which “does not have the authority to amend the statute [the court] construed” in a prior case. *Neal v. United States*, 516 U.S. 284, 290, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996).

Neal is instructive on this point. Federal law imposes a mandatory minimum sentence of 5 years for the distribution of “1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD).” 21 U.S.C. § 841(b)(1)(B)(v). Neither the terms “mixture” nor “substance” are defined by the statute, and in the absence of any applicable Sentencing Commission guidance, the Supreme Court had previously looked to the statute’s “ordinary meaning” to determine that the “blotter paper customarily used to distribute LSD[] is a ‘mixture or substance containing a detectable amount’ of LSD.” *Chapman v. United States*, 500 U.S. 453, 461-62, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). Several years after this decision, the Sentencing Commission issued new guidelines “instruct[ing] courts to give each dose of LSD on a carrier medium a constructive or presumed weight of 0.4 milligrams,” a change it made retroactive. *Neal*, 516 U.S. at 287, 116 S.Ct. 763. The Supreme Court, acknowledging the principle that the Sentencing Commission’s work is entitled to deference, nonetheless rejected these new guidelines as inconsistent with its decision in *Chapman*. *Id.* at 294, 111 S.Ct. 1919. “Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later interpretation of the statute against that settled law.” *Id.* at 295, 116 S.Ct. 763. And while the Sentencing Commission, “[e]ntrusted within

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its sphere to make policy judgments,” was itself free to reconsider its prior determinations, courts “do not have the same latitude to forsake prior interpretations of a statute.” *Id.*; see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

So too here. It is true that, as with every amendment to the sentencing guidelines, Section 1B1.13(b)(6) was the result of the Sentencing Commission’s “in-depth research into prior sentences, presentence investigations, probation and parole office statistics, and other data, . . . reflect[ing] the collected wisdom of various institutions.” *United States v. Goff*, 501 F.3d 250, 257 (3d Cir. 2007). And it is likewise true that *Andrews* was decided without the benefit of input from this expert body—which lacked a quorum for almost the entire duration between the enactment of the First Step Act and the publication of that decision. If given the opportunity to do so, the Third Circuit might well elect to reconsider its prior holding to give the Sentencing Commission’s expertise its fair due. Indeed, several judges on the court have expressed an openness to doing just that. See *United States v. Stewart*, 86 F.4th 532, 535 n.2 (3d Cir. 2023) (indicating that the Third Circuit “may consider [the revised policy statement’s] effect on the validity of *Andrews* in an appropriate case”). But, as things currently stand, this binding precedent instructs that a defendant’s unusually long sentence is

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not an adequate basis for compassionate release. Unless and until any reconsideration of *Andrews* takes place or it is abrogated by a Supreme Court decision, that holding remains binding on district courts in this circuit.

Carter makes several more arguments in a similar vein, none of which is availing. First, he points to the Supreme Court’s decision in *Concepcion v. United States* for the proposition that district courts have “broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them,” and that this discretion “is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.” 597 U.S. 481, 491, 142 S.Ct. 2389, 213 L.Ed.2d 731 (2022). Thus, he argues, because Congress never placed a defendant’s “unusually long sentence,” as defined by Section 1B1.13(b) (6), expressly out-of-bounds, courts retain the discretion to deem this an “extraordinary and compelling” basis for a sentence modification. But the Third Circuit recently rejected this exact argument, explaining that *Concepcion* says nothing about “the ‘threshold question’ of whether ‘any given prisoner has established an “extraordinary and compelling” reason for release’ under” the compassionate-release statute. *Stewart*, 86 F.4th at 535 (quoting *United States v. King*, 40 F.4th 594, 596 (7th Cir. 2022)). Rather, *Concepcion* simply reaffirmed a district court’s broad discretion to consider all relevant, non-proscribed information—including the length of a defendant’s sentence and “the current sentencing landscape”—when determining if a new sentence would be consistent with the Section 3553(a) factors. *Id.*

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Second, Carter highlights the fact that the Section 1B1.13(b)(6) was submitted to Congress for its review as part of the Sentencing Commission’s 2023 package of proposed guidelines amendments. *See* 28 U.S.C. § 994(p) (providing for congressional oversight of amendments to the sentencing guidelines). When Congress allowed these amendments to go into effect without modification, Carter argues, it effectively placed its imprimatur on their contents, including Commission’s interpretation of the phrase “extraordinary and compelling.” But “[t]he search for significance in the silence of Congress is too often the pursuit of a mirage.” *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942). And so courts ordinarily “resist reading congressional intent into congressional inaction.” *Kimbrough v. United States*, 552 U.S. 85, 106, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). True, there are exceptions—in *Kimbrough*, for example, the Supreme Court placed some weight on the fact that “Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority.” *Id.* But those unusual circumstances are not present here, and the Supreme Court has subsequently reiterated that Congress’s acquiescence to a guidelines amendment is not evidence that “it has effectively adopted that interpretation with respect to the statute.” *DePierre v. United States*, 564 U.S. 70, 87 n.13, 131 S.Ct. 2225, 180 L.Ed.2d 114 (2011).

Finally, Carter criticizes the Government’s opposition to his motion as inconsistent with its prior litigation posture, arguing that prior to the promulgation of Section 1B1.13(b)(6), the Government “routinely” claimed that only

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the Sentencing Commission has the authority to defined “extraordinary and compelling reasons” warranting a reduced sentence. Now that the Sentencing Commission has done so, he argues, the Government “has shamelessly pivoted to the exact opposite position” that the new policy statement exceeds the Commission’s authority. Rhetorically, Carter’s point is well-taken. In *Andrews*, for example, the Government told the Third Circuit that a defendant facing “stacked” sentences under Section 924(c) was “not without a remedy in challenging his sentence,” as “he may ask the Sentencing Commission to revisit the definition of “extraordinary and compelling reasons.” Brief for Appellee United States of America, *United States v. Andrews* (No. 20-2768), 2020 WL 6940234, at *57. That statement and others like it are hard to square with the Government’s current argument that the Sentencing Commission was not, in fact, free to revisit the definition of “extraordinary and compelling reasons.” But as a legal matter, prior inconsistent arguments by a party are only relevant insofar as they implicate judicial estoppel—a doctrine designed to “prevent a litigant from playing fast and loose with the courts.” *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010). That doctrine plays no role here. Even assuming that the Government’s arguments in this case are “irreconcilably inconsistent” with its position in *Andrews* and other compassionate-release litigation—a prerequisite for invoking judicial estoppel, *see id.*—“a litigant must prove ‘affirmative misconduct’ to succeed on an estoppel claim against the government.” *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987). Carter makes no attempt to do so.

*Appendix B***B. Carter has not Demonstrated “Other Reasons”
Warranting a Sentence Reduction Pursuant to
U.S.S.G. § 1B1.13(b)(5)**

In addition to Section 1B1.13(b)(6) of the Sentencing Commission’s revised policy statement, Carter’s motion for compassionate release points to Section 1B1.13(b)(5), which provides that “extraordinary and compelling” circumstances exist when:

OTHER REASONS.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

Carter argues this is the case here, highlighting factors like his strong family ties, extensive efforts at rehabilitation, and good conduct while incarcerated as evidence that the totality of his circumstances supply the necessary extraordinary and compelling reason to reduce his sentence. But as the policy statement explains, a defendant’s “other circumstances,” even when considered together, must be “similar in gravity to those described in [U.S.S.G. § 1B1.13(b)(1)-(4)]” to warrant compassionate release. *Id.* at § 1B1.13(b)(5). The circumstances identified by Carter, while commendable and impressive, fall short of this demanding threshold.

To begin, Carter argues that he has demonstrated a remarkable record of rehabilitation. He is right about

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that. Despite serving the vast majority of his sentence with no realistic hope that he would ever be released, the record shows that Carter has thrown himself into efforts to improve himself. In addition to earning his GED, Carter has completed multiple extracurricular certification courses, gaining himself valuable vocational skills in fields like wellness and nutrition. Using those skills—and inspired by his deepened religious faith—Carter now works to improve the lives of his fellow inmates, providing counseling and spiritual guidance. Several of the individuals who wrote in support of his compassionate release motion discuss the deep remorse he feels for his prior misconduct, a sentiment that is likewise reflected in the perfect disciplinary record he has maintained for over eight years—an impressive achievement by any standard. Even the Government agrees that Carter has turned a corner; as its surreply puts it, “he is not the same unapologetic miscreant who last faced the Court.” In short, Carter has become the kind of model prisoner that our system tries, but too often fails, to produce.

Next, Carter highlights that fact that even while serving a de facto life sentence, he has maintained close and laudable ties to his family and community. In addition to completing a parenting course and working to improve his relationship with his adult children, Carter recently married his long-time partner, Natasha Williams. And his motion includes letters from multiple family members attesting to Carter’s continued role in their lives.⁴ One

4. This continued role was evident at oral argument on Carter’s motion, which was attended by numerous family members who came to show their support for his release. In the Court’s

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of these, from Carter’s brother Tommy Watts, offers a place for Carter to stay upon his release from prison—an important and relevant consideration when evaluating his circumstances. *Pollard*, 2020 WL 4674126, at *7 (citing *United States v. Adeyemi*, 470 F.Supp.3d 489, 495 (E.D. Pa. 2020)).

Third, Carter correctly notes that his age “weigh[s] in favor of finding extraordinary and compelling reasons.” *Adeyemi*, 470 F.Supp.3d at 528. At the time Carter and his accomplices undertook their crime spree, he was in his late 20s. Now, after spending almost two decades behind bars, he is approaching 50. By every account, Carter is a changed person than the one who was sentenced to a lifetime in prison, permitting the conclusion that he “would return as a productive member of society if compassionately released.” *Id.*; see *United States v. Bayron*, 2021 WL 632677, at *5 (E.D. Pa. Feb. 18, 2021) (“[T]he circumstances of the crimes indicate to the Court that they were likely the product of the immaturity of the Defendant at the time they were committed.”). The data supports this inference too; as the Sentencing Commission has reported, “as age increases recidivism by any measure declined.” U.S. Sent’g Comm’n, *The Effects of Aging on Recidivism Among Federal Offenders* 30 (2017).

Fourth, and relatedly, Carter argues that he is no longer a danger to others or to his community. His record supports this contention. As previously noted, Carter

experience, such a strong turnout would have been highly unusual even at an initial sentencing—let alone at a hearing for a defendant who has spent almost 17 years behind bars.

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now serves as a mentor to his fellow inmates, has taken affirmative steps to better himself (including courses on topics like anger management), and is currently in the midst of a remarkable eight-year streak without a single disciplinary infraction. “A defendant’s behavior while in BOP custody is an important indicator of whether he remains a danger to the community.” *United States v. Harrison*, 2023 WL 4744747, at *10 (D. Md. July 25, 2023). And Carter’s turnaround is strong evidence that he is no longer the dangerous man who was sentenced to a lifetime in prison.

These achievements are undoubtably impressive and praiseworthy, and as discussed in Part II.C, *infra*, they provide strong support for finding that a reduced term of incarceration would be consistent with the purposes of federal sentencing. But before a court may reach that question, it must first determine that a defendant’s circumstances are “extraordinary and compelling”—*i.e.*, that they go “beyond what is usual, customary, or common” and that “irreparable harm or injustice would result if the relief is not granted.” *Pollard*, 2020 WL 4674126, at *6 (alterations accepted). Carter’s circumstances do not meet this high bar. While his efforts at rehabilitation have been truly exceptional, Congress has explicitly instructed that a defendant’s rehabilitation “shall not be considered an extraordinary and compelling reason” warranting compassionate release. 28 U.S.C. § 994(t). And even when Carter’s rehabilitation is considered alongside his other circumstances, it is not “similar in gravity to those described in [U.S.S.G. § 1B1.13(b)(1)-(4)],” as required by Section 1B1.13(b)(5). As the Government

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notes, the reasons enumerated by subsections b(1)-(4) are scenarios falling outside the experience of nearly all federal inmates, such as a terminal medical condition, dire family emergency, or abuse at the hands of a custodian. In other words, as the policy statement's language indicates, they are truly "grave": "involving or resulting in serious consequence; likely to produce real harm or damage." Grave, *Webster's Third New Int'l Dictionary* 992 (1993). That Carter is not dangerous as he was when sentenced, has friends and family who continue to support him, and has matured while in prison is laudable. But by any measure, these circumstances are not "similar in gravity" to the exceptional situations enumerated in subsections b(1)-(4).

At oral argument and in his supplemental briefing, Carter argues that even if the "other circumstances" discussed above are not themselves extraordinary and compelling, they become so when considered alongside the unusual and disproportionate length of his sentence. In short, he reasons that Section 1B1.13(b)(5) allows courts to consider whether "*any other circumstance* or combination of circumstances" warrant compassionate release, U.S.S.G. § 1B1.13(b)(5) (emphasis added), subject only to the restriction that a defendant's rehabilitation is by itself insufficient. "This language could not be broader," Carter argues, and so the "any other circumstances" described by Section 1B1.13(b)(5) may include the fact that the defendant is serving a disproportionately long sentence. But even assuming that factoring the length of Carter's sentence into a Section 1B1.13(b)(5) analysis would be consistent with *Andrews*, it would nonetheless run afoul of the Sentencing Commission's directive that "[e]xcept

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as provided in [Section 1B1.13(b)(6)], a change in the law . . . shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement.” *Id.* § 1B1.13(b)(c). The only reason that Carter’s sentence is disproportionately long is such a change in law, and so taking the former into account necessarily means that a court is considering the latter. Thus, doing so here would run contrary to the Sentencing Commission’s clear instruction.

C. A Reduced Sentence, if Permitted, Would be Consistent with Purposes of Federal Sentencing

Because Carter has not met his threshold burden of establishing that “extraordinary and compelling reasons” warrant a modification to his sentence, he is not eligible for relief pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). For completeness, however, the Court turns to the final question in this analysis: whether a reduced sentence would be consistent with the factors enumerated in 18 U.S.C. § 3553(a). As relevant here, those factors are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

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- (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . .

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Beginning with the nature and circumstance of the offence, the Court shares the Government's assessment that although Carter's victims fortunately escaped without injury, his crimes were nonetheless serious and violent. Over the span of two months, Carter and his accomplices robbed four banks at gunpoint, netting themselves over a quarter-million dollars in cash and leaving a trail of terrified employees in their wake. As the Hon. Lawrence Stengel, who presided over Carter's sentencing, summarized it:

[T]he nature of these crimes is among the worst that we have in the—in our criminal courts. These were bold, violent, aggressive crimes and this defendant was a central figure in this conspiracy. He used a long gun, he pointed the gun at tellers. He caused fear, his intent was to intimate and terrorize the bank employees and the customers. It is in my view, criminal conduct of the worst kind. The defendant, time and again, through these various robberies . . . shows absolutely no regard for the law, no respect for any person and these were well-planned, sophisticated crimes.

Sentencing Hr'g Tr. at 17:8-19, *United States v. Carter*, No. 07-0374 (E.D. Pa. Jan. 5, 2012) (ECF No. 266). Yet, even as he acknowledged the severity of these crimes, Judge Stengel also opined that the mandatory minimum sentence he was required to impose was nonetheless “high and probably, longer than necessary to accomplish the legitimate purposes of federal sentencing.” *Id.* at 22:2-4. The Court agrees with this assessment too.

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A sentence must reflect the seriousness of the offense, promote the rule of law, and provide deterrence to criminal conduct, and must further adequately protect the public from future crimes of the defendant. Unlike some petitioners seeking compassionate release, Carter's actions were not "an outlier from his otherwise lawful behavior." *Pollard*, 2020 WL 4674126, at *8. In the roughly eleven years between his eighteenth birthday and arrest for bank robbery, Carter cycled in-and-out of prison, the result of at least eight separate convictions for offenses like theft by unlawful taking, burglary, and similar crimes. Collectively, these convictions meant that Carter was in the highest criminal history category (Category VI) when the sentencing court calculated his guidelines range. But a law-breaking past does not necessarily predict a law-breaking future, and Carter's record of rehabilitation supports a finding that he is no longer a danger to others. His eight-year discipline-free streak strongly suggests that his time in prison has given him the tools and maturity he will need to continue on his peaceful path. *See Pepper v. United States*, 562 U.S. 476, 492, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011) ("[A] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing.") (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)).

A sentence must provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Here, as part of his rehabilitation, Carter has availed himself of multiple educational and training opportunities, including earning his GED. Yet, while he has taken some college

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classes and earned some extracurricular credentials, the only specific vocational training he points to are three years he spent working as a commissary clerk—work that was discontinued upon his transfer to his current facility. While it is possible that Carter could support himself by finding similar employment upon his release from prison, he has far from exhausted the training and educational opportunities that have been made available to him during his incarceration. *Cf. Pollard*, 2020 WL 4674126, at *8 (noting that the petitioner “holds multiple technical certifications and has a job lined up were he to be released”).

Turning next to the sentences available and applicable sentencing range, the Government reports that Carter’s applicable sentencing range, if sentenced under current law, would be 462 to 514 months, as compared to the 840-month sentence he is currently serving. Most significantly, this includes a mandatory minimum sentence of just 21 years—considerably below the 57-year mandatory minimum that makes up the bulk of his current sentence.

Finally—and most significantly for this case—a sentence should avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct. As discussed at length in this opinion, Carter’s original sentence is both severe (a *de facto* life sentence for a crime resulting in no injuries) and grossly disproportionate to one that would be handed down today. Not even the Government defends the appropriateness this sentence on its face; in fact, the

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Government has come out in favor of making the First Step Act's changes to Section 924(c) sentences retroactive (albeit while maintaining that such a change may only come from Congress).⁵ Modifying Carter's sentence to a shorter term of incarceration would serve the goals of sentencing by eliminating this disparity.⁶

When considered together, these factors paint a clear picture of a defendant who, while undoubtably having earned himself a significant term of imprisonment for serious and violent offenses, does not deserve to spend his life behind bars. If permitted to do so, the Court would be inclined to agree with his argument that a shorter sentence would be "sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing. 18 U.S.C. § 3553(a). But, as discussed in Parts II.A and II.B, *supra*, Third Circuit precedent forecloses a finding that "extraordinary and compelling reasons"

5. Letter from Jonathan J. Wroblewski, Director, Office of Policy & Legislation, to the Honorable Carlton W. Reeves, Chair, U.S. Sentencing Comm'n, at 7-8 (Feb. 15, 2023), available at: <https://www.ussc.gov/sites/default/files/pdf/amendmentprocess/public-hearings-and-meetings/20230223-24/DOJ1.pdf>.

6. That said, this same factor weighs against Carter's request that his sentence be modified to a term of time served, entitling him to release immediately. As the Government correctly notes, such a modification would result in a sentence below the 21-year mandatory minimum that would be imposed on similarly situated defendants today—undermining Congress's directive to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a).

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warrant compassionate release. Unless and until that changes, his remedy lies not with the judicial branch, but with Congress—which could make its amendments to Section 924(c)’s mandatory minima retroactive—or the executive—whose clemency power operates as “the ‘fail safe’ in our criminal justice system.” *Herrera v. Collins*, 506 U.S. 390, 415, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

III. CONCLUSION

Carter’s progress towards rehabilitation has been laudable, and the sentence he is serving is both unduly long and grossly disproportionate to the sentence a similarly situated defendant would receive today. But in light of the Third Circuit’s decision in *Andrews*, these considerations cannot serve as the kinds of “extraordinary and compelling reasons” required to find him eligible for compassionate release. As such, his motion must be denied.

An appropriate order follows.

**APPENDIX C —
RELEVANT STATUTORY PROVISIONS**

Relevant Statutory Provisions – Carter 24-1115

1. Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221-22, provides:

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE. (a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking “second or subsequent conviction under this subsection” and inserting “violation of this subsection that occurs after a prior conviction under this subsection has become final”. (b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

2. Section 603(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5239-41, provides:

SEC. 603. FEDERAL PRISONER REENTRY INITIATIVE REAUTHORIZATION; MODIFICATION OF IMPOSED TERM OF IMPRISONMENT

* * *

(b) INCREASING THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE.—Section 3582 of

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title 18, United States Code, is amended— (1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after “Bureau of Prisons,” the following: “or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by

the warden of the defendant’s facility, whichever is earlier;”; (2) by redesignating subsection (d) as subsection (e); and (3) by inserting after subsection (c) the following: “(d) NOTIFICATION REQUIREMENTS.— “(1) TERMINAL ILLNESS DEFINED.—In this subsection, the term ‘terminal illness’ means a disease or condition with an end-of-life trajectory. “(2) NOTIFICATION.—The Bureau of Prisons shall, subject to any applicable confidentiality requirements— “(A) in the case of a defendant diagnosed with a terminal illness— “(i) not later than 72 hours after the diagnosis notify the defendant’s attorney, partner, and family members of the defendant’s condition and inform the defendant’s attorney, partner, and family members that they may prepare and submit on the defendant’s behalf a request for a sentence reduction pursuant to subsection (c)(1)(A); “(ii) not later than 7 days after the date of the diagnosis, provide the defendant’s partner and family members (including extended family) with an opportunity to visit the defendant in person; “(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

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“(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant’s behalf by the defendant or the defendant’s attorney, partner, or family member, process the request; “(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)— “(i) inform the defendant’s attorney, partner, and family members that they may prepare and submit on the defendant’s behalf a request for a sentence reduction pursuant to subsection (c)(1)(A); “(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant’s behalf by the defendant’s attorney, partner, or family member under clause (i); and “(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and “(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of— “(i) a defendant’s ability to request a sentence reduction pursuant to subsection (c)(1)(A);

“(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and “(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted. “(3) ANNUAL REPORT.— Not later than 1 year after the date of enactment of this subsection, and once every year thereafter, the Director

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of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c) (1)(A), which shall include a description of, for the previous year— “(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence; “(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence; “(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request; “(D) the number of requests that attorneys, partners, or family members submitted on a defendant’s behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request; “(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by

the criteria relied on as the grounds for a reduction in sentence; “(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence; “(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence; “(H) for each request, the number of prisoners who died while their request was pending and,

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for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence; “(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit; “(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and “(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.”.

3. 18 U.S.C. § 3582(c)(1)(A) provides:

§ 3582. Imposition of a sentence of imprisonment

* * *

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that— (1) in any case— (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring

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a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that— (i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

* * *

4. 28 U.S.C. § 994(t) provides:

§ 994. Duties of the Commission

* * *

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling

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reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

5. USSG § 1B1.13(b)(6)

USSG § 1B1.13(b)(6) provides:

(b) Extraordinary and Compelling Reasons.--
Extraordinary and compelling reasons exist under any
of the following circumstances or a combination thereof

* * *

(6) Unusually Long Sentence.--If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

No. ____

In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether criminal restitution under the Mandatory Victim Restitution Act (MVRA) is penal for purposes of the Ex Post Facto Clause.

II

PARTIES TO THE PROCEEDING

Petitioner, Holsey Ellingburg, Jr., was the defendant in the Western District of Missouri and the appellant in the Eighth Circuit.

Respondent, United States of America, was the plaintiff in the Western District of Missouri and appellee in the Eighth Circuit.

III

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Holsey Ellingburg, Jr.*, No. 23-3129 (8th Cir. Sept. 30, 2024) (denying petition for rehearing en banc).
- *United States v. Holsey Ellingburg, Jr.*, No. 23-3129 (8th Cir. Aug. 23, 2024) (affirming district court's judgment).
- *United States v. Holsey Ellingburg, Jr.*, No. 4:22-cr-00173-RK (W.D. Mo. May 4, 2024) (denying defendant's motion to show cause).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of the Court's Rule 14.1(b)(iii).

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In the Supreme Court of the United States

HOLSEY ELLINGBURG, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Holsey Ellingburg, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at 113 F.4th 839 (8th Cir. 2024). Pet.App.2a-9a. The court of appeals' order denying rehearing en banc is unreported but available at 2024 WL 4349610. Pet.App.1a. The opinion of the district court is unreported. Pet.App.12a-16a.

JURISDICTION

The court of appeals entered judgment on August 23, 2024, and denied rehearing en banc on September 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the U.S. Constitution provides in relevant part: “No . . . ex post facto Law shall be passed.” U.S. Const. art. I, § 9, cl. 3.

Relevant provisions of the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663 (1994), and the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A(a)(1) (2018), are in the Petition Appendix. Pet.App.32a-41a.

STATEMENT

This case presents an ideal vehicle to resolve a deeply entrenched circuit split on an important constitutional issue regarding criminal law that requires this Court’s resolution: whether criminal restitution ordered as part of a defendant’s sentence under the MVRA is penal for purposes of the Ex Post Facto Clause.

The government violates the Ex Post Facto Clause if (1) it applies a *penal* law retroactively, and (2) retroactive application of the law disadvantages the affected offender by altering the definition of criminal conduct or increasing the punishment for the crime. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). This case involves the first, threshold step of this test—whether a law is penal. Four circuits—the Third, Fifth, Sixth, and Eleventh Circuits—have held that restitution under the MVRA is penal and that retroactive application of the MVRA thus violates the Ex Post

Facto Clause if it increases a defendant's punishment. More broadly, five additional circuits have determined restitution under the MVRA is penal in other contexts. By contrast, two circuits, the Seventh Circuit and the Eighth Circuit below, hold the opposite. In those circuits, which hold that the MVRA provides only a civil remedy, courts never proceed to the second step of the ex post facto analysis.

The split in authority is entrenched and recognized. Commentators and courts, including the Eighth Circuit below, have highlighted the clear split. The Eighth Circuit's denial of rehearing en banc—even though panel members below suggested that en banc review might be warranted—demonstrates that only this Court can resolve this deeply entrenched split. *See* Pet.App.1a, 7a-8a.

Whether criminal restitution under the MVRA is penal or civil for Ex Post Facto Clause purposes is a question of national importance impacting countless defendants with restitution orders. This case illustrates the pernicious consequences of the split in authority. Petitioner committed the underlying offense in 1995, when the VWPA was in effect. The sentencing court entered a restitution order. Under the VWPA, petitioner was required to make restitution payments for twenty years following his judgment. Under the VWPA, then, petitioner's restitution liability ended in 2016, twenty years from entry of judgment.

But after that twenty-year period expired, the government continues to demand and collect restitution from petitioner, on the theory that the MVRA requires payment of restitution for twenty years from release from imprisonment. And because the MVRA requires application of interest to restitution orders, on the government's view,

petitioner remarkably now owes even more than he did in 2016.

Whether a defendant is protected by the Ex Post Facto Clause should not depend on geography. This Court should grant certiorari now to resolve this unjust conflict.

A. Statutory Background

The VWPA “ensure[s] that the Federal Government does all that is possible within limits of available resources to assist victims . . . without infringing on the constitutional rights of the defendant.” VWPA, Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248, 1249 (1982). The VWPA permitted, but did not require, courts to order restitution as part of a defendant’s criminal sentence and authorized the government to enforce such orders. 18 U.S.C. § 3663(a), (h)(1) (1994). Under the VWPA, a defendant’s restitution liability period completely expired twenty years after entry of judgment, regardless of the amount remaining at that time. 18 U.S.C. § 3613(b) (1994).

On April 24, 1996, Congress enacted the MVRA, which amended the VWPA and made restitution mandatory. *See* MVRA, Pub. L. No. 104-132, §§ 201-11, 110 Stat. 1214, 1227-41 (1996); 18 U.S.C. § 3663A(a)(1). Additionally, the MVRA extended a defendant’s restitution liability period: whereas the VWPA extinguished a defendant’s restitution liability after twenty years from entry of judgment, the MVRA extinguishes a defendant’s liability after twenty years from entry of judgment or release from imprisonment, whichever is later. *Compare* 18 U.S.C. § 3613(b) (1994), *with* 18 U.S.C. § 3613(b) (2018). The MVRA also requires collection of interest on restitution. 18 U.S.C. § 3612(f)(1) (2018).

The VWPA and MVRA place criminal restitution in the criminal code along with criminal fines, and restitution is part of a defendant’s sentence. *See* 18 U.S.C. §§ 3612 (title), 3663A(c)(1). Criminal restitution can influence the amount of other criminal punishments and can even replace a criminal fine altogether. *See* 18 U.S.C. §§ 3572(b), 3663A(a)(1). Payment of outstanding restitution orders is also a mandatory condition of probation and supervised release. 18 U.S.C. §§ 3563(a)(6)(A) (citing 18 U.S.C. § 3664), 3583(d).

B. Factual and Procedural Background

1. On December 4, 1995, while the relevant provisions of the VWPA were in effect, petitioner Holsey Ellingburg Jr. committed a bank robbery in Georgia. *See* Pet.App.13a. A federal jury convicted petitioner, and, on November 20, 1996, the district court sentenced petitioner to 322 months’ imprisonment with 5 years of supervised release. Pet.App.13a. Additionally, the court ordered a \$100.00 mandatory assessment and \$7,567.25 in restitution. Pet.App.24a. Petitioner started his prison sentence on November 20, 1996, the day of sentencing. *See* Pet.App.19a. While incarcerated, petitioner made thirty-six payments totaling \$2,054.04 toward his restitution amount from July 24, 2000, to April 19, 2016, before his twenty-year restitution liability period expired. *See* D. Ct. Dkt. 12-3.

November 20, 2016, marked twenty years after the entry of judgment in petitioner’s case—meaning he could no longer be liable for the restitution he owed pursuant to the VWPA. *See* 18 U.S.C. § 3613(b) (1994). Yet the government continued to withdraw money from petitioner’s Bureau of Prisons account after this date. *See* Pet.App.3a. Petitioner was released from prison in June 2022 and has tried to resume a normal life in Missouri with his fiancée.

See Pet.App.3a; D. Ct. Dkt. 6. Like many individuals who have recently been released from prison and are trying to reintegrate into society, petitioner has had to put most of his wages toward his monthly bills. D. Ct. Dkt. 6.

The government is still trying to enforce payment on petitioner's restitution order and to charge interest, even though it has been eight years since his restitution liability expired under the VWPA. D. Ct. Dkts. 12, 12-2, 12-3. In January and February 2023, petitioner received text messages from his probation officer stating that he would need to make a \$100.00 restitution payment by February 23, 2023, and at the end of every month thereafter, citing the MVRA. C.A. Appellant's Add.20. The government now claims that petitioner still owes \$13,476.01 in restitution—almost double the amount of restitution he was originally ordered to pay and well more than double the amount outstanding when the twenty-year liability period expired in 2016. *See* D. Ct. Dkts. 12, 12-2, 12-3.

2. On March 2, 2023, petitioner moved to show cause in the U.S. District Court for the Western District of Missouri why he should have to pay restitution, arguing that his restitution liability expired in November 2016 under the VWPA and that applying the MVRA's extended liability period would violate the Ex Post Facto Clause. Pet.App.12a. Again, an Ex Post Facto Clause violation occurs if (1) a penal law is applied retroactively, and (2) retroactive application of the law disadvantages the affected offender by, as relevant here, increasing the punishment for the crime. *Weaver*, 450 U.S. at 29. The district court denied petitioner's motion, agreeing with some federal circuit courts that have held at the second step of this test that retroactively applying the MVRA's extended liability period does not increase a defendant's punishment. Pet.App.15a. Petitioner appealed.

3. The Eighth Circuit affirmed, but on the ground that the MVRA is not penal at the first step of the test. The court held it was bound by prior Eighth Circuit precedent holding that criminal restitution is a civil remedy. Pet.App.6a-7a. Therefore, it held, retroactively applying the MVRA does not implicate the Ex Post Facto Clause at all. Pet.App.7a. The court, however, recognized that its holding conflicts with the view of a super-majority of other circuits. Pet.App.6a. Further, a two-judge concurrence noted that the Eighth Circuit's current position conflicts with this Court's decision in *Paroline v. United States*, 572 U.S. 434 (2014). Pet.App.7a.

In *Paroline* this Court analyzed the causal nexus between a defendant's offense conduct and a victim's harm required to impose restitution under 18 U.S.C § 2259. In rejecting the government's argument for a "less restrictive causation standard," the Court distinguished criminal restitution from civil tort law. *Paroline*, 572 U.S. at 451, 452-57. The Court explained that restitution "serves punitive purposes," "implicates the prosecutorial powers of government," and "is imposed by the Government at the culmination of a criminal proceeding and requires conviction of an underlying crime." *Id.* at 456-57 (citations and quotation marks omitted).

But because the court of appeals determined it was bound by a post-*Paroline* Eighth Circuit decision, those judges explained that "only the en banc court [could] overturn such [circuit] precedent." Pet.App.6a-7a.

The Eighth Circuit denied rehearing en banc. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

This petition is the ideal vehicle for resolving an intolerable circuit split over whether criminal restitution ordered as a part of a defendant's sentence under the MVRA is penal for Ex Post Facto Clause purposes. Again, an Ex Post Facto Clause violation occurs if (1) a penal law is applied retroactively, and (2) it disadvantages the affected offender. Under the first prong, four circuits have held that criminal restitution under the MVRA, or its predecessor, the VWPA, is a criminal punishment for Ex Post Facto Clause purposes. By contrast, two circuits—the Seventh and Eighth—have held that criminal restitution is a civil remedy in the context of the Ex Post Facto Clause. Only this Court can resolve this clear split on a recurring issue of critical importance that has long been recognized by courts and commentators.

I. The Circuits Are Squarely Divided Over Whether Criminal Restitution Under the MVRA Is Penal for Ex Post Facto Purposes

Four circuits have held that criminal restitution under the MVRA, or the VWPA, its predecessor, is a criminal punishment and part of a defendant's criminal sentence for Ex Post Facto Clause purposes. And five additional circuits have described MVRA restitution as a criminal penalty in other contexts. In direct conflict, two circuits hold that criminal restitution is a civil remedy intended to compensate victims for Ex Post Facto Clause purposes.

1. The Third, Fifth, Sixth, and Eleventh Circuits hold that criminal restitution under the MVRA or the VWPA is penal for Ex Post Facto Clause purposes.

The Third Circuit has explained that restitution, including under the MVRA and the VWPA, is a “criminal penalty” in the Ex Post Facto Clause context. *United States v. Norwood*, 49 F.4th 189, 215-16 (3d. Cir. 2022) (citing *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)); accord *United States v. Edwards*, 162 F.3d 87, 89 (3d Cir. 1998) (“[R]estitution imposed as part of a defendant’s sentence is criminal punishment, not a civil sanction . . .”).

The Fifth Circuit also holds that “restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause.” *United States v. Richards*, 204 F.3d 177, 213 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002). “Restitution . . . is a criminal penalty and a component of the defendant’s sentence.” *United States v. Chaney*, 964 F.2d 437, 451 (5th Cir. 1992); see also *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004).

The Sixth Circuit likewise holds that “restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause” and “that this is also true under the MVRA.” *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001) (citing *United States v. Streebing*, 987 F.2d 368, 376 (6th Cir. 1993)). That court has acknowledged the circuit split and expressly rejected “the minority approach” that “restitution orders [under the MVRA] are not punishment for the purpose of Ex Post Facto Clause analysis.” *Id.*

The Eleventh Circuit too holds “restitution under the MVRA is a penalty” for purposes of the Ex Post Facto Clause. *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998); accord *United States v. Puentes*, 803 F.3d 597,

609 (11th Cir. 2015) (“To be sure, restitution is penal, rather than compensatory.” (internal quotation marks omitted)). Again, the court rejected the minority position because it “is inconsistent with [that] court’s position” that “restitution is a criminal penalty carrying with it characteristics of criminal punishment.” *Siegel*, 153 F.3d at 1260.¹

2. Relatedly, as the Eighth Circuit noted, multiple other circuits have recognized that criminal restitution under the MVRA is criminal punishment in other contexts. Pet.App.6a.

The First Circuit determined that restitution ordered under the MVRA is a criminal penalty when holding that the government has standing to enforce a defendant’s restitution order. *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) (citing *Kelly v. Robinson*, 479 U.S. 36, 52 (1986)).

¹ The Second and D.C. Circuits also have signaled that criminal restitution under the MVRA is criminal punishment for Ex Post Facto Clause purposes. See *United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (stating that “even if the MVRA was in effect when [the defendant] was convicted, application of the [MVRA’s] new amendments . . . would be barred by the *ex post facto* clause of the United States Constitution”); see also Pet.App.6a (categorizing the Second Circuit as holding the majority view); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997) (citing *Thompson*, 113 F.3d at 15 n.1) (stating that applying the MVRA retroactively would raise “*ex post facto* concerns”); *United States v. Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998) (same); see also *Schulte*, 264 F.3d at 661-62 (categorizing the D.C. Circuit as holding the majority view).

The Second Circuit also recognized that restitution under the MVRA is “a serious component of criminal punishment” when determining that the one-year limitations period for filing a § 2255 motion begins to run upon the entry of the revised restitution order on remand. *See Gonzalez v. United States*, 792 F.3d 232, 236, 236 n.18, 239 (2d Cir. 2015) (citing *Pasquantino*, 544 U.S. at 365).

The Fourth Circuit similarly described the MVRA’s goals as “both compensatory and penal” in rejecting an argument that the victim bank’s losses were limited to the amount it paid to purchase the at-issue mortgage. *United States v. Ritchie*, 858 F.3d 201, 214 (4th Cir. 2017) (citing *Paroline*, 572 U.S. at 456).

The Ninth Circuit concluded that “restitution is part of a defendant’s punishment under the MVRA” in holding that the rule of lenity applies when construing the MVRA. *United States v. Lillard*, 935 F.3d 827, 835 (9th Cir. 2019).

Finally, the Tenth Circuit held that criminal restitution under the MVRA “serves punitive purposes” and is a “part of the criminal sentence” when determining that the one-year limitations period for filing a § 2255 motion begins to run upon the entry of the judgment and deferred restitution order. *United States v. Anthony*, 25 F.4th 792, 797-99, 798 n.5 (10th Cir. 2022) (quoting *Paroline*, 572 U.S. at 456).

3. In direct and stark conflict, the Seventh and Eighth Circuits hold that for ex post facto purposes criminal restitution is a *civil* remedy designed to make victims whole. As discussed, the Eighth Circuit below held that restitution under the MVRA is not a criminal punishment in the ex post facto context, relying on prior Eighth Circuit cases

deciding whether restitution awards require jury factfinding under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet.App.5a-7a (citing *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015), and *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005)). According to the Eighth Circuit, restitution “is designed to make victims whole, not to punish perpetrators, . . . [and] it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” Pet.App.5a (quoting *Carruth*, 418 F.3d at 904). And the Eighth Circuit denied rehearing en banc below, even though two panel members flagged that the Eighth Circuit’s position likely conflicts with this Court’s precedent. Pet.App.1a, 7a.

Likewise, the Seventh Circuit holds that a defendant’s “ex post facto claim falters” because restitution under the MVRA does not “qualif[y] as a criminal punishment.” *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998). As a result, defendants in the Seventh and Eighth Circuits are categorically barred from presenting ex post facto challenges to their criminal restitution orders.

4. Courts and commentators recognize the circuit split on this issue. The Eighth Circuit below acknowledged that a “majority of circuits” have determined that “restitution is a criminal penalty.” Pet.App.6a. In 2022, the Tenth Circuit, previously in the minority, switched to the majority view and recognized that “[n]early all the other circuits also view restitution as penal and part of the criminal sentence.” *Anthony*, 25 F.4th at 798 n.6 (collecting cases). The Third, Sixth, and Eleventh Circuits have highlighted the split as well and expressly confronted and rejected the minority view. *See Edwards*, 162 F.3d at 89-

92; *Siegel*, 153 F.3d at 1260; *Schulte*, 264 F.3d at 661-62. Nearly every other circuit has recognized the split too.²

Academic commentators likewise recognize that the Seventh Circuit (and now the Eighth Circuit) is the “only [] circuit court” where criminal restitution falls on the “civil side of the ledger.” Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 111-12, 112 n.67 (2014) (citing *Newman*, 144 F.3d at 540, and *Edwards*, 162 F.3d at 90 n.5).³ Other commentators continue to note the opposing views on this issue. *See, e.g.*, 24 Francis C. Amendola et al., *C.J.S. Criminal Procedure & Rights of Accused* § 2503 (May 2024 update); 1 John K. Villa, *Banking Crimes: Fraud, Money Laundering & Embezzlement* § 8:29 (2024-2025 ed. Sept. 2024 update).

This Court’s intervention is patently necessary to resolve this split in authority.

² *See United States v. Karam*, 201 F.3d 320, 330 n.13 (4th Cir. 2000); *United States v. Richards*, 204 F.3d 177, 213 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Dawson*, 250 F.3d 1048, 1052 (7th Cir. 2001).

³ *See also* Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After Southern Union v. United States?*, 64 Ala. L. Rev. 803, 832 n.178 (2013); Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 Fordham L. Rev. 2711, 2739-44 (2005); Adam S. Zimmerman, *Restitution*, 87 Geo. L.J. 1750, 1756 & n.2360 (1999); Irene J. Chase, Note, *Making the Criminal Pay In Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. Chi. L. Rev. 463, 470-75 (2001).

II. This Case Is an Ideal Vehicle To Decide This Exceptionally Important Question

1. Whether criminal restitution under the MVRA is penal or civil for Ex Post Facto Clause purposes is a question of national importance impacting countless defendants with restitution orders.

Because “[r]estitution is an effective rehabilitative penalty,” *Kelly*, 479 U.S. at 49 n.10, criminal restitution “plays an increasing role in federal criminal sentencing today.” *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting). “[F]rom 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay \$33.9 billion in restitution.” *Id.* (citing GAO, G. Goodwin, Federal Criminal Restitution 16 (GAO-18-203, 2018)). The MVRA particularly places a heavy burden on formerly incarcerated individuals who are trying to reintegrate into society by subjecting them to restitution obligations for a longer period of time, mandatory compounding interest, the looming threat of default, and the collateral consequences that attach to potentially ongoing criminal liability, including re-incarceration. *See Norwood*, 49 F.4th at 196.

These collateral consequences can be “profound.” *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting). As a practical matter, “an unpaid restitution obligation instantly becomes an added condition of parole or supervised release [under both the VWPA and MVRA].” *Norwood*, 49 F.4th at 219 (citation omitted). Accordingly, unpaid restitution can result in further incarceration or supervised release. *Id.*; *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting). Further, unpaid restitution orders can result in the denial of “the right to vote, to serve on a jury, or to run

for office, along with suspension of one’s driver’s license, or the right to own a firearm.” *Norwood*, 49 F.4th at 219 (citations omitted). As such, the collateral consequences extend beyond just financial impacts—they include the potential loss of liberty and civil rights. *See id.* Criminal restitution thus saddles defendants like petitioner with insurmountable burdens as they seek to reintegrate into society.

In 2016, \$100 billion (ninety-one percent) of the \$110 billion in outstanding federal restitution debt was uncollectible because offenders had “little ability to pay.” GAO, G. Goodwin, Federal Criminal Restitution 25 (GAO-18-203, 2018). This is unsurprising given that federal prisoners are paid only 12 to 40 cents per hour. *Work Programs*, Fed. Bureau of Prisons, <https://tinyurl.com/yvcd5r>. Plus, federal courts are required to determine the amount of restitution “without consideration of the economic circumstances of the defendant.” 18 U.S.C. § 3664(f)(1)(A). In reality, then, very few federal defendants can pay off their restitution debt—meaning it is almost certain they will be subject to the “profound” consequences of unpaid restitution debt until their restitution liability expires. *See Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting).

Whether the MVRA may be applied retroactively to individuals whose offense conduct occurred before its enactment has life-changing ramifications. In petitioner’s case, for example, the government claims that petitioner now owes more than double the amount of restitution he was initially ordered to pay, nearly 30 years after his offense. And the government claims that petitioner remains on the hook to pay this amount until 2042, exposing him to

the associated collateral consequences of a failure to pay for many years to come.

The MVRA’s application should not depend on geography. After his release from incarceration, petitioner settled in Missouri. As a result of the decision below, the courthouse door is closed to any ex post facto challenge by petitioner or any other resident of the Eighth Circuit to retroactive application of any aspect of the MVRA to their restitution orders. By contrast, at least four circuits (and likely more) would entertain those challenges. Indeed, the Third Circuit has ruled for an identically situated defendant, holding that retroactively applying the MVRA’s extended liability period violates the Ex Post Facto Clause. *Norwood*, 49 F.4th at 196. If petitioner had settled in the Third Circuit, he would owe nothing in restitution.⁴

2. This case is the perfect vehicle to resolve the split. The case squarely presented the Eighth Circuit with the

⁴ The circuits are split on the second prong of the Ex Post Facto Clause test on the facts of this case. *See* Pet.App.15a. A pending certiorari petition presents that question. *See* Pet. for a Writ of Certiorari, *Weinlein v. United States*, No. 24-458 (filed Oct. 21, 2024). The Second, Ninth, Tenth, and Eleventh Circuits have held that retroactively applying the MVRA’s extended liability period does not violate the Ex Post Facto Clause. *United States v. Weinlein*, 109 F.4th 91, 103-04 (2d Cir. 2024); *United States v. Blackwell*, 852 F.3d 1164, 1166 (9th Cir. 2017) (per curiam); *United States v. McGuire*, 636 F. App’x 445, 447 (10th Cir. 2016); *United States v. Rosello*, 737 F. App’x 907, 909 (11th Cir. 2018) (per curiam). The Third Circuit came to the opposite conclusion. *Norwood*, 49 F.4th at 217-20. In *Weinlein*, the Second Circuit “assume[d] . . . —without deciding—that the MVRA imposes a criminal punishment” before deciding the second step of the ex post facto question. 109 F.4th at 98. This petition presents the threshold question that the Second Circuit merely assumed in *Weinlein*.

question whether criminal restitution under the MVRA is punitive for Ex Post Facto Clause purposes. Despite the recognition of two panel members that the Eighth Circuit is in the minority—and that its current view likely contradicts this Court’s precedent—the Eighth Circuit adhered to its precedent and denied rehearing en banc. Pet.App.1a, 6a-7a.

Moreover, the question presented is the only issue on which the Eighth Circuit ruled. The Eighth Circuit did not, and could not, rule on the second step of petitioner’s ex post facto challenge—i.e., whether the MVRA increased his punishment—because it viewed criminal restitution as a civil remedy. A favorable ruling on this threshold question would allow petitioner’s ex post facto claim to continue on remand.

Not only is this case an ideal vehicle, this is also the right time for this Court to resolve this issue. Nearly all circuits have voiced an opinion on whether restitution under the MVRA is criminal punishment, and the minority view of the Seventh and Eighth Circuits is entrenched. The Seventh Circuit has refused to reconsider its position at least five times, adhering to its position as recently as 2022.⁵ By denying rehearing en banc in this case, the Eighth Circuit has definitively signaled an unwillingness

⁵ See, e.g., *Lee v. Carr*, 2022 WL 519890, at *2 (7th Cir. Feb. 22, 2022); *United States v. Baldwin*, 414 F.3d 791, 800 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007); *Dawson*, 250 F.3d at 1052; *United States v. Lopez*, 222 F.3d 428, 440 (7th Cir. 2000); *United States v. Bach*, 172 F.3d 520, 522-23 (7th Cir. 1999); *United States v. Szarwark*, 168 F.3d 993, 998 (7th Cir. 1999).

to change its position. Pet.App.1a. Now is the time, and this is the case.

III. The Decision Below Is Wrong

The court of appeals’ conclusion below that criminal restitution is a civil remedy, not criminal punishment, flouts the MVRA’s text and structure and this Court’s precedent.

1. At step one of the Ex Post Facto Clause analysis, *see Weaver*, 450 U.S. at 29, a court asks “whether the legislature, ‘in establishing the penalizing mechanism, indicated either expressly *or* impliedly a preference” for a criminal or civil label. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citation omitted) (emphasis added). This is a question of “statutory construction,” *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (citation omitted), one that “consider[s] the statute’s text *and* its structure to determine the legislative objective,” *Smith v. Doe*, 538 U.S. 84, 92 (2003) (emphasis added). If the text and structure reveal that Congress intended—either expressly or impliedly—to create a criminal punishment, the inquiry is done, and a court need not proceed to consider the factors set out in *Hudson*’s second step. *Smith*, 538 U.S. at 92-93.

The MVRA’s text and structure demonstrate that Congress intended criminal restitution to be penal when it passed the MVRA. Most telling, criminal restitution under the MVRA is placed in the criminal code along with criminal fines, is part of a defendant’s sentence, is tied to the underlying criminal offenses, and is collected by the Attorney General. *See* 18 U.S.C. §§ 3612 (title), (b)-(c), 3663A(c)(1). Not only does criminal restitution influence

the amount of other criminal punishments, it can actually *replace* a criminal fine altogether. 18 U.S.C. §§ 3572(b), 3663A(a)(1). And restitution is a mandatory condition of probation and supervised release. 18 U.S.C. §§ 3563(a)(6)(A), 3583(d). The determination of the restitution amount, if any, is governed by the Federal Rules of Criminal Procedure and federal criminal law governing sentencing and post-sentence administration. 18 U.S.C. § 3664(c). Put simply, there is nothing “civil” about the administration of criminal restitution under the MVRA.

The MVRA’s scheme contains several other indicia that criminal restitution is penal and not purely compensatory. First, the statute states that “[a]n order of restitution . . . does not create any right of action against the United States by the person to whom restitution is ordered to be paid.” 18 U.S.C. § 3612(c). Further, both the court and the Attorney General can waive interest on criminal restitution. 18 U.S.C. § 3612(f)(3), (h). The court can even waive restitution entirely in some instances or direct the defendant to make only “nominal periodic payments.” 18 U.S.C. §§ 3663A(c)(3), 3664(f)(3)(B).

2. Since 1986, this Court has viewed “[r]estitution [a]s an effective rehabilitative penalty.” *Kelly*, 479 U.S. at 49 n.10. As recently as 2014, this Court exhaustively distinguished criminal restitution from civil tort liability. *See Paroline*, 572 U.S. at 453-56. As this Court explained, “despite the differences between restitution and a traditional fine, restitution still implicates ‘the prosecutorial powers of government,’” *id.* at 456, and is thus a “criminal punishment,” *Pasquantino*, 544 U.S. at 365. Viewing restitution

as a criminal penalty “better effects the need to impress upon defendants that their acts are not irrelevant or victimless.” *Paroline*, 572 U.S. at 461. This “direct relation between the harm and the punishment” gives criminal restitution an even stronger deterrent effect “than a traditional fine.” *Kelly*, 479 U.S. at 49 n.10. That deterrent effect has long been seen as one of the “traditional aims of punishment.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

Justices of this Court have recently reiterated that federal statutes and this Court’s cases both “describe restitution as a ‘penalty’ imposed on the defendant as part of his criminal sentence.” *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting). A majority of circuits have similarly understood this Court to hold that restitution is a punishment. *See, e.g., Norwood*, 49 F.4th at 215-16; *United States v. Zukerman*, 897 F.3d 423, 432-33 (2d Cir. 2018); *Anthony*, 25 F.4th at 797-98.

3. The contrary reasoning of the Seventh and Eighth Circuits is incorrect.

The Seventh Circuit incorrectly arrived at its position using the factors this Court enumerated in *Hudson*. *Newman*, 144 F.3d at 540-42. But those factors inform the second step of the *Hudson* analysis. As discussed above, step one of the *Hudson* test requires a court first to analyze the text and structure of a statute to determine whether Congress expressly or impliedly intended to create a criminal punishment. *Supra* p. 18. At that first step, the Seventh Circuit summarily concluded that there was no “express language” in the MVRA that indicated whether criminal

restitution was criminal or civil. *Newman*, 144 F.3d at 540. That analysis overlooked the plethora of textual and structural indicia discussed above indicating that Congress intended to create a criminal penalty.

The Eighth Circuit has summarily reasoned, in cases involving the application of *Apprendi* to restitution orders, that “[r]estitution is designed to make victims whole, not to punish perpetrators; it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” *Car-ruth*, 418 F.3d at 904; *Thunderhawk*, 799 F.3d at 1209. It too has overlooked the indicia of congressional intent discussed above. In the decision below, the court simply deemed itself bound to those prior decisions. Pet.App.6a-7a.

* * *

This Court should grant certiorari, hold that criminal restitution under the MVRA is a criminal punishment for Ex Post Facto Clause purposes, and restore uniform ex post facto protections for criminal defendants.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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OCTOBER 25, 2024

No. _____

In the
Supreme Court of the United States

DIONTAI MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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March 7, 2025

QUESTION PRESENTED

In 2021, intruders tried to break into the house where Diontai Moore was living with his fiancée and her three children. Terrified, his fiancée took her handgun out of the safe and gave it to Moore while she fled with the children. Fortunately, Moore was able to use the handgun to ward off the intruders. Moore was on supervised release at the time as part of his sentence for a violation of 18 U.S.C. §922(g)(1)'s prohibition on possession of a firearm by a felon. Moore promptly informed his probation officer of the incident—and then was charged with another §922(g)(1) violation for using his fiancée's firearm to fend off the invaders. The indictment identified Moore's disqualifying offenses as three drug-related charges and his earlier §922(g) conviction. Moore pled guilty on the condition that he could challenge his §922(g)(1) conviction under the Second Amendment on appeal. Yet when he tried to challenge §922(g)(1) as applied to the convictions identified in the indictment, the Third Circuit declined to analyze whether those offenses could justify a permanent deprivation of Second Amendment rights. Instead, it held that Moore could be disarmed consistent with historical tradition because he was on supervised release—which is not the basis for his §922(g)(1) conviction or the 84-month sentence he has been ordered to serve.

The question presented is:

Whether courts should analyze as-applied Second Amendment challenges to 18 U.S.C. §922(g)(1) by examining whether historical tradition supports permanently disarming someone for the predicate offense(s) underlying the defendant's conviction.

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 14.1(b)(i), petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Diontai Moore was the defendant in the district court and appellant below.

Respondent United States of America was the plaintiff in the district court and appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Western District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit:

United States v. Diontai Moore, No. 2:14-cr-00110-RJC-1 (W.D. Pa.) (Apr. 20, 2023);

United States v. Diontai Moore, No. 2:21-cr-00121-RJC-1 (W.D. Pa.) (Apr. 20, 2023);

United States v. Diontai Moore, No. 23-1843 (3d Cir.) (Aug. 2, 2024).

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PETITION FOR WRIT OF CERTIORARI

It is a bedrock rule of our judicial system that the government may not convict someone of violating an unconstitutional law. So if the government secures a conviction under a law that the defendant maintains is unconstitutional, whether on its face or as applied to him, the government must defend the conviction by demonstrating that the law is consistent with the Constitution. That unremarkable principle applies with full force in the Second Amendment context. As this Court has explained at length, if the government chooses to regulate arms-bearing conduct, then it bears the burden of proving that its regulation is “consistent with this Nation’s historical tradition of firearm regulation.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022). Accordingly, when courts are faced with criminal defendants who argue that they were convicted under a law that violates the Second Amendment, courts must determine whether that law (or the application of it at hand) is consistent with historical tradition.

The Third Circuit failed to follow that bedrock rule here. Diontai Moore was convicted under 18 U.S.C. §922(g)(1) of possessing a firearm after having been convicted of certain felonies that the government specified in securing his conviction. He challenged his §922(g)(1) conviction under the Second Amendment, arguing that the government cannot identify any historical tradition that would support permanently disarming individuals for the conduct at issue in his predicate crimes. Yet rather than resolve that question, the Third Circuit decided to address a different question entirely: whether the government

may disarm individuals while they are serving a term of supervised release.

That would make eminent sense if Moore were challenging a conviction for possession of a firearm while on supervised release. But while Moore faced additional loss of liberty for violating the terms of his supervised release, he did not challenge that judgment on appeal. At the Third Circuit, Moore challenged only his conviction (and accompanying 84-month sentence) under §922(g)(1) for possessing a firearm after having committed a felony. So whether the government may deprive people of firearms while they are on supervised release was entirely beside the point. There is not some harmless-error doctrine under which the government may avoid defending the constitutionality of the law under which it chose to proceed by showing that a hypothetical prosecution under a different statute would not violate the Constitution. To the contrary, such sleights of hand have long been rejected by both this Court and others.

Even without *Bruen* and *Rahimi*, it should be obvious that the government cannot defend a criminal conviction by arguing that it would have been constitutional to deprive someone of their constitutional rights for an entirely different reason. The government wants to send Moore to prison for seven years because he possessed a firearm after committing a felony. To do so, the government must show why *that* criminal prohibition—not some other hypothetical criminal provision—is constitutional. The Third Circuit’s decision affirming Moore’s permanent disarmament without resolving that question is gravely erroneous.

Unfortunately, this case is no isolated incident, but rather is emblematic of the profound confusion and division among the lower courts about how to analyze as-applied challenges to §922(g)(1). The Third Circuit is not alone in holding that §922(g)(1) may constitutionally be applied to individuals who are on supervised release even though that fact played no role in their §922(g)(1) charge. The Fifth and Sixth Circuits have embraced that approach too. Indeed, the Fifth Circuit has done so even as it has (correctly) concluded in *other* contexts that §922(g)(1) challenges must be resolved by examining whether historical tradition supports disarming someone *for the predicate offense(s) that justified the §922(g)(1) charge*. Still other circuits have rejected as-applied challenges to §922(g)(1) entirely, on the theory that having been convicted of a felony is itself sufficient justification to permanently deprive someone of Second Amendment rights, no matter what the prior felony was.

That intractable conflict necessitates this Court's resolution. Indeed, lower courts have recognized that "there is significant disagreement about" how to resolve §922(g) challenges "that the Supreme Court should resolve." *United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024). The Court should grant certiorari and hold that, when addressing as-applied challenges to §922(g)(1), courts must ask whether historical tradition supports disarming people based on the felony offense(s) underlying the §922(g)(1) charge. But at the very least, the Court should grant, vacate, and remand with instructions for the Third Circuit to decide whether Moore can constitutionally be convicted of the crime with which he was actually charged.

OPINIONS BELOW

The Third Circuit’s opinion is reported at 111 F.4th 266 and reproduced at App.1-15. The district court’s decision denying Moore’s motion to dismiss the indictment is reported at 2022 WL 17490023 and reproduced at App.18-31. The district court’s opinion denying Moore’s motion for reconsideration of his motion to dismiss is reported at 2022 WL 17490021 and reproduced at App.32-34.

JURISDICTION

The Third Circuit issued its opinion on August 2, 2024, and denied a timely rehearing petition on October 9, 2024. Justice Alito extended the deadline to file a petition for writ of certiorari to March 8, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution and 18 U.S.C. §922(g) are reproduced at App.35-36.

STATEMENT OF THE CASE

A. Legal Background

In its seminal decision in *District of Columbia v. Heller*, this Court held that there is “no doubt ... that the Second Amendment confer[s] an individual right to keep and bear arms.” 554 U.S. 570, 595 (2008). While the Court acknowledged that the right is not “unlimited,” it looked to historical restrictions on firearm possession to inform its analysis of the constitutionality of the law at hand. *Id.* at 626-27, 631-34. But the Court left a full-throated exposition of that historical analysis for another day.

Over the next decade, lower courts “coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.” *Bruen*, 597 U.S. at 17. But this Court ultimately rejected that approach in *Bruen*, explaining that a “judge-empowering ‘interest-balancing inquiry’” would not sufficiently safeguard individuals’ constitutional rights. *Id.* at 22. After all, as *Heller* made clear, “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Id.* at 23 (quoting *Heller*, 554 U.S. at 634). So the Court laid out a more robust constitutional framework steeped in “the Nation’s historical tradition of firearm regulation.” *Id.* at 24. Under that approach, if the regulated conduct is covered by the text of the Second Amendment, then it is presumptively protected, and the burden shifts to the government to justify its regulation. *Id.* To do so, the government must identify historical firearm restrictions that are analogous to the modern challenged regulation in their “how and why”—i.e., the “modern and historical regulations” must “impose a comparable burden on the right of armed self-defense” that “is comparably justified.” *Id.* at 29.

Last year, this Court provided additional guidance on how to implement *Bruen*’s methodology in *United States v. Rahimi*, 602 U.S. 680 (2024). *Rahimi* reiterated that “the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition” as evidenced by the government’s proffered historical analogues. *Id.* at 692. This Court clarified that those analogues “need

not be a ‘dead ringer’ or a ‘historical twin’” for the challenged regulation. *Id.* But it reiterated that “[w]hy and how the [challenged] regulation burdens the right are central” to the Second Amendment inquiry. *Id.* In other words, the focus remains on whether the challenged regulation “impos[es] similar restrictions for similar reasons.” *Id.* Applying that framework, this Court held that §922(g)(8)(C)(i) is constitutionally sound, as it is grounded in a historical tradition of temporarily disarming individuals who have been found to pose “a credible threat to the physical safety of another.” *Id.* at 702.

In short, as exemplified in *Rahimi*, *Bruen* tasks courts with conducting a categorical comparison of the mechanics of the challenged provision and the government’s historical analogues to assess whether the challenged law passes constitutional muster.

B. Factual Background

1. In 2008, Diontai Moore was arrested and charged with having distributed less than five grams of cocaine base in violation of 21 U.S.C. §841(a)(1) and (b)(1)(C). App.2. He pled guilty and was sentenced to 72 months in prison, followed by a three-year term of supervised release. App.2.

In 2013, after Moore had served the prison sentence on his drug conviction, police again arrested him after they observed a bulge under his shirt and discovered that he possessed a handgun. App.2. Because of his prior felony drug conviction, Moore was charged with—and eventually pled guilty to—violating 18 U.S.C. §922(g)(1). App.2. For this first §922(g)(1) conviction, Moore was sentenced to 60 months’ imprisonment, followed by a three-year term

of supervised release. App.2. Moore was released from prison in July 2019 and began serving his term of supervised release. App.2.

Moore eventually moved into the townhouse of his fiancée, Gwendolyn Pullie, where they lived with her three children. App.2-3. Early one morning, Moore and Pullie heard their dog barking wildly in the kitchen. App.3. This commotion “terrified” Pullie, as she believed that she and her children might be “in harm’s way.” App.3. Her fear that “someone was at [her] back door” was confirmed when she and Moore went downstairs and observed “shadowy figures near the back of the house.” App.3. Surveillance footage reveals that two individuals had broken into Pullie’s car behind her townhouse. App.3.

Fearing for her safety and the safety of her children, Pullie removed her handgun from the safe she kept in the bedroom and gave the loaded firearm to Moore. App.3. Pullie woke up her children and fled with them, while Moore went out to face the intruders. App.3. Fearing the trespassers were going to break into the residence, Moore fired three shots, injuring one of them in the thigh. App.3. Fortunately, the intruders fled. App.3.

2. Shortly after the incident, Moore and Pullie reached out to law enforcement to inform them of the crime that had been perpetrated against them and the shooting that had ensued. App.3-4. Moore called his probation officer to explain what had happened; Pullie also spoke with a local detective and, upon request, turned over her firearm. App.3-4. For his troubles, Moore was charged with another violation of §922(g)(1) for having possessed Pullie’s firearm as a

convicted felon. App.4. The indictment was predicated on two 15-year-old state drug-trafficking convictions, Moore's federal cocaine distribution conviction, and his first §922(g) conviction. App.4; D.Dkt.3. Soon after the grand jury indicted him on this new §922(g)(1) charge, the government filed a petition to revoke his term of supervised release. W.D.Pa.No.14-00110.D.Dkt.102.

Moore twice attempted to dismiss the new §922(g)(1) charge. Each time, he argued that he could not constitutionally be convicted of a crime for his momentary use of Pullie's handgun in self-defense because §922(g)(1) is unconstitutional as applied to individuals who committed only non-violent prior felonies. App.18-22; D.Dkt.67. His initial motion raised these arguments in the context of the then-applicable means-end scrutiny analysis that *Buren* ultimately rejected. App.20-21. Applying that framework, the district court denied the motion, concluding that the government could deprive Moore of his Second Amendment rights based on its assessment that his prior non-violent felonies were "serious" in nature. App.22.

This Court decided *Bruen* shortly thereafter, and Moore moved for reconsideration, raising both a facial and an as-applied challenge to the constitutionality of §922(g)(1) under *Bruen*'s newly minted framework. D.Dkt.67. Moore argued that because he is among "the people" whose rights are protected by the Second Amendment, his possession and use of Pullie's firearm in self-defense was presumptively protected conduct. *Id.* at 5-7. And he argued that §922(g)(1) is facially unconstitutional under *Bruen*'s second step because

felon-disarmament laws are not rooted in the Nation's history and tradition of firearms regulation. *Id.* at 7-9. Moore also argued in the alternative that §922(g)(1) is unconstitutional as applied to him because his prior felonies were non-violent. *Id.* at 9-10.

The government resisted these arguments, trying to justify the application of §922(g)(1) across the board by invoking a purported tradition of disarming “unvirtuous” citizens. D.Dkt.72 at 4, 7-9. The district court denied reconsideration, relying on other district court decisions that rejected similar facial and as-applied challenges to §922(g)(1) after *Bruen*, and again resting on its earlier determination that Moore's prior drug-related offenses were “serious” crimes. App.32-34.

At that point, Moore agreed to plead guilty to the §922(g)(1) charge on the condition that he could challenge the constitutionality of his conviction facially and as applied under *Bruen*. D.Dkt.103-1 at 2-3. Under the plea agreement, Moore also admitted that he had violated the condition of his supervised release barring him from possessing a firearm. *Id.* at 2. And he did not seek or secure any right to contest the revocation of his supervised release. *Id.* at 2-3. The district court sentenced Moore for both his §922(g)(1) conviction and the violation of the terms of his supervised release. For the §922(g)(1) conviction, the court sentenced him to 84 months' imprisonment and three years of supervised release. D.Dkt.107. As for the supervised-release violation, the court sentenced him to 12 months' imprisonment, to run consecutively. W.D.Pa.No.14-00110.Dkt.147.

3. As permitted by his conditional plea agreement, Moore appealed the judgment entered on his §922(g)(1) conviction. D.Dkt.111. The Third Circuit affirmed—but only by answering a question that had nothing to do with the constitutional challenge Moore pressed. App.1. Seizing on an argument the government raised for the first time on appeal, *see* Gov’t.CA3.Opp.21-23, the Third Circuit posited that whether the government could constitutionally convict Moore for possessing a firearm after having committed non-violent felonies turns on whether “a convict completing his sentence on supervised release ha[s] a constitutional right to possess a firearm.” App.1.

The Third Circuit’s analysis started on firm footing. The court had little difficulty concluding that Moore “is one of the ‘people’ whom the Second Amendment presumptively protects” and that “the charge at issue punishes Moore for quintessential Second Amendment conduct: possessing a handgun.” App.4-5. And it correctly explained that, under *Bruen* and *Rahimi*, the government “bears the burden of justifying [the] regulation” it seeks to enforce. App.5 & n.2. The panel also reiterated that, “[a]s compared to its historical analogue, [the] modern regulation [at issue] must ‘impose a comparable burden on the right of armed self-defense, and ... that burden [must be] comparably justified.’” App.5-6 (quoting *Bruen*, 597 U.S. at 29) (final brackets in original).

But despite clearly and correctly identifying its doctrinal responsibility under *Bruen* and *Rahimi*, the Third Circuit proceeded to depart from that task. Rather than address whether depriving someone of the right to possess a firearm *based on Moore’s past*

felony convictions “impose[s] a comparable burden” to the government’s historical analogues that is “comparably justified,” the court assessed whether historical analogues support dispossessing a criminal defendant who is serving a term of supervised release. App.6.

Moore had pointed out that his supervised-release status “c[ould not] support his felon-in-possession conviction” because that is not one of “the predicate offenses that made him a felon.” App.13. But the Third Circuit disagreed. In its view, it was not confined to asking whether the law *at hand* is constitutional as applied to Moore, but rather could consider any “fact[s] that [it] deem[ed] constitutionally relevant”—i.e., whether there is *any* basis that might justify disarming Moore, whether tied to the law of conviction at issue or not. App.13. And, according to the court, “the tradition of forfeiture laws, which temporarily disarmed convicts while they completed their sentences,” sufficed “[t]o justify disarming Moore while he was on supervised release.” App.6; *see* App.6-11 (discussing Founding-era forfeiture laws). Thus, in the Third Circuit’s view, the actual “predicate offenses alleged in the indictment”—and whether the government had established a historical tradition of disarming individuals based on similar offenses—were beside the point; the only “fact ... constitutionally relevant” was that “Moore was on supervised release when he possessed the firearm.” App.13.

For similar reasons, the court rejected Moore’s argument that §922(g)(1) could not constitutionally be applied to him at home while acting in self-defense. App.13-14. The court again focused not on whether

any historical tradition supports permanently disarming non-violent felons, but on the fact that Moore was not permitted to possess a firearm while on supervised release. App.13-14. And having found that Moore's irrelevant supervised-release status defeated his as-applied challenge to his §922(g)(1) conviction, the Third Circuit summarily rejected his facial challenge as well. App.14 n.5.¹

REASONS FOR GRANTING THE PETITION

The decision below is patently wrong. There is no other context in which the government may defend a conviction under a law that criminalizes constitutionally protected behavior by arguing that it could validly deprive the defendant of his constitutional rights for some other reason entirely. And certainly nothing in *Heller*, *Bruen*, or *Rahimi* suggests that, when a defendant argues that his conviction violates the Second Amendment, the inquiry turns on whether there is *any* reason that someone in similar shoes could be punished for possessing a firearm consistent with historical tradition. To the contrary, both this Court's cases and bedrock principles make plain that the government must defend the challenged law itself. Yet the Third Circuit failed to hold the government to that burden here.

Unfortunately, this case is no isolated incident. Multiple courts of appeals have made the category mistake of letting the government avoid defending §922(g)(1) convictions on their own terms by pointing

¹ Moore sought rehearing en banc, which the Third Circuit denied. App.16-17.

to the fact that the defendant was on supervised release at the time of the unlawful possession. Indeed, even one circuit that typically *does* require the government to justify a §922(g)(1) conviction by focusing on the prior convictions underlying it has inexplicably abandoned that approach when it comes to defendants who were on supervised release when they unlawfully possessed a firearm. And other circuits have rejected as-applied challenges to §922(g)(1) altogether, on the theory that historical tradition supports disarming individuals who have shown a disregard for the law, no matter what law they violated.

In short, although most circuits have squarely addressed as-applied challenges to §922(g)(1), they have hopelessly splintered on the basic question of how to analyze them. That disarray readily warrants this Court's attention. Indeed, lower courts have implored this Court for further guidance even after *Rahimi*. And this is a particularly good vehicle to answer the methodological question, as the Court would have the option of answering *only* that question here should it prefer to do so. The Court could simply resolve the analytical dispute over how to evaluate as-applied Second Amendment challenges that has fractured the lower courts and then remand for the Third Circuit to consider Moore's appeal under the proper framework. But in all events, whether through plenary review or summary reversal, the Court should not let the decision below stand, as Moore is, at the very least, entitled to a resolution of the constitutional question he actually raised—namely, whether the government can send him to prison for seven years because he briefly used a firearm to defend himself,

his loved ones, and his property after having committed non-violent felonies.

I. The Decision Below Defies This Court’s Precedents And Deepens A Circuit Split.

A. The Decision Below Is Egregiously Wrong.

1. There is no basis in law or logic to permit the government to defend the constitutionality of a conviction by speculating that it could have reached the same result via an entirely different statute (real or imagined). Indeed, that much should have been clear even without *Heller*, *Bruen*, or *Rahimi*. After all, this Court expressly rejected that sleight of hand more than half a century ago in *Williams v. Illinois*, 399 U.S. 235 (1970). There, a defendant challenged a state statutory regime that forced indigent criminal defendants who failed to pay the fines imposed as part of their sentences to serve a prison sentence longer than the applicable one-year statutory maximum. *Id.* at 238. Although the state argued that the statute was “not constitutionally infirm simply because the legislature could have achieved the same result by some other means,” this Court had no difficulty rejecting that argument, as the state’s authority to pass alternative means to achieve the same goal “does not resolve the [constitutional] issue” actually presented by the law it sought to enforce. *Id.* at 238-39. For that reason, the Court granted relief to the defendant after finding that the law the state actually enacted and enforced violated his equal protection rights—even though it acknowledged that the state could “have appropriately fixed the penalty, in the first instance,” and incarcerated the defendant for

greater than one year for the same conduct. *Id.* at 240-41; accord *Tate v. Short*, 401 U.S. 395, 399-401 (1971).

After *Williams*, there is no room for the government to argue that its ability to implement an *alternative*, supposedly constitutionally valid regime enables the *provision it actually enforced* to survive (or evade) constitutional review. As one court aptly put it, “[a]n unconstitutional statute does not ‘become constitutional’ simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so.” *People v. Burns*, 79 N.E.3d 159, 165-66 (Ill. 2015). That is why this Court invalidated a law categorically banning the display of signs outside its building under the First Amendment in *United States v. Grace*, 461 U.S. 171 (1983), even though the same behavior may have been regulated through “reasonable time, place and manner restrictions.” *Id.* at 183-84. It also explains why this Court concluded in *United States v. Eichman*, 496 U.S. 310 (1990), that the government could not criminally punish a defendant for burning a Post Office flag under a law specifically outlawing flag burning, even though he could still be subject to prosecution for the destruction of federal property for the exact same conduct. *Id.* at 313 n.1, 316 n.5.

This understanding of as-applied challenges is ubiquitous precisely because it follows from bedrock constitutional principles. Indeed, any other approach would render the “as-applied challenge” label a misnomer. As this Court has long observed, a court is “never to anticipate a question of constitutional law in advance of the necessity of deciding it.” *United States v. Raines*, 362 U.S. 17, 21 (1960). If courts were

instead authorized to sustain statutory enactments on the grounds that the government might have chosen another valid means to achieve the same result, they would stray from the case presented and answer constitutional questions that are not implicated. *Id.* Courts thus routinely reject government efforts to employ such sleights of hand. *See, e.g., United States v. Price*, 111 F.4th 392, 402 n.4 (4th Cir. 2024) (en banc) (rejecting an attempt to invoke defendant’s felon status to defeat his constitutional challenge to §922(k)’s ban on possessing firearms with obliterated serial numbers because regulating felon firearm possession was “not the law Congress enacted via §922(k)”).

That principle does not change just because the court is tasked with addressing a Second Amendment challenge under *Bruen* and *Rahimi*. Indeed, there is absolutely nothing in the methodology laid out in either case that would justify a deviation from this bedrock rule. Both made clear that the focus of the analysis turns on the mechanics and contours of the challenged regulation itself. *See Rahimi*, 602 U.S. at 692 (“Why and how the [challenged] regulation burdens the right are central to this inquiry.”); *Bruen*, 597 U.S. at 29 (requiring courts to evaluate “how and why the [challenged] regulations burden” the Second Amendment right). And neither announced any rule giving judges or the government a roving license to investigate whether there is any conceivable reason that the party asserting his Second Amendment rights could be disarmed. It is little wonder why not: Such a rule not only would treat the Second Amendment “as a second-class right,” *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality), but would run

afoul of the constitutional principles requiring strict adherence to examining the application of the challenged law to the facts at hand, *cf. City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (explaining that the Court “considered only applications of the statute in which it actually authorizes or prohibits conduct” when assessing its constitutionality).

Take *Rahimi*. This Court focused exclusively on whether historical going-armed and surety laws were comparable to §922(g)(8), even though the defendant there had not only threatened his domestic partner (prompting the domestic restraining order) but also threatened a woman with a firearm (prompting an aggravated assault charge) and was connected to five other shootings. *See* 602 U.S. at 687. Because the government charged Rahimi only with violating §922(g)(8), the Court asked only whether §922(g)(8) could pass constitutional muster, not whether the government could have constitutionally disarmed him on another basis. *See id.* at 690, 700-02; *see also id.* at 777 (Thomas, J., dissenting) (“This case is not about whether States can disarm people who threaten others.... Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order[.]”). Just as with other constitutional questions, then, whether there may be other reasons the government could disarm someone is not a valid consideration in the proper constitutional analysis. *Cf. TikTok v. Garland*, 145 S.Ct. 57, 68 (2025) (“[W]e look [only] to the provisions of the Act that give rise to the effective TikTok ban that petitioners argue burdens their First Amendment rights” to address their as-applied challenge.).

2. Rather than follow these well-settled principles, the Third Circuit answered a question not properly presented for its review—effectively affirming a double deprivation of liberty (sending a man to prison and allowing him to be stripped of his right to keep and bear arms) without ever deciding whether the actual statute of conviction could constitutionally be applied to the defendant.

Moore appealed his judgment of conviction under §922(g)(1) to challenge the criminal penalties the government sought to impose for violating *that* statute. D.Dkt.111. The government was therefore obligated to defend the appealed conviction by demonstrating that applying §922(g)(1) to someone based on the felonies Moore committed is consistent with our Nation’s historical tradition. *See Bruen*, 597 U.S. at 29. Nothing about that inquiry turns on an independent assessment of whether there may be *other* reasons why Moore could constitutionally be disarmed. Whether §922(g)(1)’s permanent prohibition on firearm possession imposes a burden on the Second Amendment right consonant with our Nation’s tradition requires the court to review how the law actually regulates *that* behavior. Yet that is not what the Third Circuit “deem[ed] constitutionally relevant.” App.13. According to the court of appeals, all that mattered was that “Moore was on supervised release when he possessed the firearm,” and (in its view) historical tradition “yield[s] the principle that a convict may be disarmed while he completes his sentence and reintegrates into society.” App.13.

To explain that (il)logic is to refute it. The existence of a parallel punishment that the

government could—or even did—impose simply does not permit the court to probe all aspects of a defendant’s life for potential ways that the government might lawfully dispossess him of his Second Amendment (or any other fundamental) rights. That would entail standing in the stead of a legislature “to make a new law, not to enforce an old one.” *United States v. Reese*, 92 U.S. 214, 221 (1875).

The Third Circuit’s error is particularly acute given that the government successfully petitioned the district court to revoke Moore’s supervised release under 18 U.S.C. §3583(e), which resulted in a *separate*, consecutive 12-month prison term. W.D.Pa.No.14-00110.Dkt.147; *see also* 18 U.S.C. §3583(g)(2). In other words, Moore was in fact already punished and sentenced for possessing a firearm while serving a term of supervised release in a separate action. Asking whether the government can constitutionally deprive someone who is serving a term of supervised release of Second Amendment rights would make sense in the context of a challenge to *that* judgment of conviction. But Moore did not appeal that judgment or sentence. He appealed only the separate 84-month sentence that he received under §922(g)(1). To allow the validity of the unappealed judgment to justify additional deprivations of fundamental rights not only deviates from settled judicial procedures, *see Greenlaw v. United States*, 554 U.S. 237, 252-53 (2008), but turns the Second Amendment into a uniquely second-class right.

What is more, the Third Circuit’s confusion about Second Amendment challenges led it to ignore its

basic obligation to address Moore’s actual challenge that his conviction could not stand under §922(g)(1)—a statute that dispossessed him of his Second Amendment rights solely because he had previously been convicted of felonies. Moore’s supervised-release status is not constitutionally relevant to “why” and “how” §922(g)(1) impinges on his Second Amendment rights.

The Third Circuit’s approach also runs headlong into the exact problem *Bruen* sought to solve—avoiding an “interest-balancing inquiry” that requires a “case-by-case basis whether the right is *really worth* insisting upon.” 597 U.S. at 22-23. *Bruen* adopted its historical-tradition approach to prevent judges from engaging in a subjective assessment of a defendant’s worthiness of Second Amendment rights—“a value-laden and political task that is usually reserved for the political branches.” *Rahimi*, 602 U.S. at 732-33 (Kavanaugh, J., concurring). Yet under the Third Circuit’s approach, courts must address extra-offense characteristics and assess a wide range of potentially disqualifying factors unmoored from the justification the government has asserted for taking away Second Amendment rights. *See, e.g., Pitsilides v. Barr*, 128 F.4th 203, 210-13 (3d Cir. 2025). Once a court steps away from the firearm regulation at hand and abandons the value-neutral analysis of how its particular features measure up against the features of historical regulations, it is left with only “value-laden” questions about who is deserving enough to exercise Second Amendment rights. That does not comport with what this Court has instructed courts to do when adjudicating Second Amendment challenges—namely, “apply faithfully the balance struck by the

founding generation to modern circumstances.” *Bruen*, 597 U.S. at 29 n.7.

In short, the government has sought to imprison Moore for seven years because he possessed a firearm after having been convicted of certain specified felonies—not because of any other action he took or any other personal detail about his background. After all, §922(g)(1) regulates possession of a firearm by an individual who has been convicted of a felony, not possession of a firearm by an individual on supervised release (which is separately regulated by a statute that applies to misdemeanants and felons alike, *see* 18 U.S.C. §3583(b)(1)). It is *that* decision to attach liberty-restricting consequences to felons’ firearm possession that ought to have been analyzed on appeal. The Third Circuit grievously erred in choosing to analyze an entirely different (and unappealed) question.

B. The Courts of Appeals Have Hopelessly Fractured Over How to Address As-Applied Challenges to §922(g)(1).

The Third Circuit’s marked departure from the proper course warrants this Court’s intervention. At the very least, the Court should vacate and remand with instructions for the court to address the challenge Moore actually pressed: whether §922(g)(1) is constitutional, either on its face or as applied to him. Notably, this Court recently granted the petitions of two criminal defendants raising the as-applied-review question, vacated the judgments in those cases, and remanded for “further consideration in light of *United States v. Rahimi*.” *See Whitaker v. United States*, 2025

WL 581590 (U.S. Feb. 24, 2025); *Rambo v. United States*, 2025 WL 581574 (U.S. Feb. 24, 2025).

The decision below is considerably more egregious than either of those Eleventh Circuit decisions. The Third Circuit held that Moore may be deprived of two fundamental liberties without ever deciding that the statute the government charged him with violating could constitutionally be applied to him. That result, which turns the whole notion of an “as-applied challenge” upside-down, cannot stand, and justifies the strong medicine of summary reversal.

That said, the lower courts would be better served by plenary review, as the Third Circuit’s approach is emblematic of the profound confusion that pervades when it comes to §922(g)(1) challenges. The Sixth and Seventh Circuits have embraced an approach similar to the Third Circuit’s, sanctioning a free-floating inquiry into whether there is *any* reason an individual could constitutionally be deprived of Second Amendment rights, rather than focusing on the predicate convictions the government invoked. The Fifth Circuit has taken the opposite (i.e., correct) approach as a general matter, focusing on the actual felonies underlying the §922(g)(1) charge. But even that court has lost the plot vis-à-vis defendants on supervised release: The Fifth Circuit recently joined the Third and Sixth Circuits in holding that as-applied challenges to §922(g)(1) necessarily fail if the defendant was on supervised release, parole, or probation when he unlawfully possessed a firearm, even though that fact played no role in securing the §922(g)(1) conviction. And other circuits have held that §922(g)(1) is not susceptible to as-applied

challenges at all. In short, the caselaw in the lower courts is a mess, and this Court’s guidance is desperately needed.

1. The decision below is no anomaly—either in the Third Circuit or otherwise. The Third Circuit has already extended the same reasoning “to defendants who are on state supervised release—including a sentence of parole or probation.” *United States v. Quailles*, 126 F.4th 215, 217 (3d Cir. 2025); *see also Pitsilides*, 128 F.4th at 213 (instructing district court to analyze all of the plaintiff’s “post-conviction conduct indicative of dangerousness” to determine whether he “poses a special danger of misusing firearms”).² And two other circuits likewise have held that §922(g)(1) is constitutional as applied to individuals who were on supervised release (or the state equivalent) when they possessed a firearm, even though that had nothing to do with the government’s §922(g)(1) charge.

The Sixth Circuit reached the same conclusion in *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024). In 2021, Goins convinced “an associate ... to purchase [an] AR pistol[] for him” because “he had multiple convictions for crimes punishable by imprisonment for more than one year,” and so was prohibited from possessing a firearm under §922(g)(1). *Id.* at 796. After he was charged with violating §922(g)(1), Goins challenged the constitutionality of the statute as

² Although *Pitsilides* involved an affirmative challenge, that the court drew exclusively on defendants’ as-applied challenges to their convictions to reach its holding, *see* 128 F.4th at 212-13, underscores that courts in the Third Circuit must now consider all potentially disqualifying characteristics, even if (as here) the defendant raised an as-applied challenge defensively.

applied to him. Yet rather than address the felonies underlying his §922(g)(1) conviction, the Sixth Circuit relied on the Third Circuit’s decision in this case to hold that “Congress could ... disarm Goins” simply because he was on probation “at the time.” *Id.* at 797; *see also id.* at 801-02 (“[O]ur nation’s historical tradition of forfeiture laws, which temporarily disarmed convicts while they completed their sentences, also supports disarming those on parole, probation, or supervised release.”).

Even outside the supervised-release context, moreover, the Sixth Circuit does not analyze §922(g)(1) challenges by focusing on whether the government has proven that historical tradition supports depriving people of their Second Amendment rights based on the predicate offenses underlying the defendant’s conviction. The court has instead concluded that, because some historical regulations allowed “individuals [to] demonstrate that their particular possession of a weapon posed no danger to peace,” a defendant challenging §922(g)(1) as applied must make an individualized showing “that he is not dangerous.” *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024). According to the court, because “officials of old” made individualized assessments of dangerousness, courts today must “focus on each individual’s *specific characteristics*,” including not only his “entire criminal record” but any “information beyond [his] criminal convictions” as well. *Id.* at 657-58, 658 n.12.

The Fifth Circuit, for its part, has *sometimes* gotten the inquiry right. In *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), for example, the court

confronted an as-applied challenge raised by a criminal defendant who had previously been convicted of car theft, evading arrest, and possessing a firearm as a felon. *Id.* at 467. Although the parties’ briefing had discussed the defendant’s “various drug offenses,” none of which was punishable by imprisonment for more than one year, the court limited its focus to only his “predicate offenses under §922(g)(1).” *Id.* Indeed, the court expressly declined to address a contemporaneous drug charge filed in the same indictment because §922(g)(1) “rel[ies] on previous history.” *Id.* As the court explained, the relevant question is whether there is “a longstanding tradition of disarming someone with a [felony] history analogous to [the defendant’s].” *Id.*; accord *United States v. Bullock*, 123 F.4th 183, 185 (5th Cir. 2024).³

³ The Ninth Circuit’s now-vacated opinion in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), employed the same mode of analysis. The court first held that the defendant constituted one of “the people” protected by the Second Amendment and then turned to whether his §922(g)(1) conviction had a proper historical analogue. *Id.* at 676-77. After reviewing the historical record and comparing those historical regulations to the defendant’s prior felony convictions, the panel majority determined that none of those “predicate offenses were, by Founding era standards, of a nature serious enough to justify permanently depriving him of his fundamental Second Amendment rights,” and so concluded that his §922(g)(1) conviction was unconstitutional. *Id.* at 691. And although *Duarte* has since been vacated, see 108 F.4th 786 (9th Cir. 2024), it is illustrative of the right approach—and is not the only Ninth Circuit decision to employ the correct methodology (albeit outside the context of a §922(g)(1) conviction). See *United States v. Perez-Garcia*, 96 F.4th 1166, 1182-84 (9th Cir. 2024).

Yet the Fifth Circuit has inexplicably departed from that approach when it comes to defendants who were on supervised release when they possessed a firearm in violation of §922(g)(1). *See United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025). In *Giglio*, following the Third Circuit’s lead, the Fifth Circuit affirmed a §922(g)(1) conviction based solely on the fact that the defendant was on supervised release when he was charged. In the eyes of the *Giglio* court, so long as “the government *may* disarm those who continue to serve sentences for felony convictions,” it does not matter if that is what the government actually did. *Id.* at 1044 (emphasis added); *see also id.* at 1045-46.

That now makes three circuits that have squarely held that §922(g)(1) is constitutional as applied to individuals who were on supervised release, probation, or parole when they possessed a firearm, even though that had nothing to do with their §922(g)(1) convictions. And while the Seventh Circuit has not yet addressed an as-applied challenge to §922(g)(1) after *Rahimi*, its analysis in *United States v. Gay* suggests that it too would adopt the approach of having district courts review the record to identify any characteristics that would permit the government to disarm the defendant. 98 F.4th 843, 847 (7th Cir. 2024) (highlighting that the defendant was on parole and fled from the police before being arrested and charged under §922(g)(1)).

2. The Fourth, Eighth, Tenth, and Eleventh Circuits have taken yet another approach. In those circuits, courts do not analyze whether historical tradition supports disarming a defendant for the

predicate felony conviction(s), or ask whether the defendant was on supervised release or probation. These circuits instead eschew as-applied challenges entirely, having deemed §922(g)(1) to be constitutional in *all* its applications.

Take, for instance, *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). After reviewing historical examples of disarmament, the Fourth Circuit purported to derive from them a tradition of “disarm[ing] categories of people based on a legislative determination that such people ‘deviated from legal norms.’” *Id.* at 707. Applying this guiding principle, the court saw no constitutional problem with *any* application of §922(g)(1), deeming it a permissible exercise of the legislature’s discretion over which individuals may be disarmed for violating the law. *Id.*

The Eighth Circuit likewise adopted a categorical rule barring as-applied challenges after observing, at a high level of generality, that “legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms.” *United States v. Jackson (Jackson I)*, 110 F.4th 1120, 1127 (8th Cir. 2024). The court never directly addressed whether the “how” and “why” of the historical examples of firearm regulations it purported to analyze matched the “how” and “why” of §922(g)(1) or the defendant’s predicate conviction. Indeed, four judges highlighted that deficiency in a dissent from the denial of rehearing en banc, noting that the court “ma[de] no attempt to explain how the burden imposed by the felon-in-possession statute, which lasts for a lifetime, is comparable to any of the

Founding-era laws it discusses.” *United States v. Jackson (Jackson II)*, 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissenting from the denial of rehearing en banc).

The Tenth and Eleventh Circuits have similarly foreclosed as-applied challenges to §922(g)(1)—without even addressing the historical record. In *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025), the court continued to rely on pre-*Rahimi* precedent that had resolved the matter by invoking dicta from *Heller* observing that the prohibition on felon firearm possession is “presumptively lawful.” *See id.* at 1265. The Eleventh Circuit has taken the same tack in a line of unpublished decisions, repeatedly observing that “*Rahimi* d[id] not displace” prior circuit precedent upholding §922(g)(1) based on the same “presumptively lawful” dicta. *E.g., United States v. Morrisette*, 2024 WL 4709935, at *2 (11th Cir. Nov. 7, 2024).

* * *

In sum, not only have multiple courts embraced the flawed logic the Third Circuit employed here, but courts more generally have hopelessly fractured on how to properly apply *Bruen*’s historical-tradition framework to as-applied Second Amendment challenges to §922(g)(1). This clear confusion “about [key aspects] of the analysis” calls out for this Court to intervene and resolve the recurring methodological issues that have caused the circuits to splinter. *Morton*, 123 F.4th at 498 n.2.

II. The Question Presented Is Exceptionally Important, And This Case Is An Effective Vehicle For This Court To Address It.

How to resolve §922(g)(1) challenges is an exceptionally important question given the frequency with which the federal government seeks to dispossess citizens of firearms under §922(g)(1). In fiscal year 2023 alone, 88.5% of all §922(g) convictions were convictions under §922(g)(1). U.S. Sent. Comm’n, *Quick Facts: 18 U.S.C. §922(g) Firearms Offenses* (June 2024), <https://tinyurl.com/nheeuyuz>. And with the increasing volume of constitutional challenges to these convictions, it is critical that courts have a shared (and correct) understanding of how to resolve them. Indeed, the government itself has made precisely this point in seeking review of decisions unfavorable to its maximalist position regarding the constitutionality of §922(g)(1). *See, e.g.*, Pet. for Rhg. En Banc 19, *United States v. Duarte*, No. 22-50048 (9th Cir. May 14, 2024), Dkt.72-1; Pet. for Cert. 24-25, *Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023).

Moreover, millions of Americans are estimated to have felony records (a non-trivial proportion of the citizenry). *See* Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 *Demography* 1795, 1806 (2018), available at <https://tinyurl.com/mz36x3uh>. And given the increasing scope of supervised release (and its state equivalents), many individuals charged with violating §922(g)(1) do so while on supervised release (or probation or parole). Not only does §922(g)(1) disqualify all of them from exercising their

fundamental rights; decisions like the one below effectively deprive them of potential as-applied challenges, amplifying the importance of ensuring that courts apply the correct framework in these cases.

There is no need to await further percolation in the lower courts, as most of them have already spoken, and there are no signs that they will all be able to independently reconcile their various disagreements about even the most fundamental aspects of the Second Amendment analysis. To the contrary, the intractable confusion and conflict has already prompted some to implore this Court for guidance. As the Sixth Circuit recently remarked, “there is significant disagreement about much of the [Second Amendment] analysis [as applied to felons] that the Supreme Court should resolve,” *Morton*, 123 F.4th at 498 n.2—especially since “[t]he constitutionality of the felon-in-possession statute is as ‘exceptionally important’ as ever,” *Jackson II*, 121 F.4th at 660 (Stras, J., dissenting from the denial of rehearing en banc). And this case presents a particularly effective vehicle for providing guidance as to the proper mode of analysis, as the Court could choose not to delve into the ultimate question of whether historical tradition supports punishing Moore for possessing a firearm based on the prior convictions that served as the predicates for his §922(g)(1) charge. Because the Third Circuit chose to sustain Moore’s §922(g)(1) conviction based on an entirely irrelevant characteristic of his background (his supervised-release status), this Court would have the option of simply resolving the cross-cutting question of how courts should approach these challenges, then letting

the Third Circuit apply the proper framework in the first instance.

At a bare minimum, though, this Court should grant, vacate, and remand with instructions for the Third Circuit to consider Moore's challenge to his §922(g)(1) conviction itself, without any free-floating inquiry into whether the government might have some independent basis for stripping Moore of his Second Amendment rights. Whatever room for debate there may be about whether §922(g)(1) is susceptible to as-applied challenges, there should be no debate that the government must defend §922(g)(1) charges by grounding §922(g)(1) in historical tradition. By failing to follow that bedrock rule, the Third Circuit not only risked sanctioning a violation of the Second Amendment, but deprived Moore of his right to a full and fair adjudication of the Second Amendment challenge he raised. The Court should not let that egregious mistake stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 23-1843

UNITED STATES OF AMERICA,
Appellee,

v.

DIONTAI MOORE,
Appellant.

Argued: Apr. 16, 2024

Filed: Aug. 2, 2024

Before: Hardiman, Smith, and Fisher,
Circuit Judges.

OPINION

HARDIMAN, *Circuit Judge.*

This appeal arises under the Second Amendment to the United States Constitution and presents a question of first impression in this Court. Does a convict completing his sentence on supervised release have a constitutional right to possess a firearm? The answer is no.

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I

A

In 2008, federal agents collaborated with Pennsylvania State Police to investigate Appellant Diontai Moore for drug crimes. As part of this investigation, a confidential informant bought nearly a gram of cocaine from Moore. The police arrested Moore and searched his home, where they found more than three grams of cocaine base. Moore was charged with distribution of less than five grams of cocaine base. *See* 21 U.S.C. § 841(b)(1)(C). He pleaded guilty and was sentenced to 72 months' imprisonment followed by 3 years' supervised release.

In 2013, while Moore was on supervised release for that cocaine conviction, Pittsburgh Police noticed an unusual bulge under Moore's shirt. After a struggle, the officers arrested Moore and recovered a handgun from him. Moore was then charged with possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). In 2015, Moore pleaded guilty. He was sentenced to 60 months' imprisonment followed by 3 years' supervised release. As a condition of his supervised release, Moore was not allowed to "possess a firearm, ammunition, destructive device, or any other dangerous weapon." Supp. App. 3.

B

Moore was released from prison and began his three-year term of supervised release in July 2019. Less than two years later, on a Friday night in March 2021, Moore went out drinking with friends to celebrate his birthday. Moore returned that night to the Pittsburgh townhome of his fiancée Gwendolyn

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Pullie, where he had been living with Pullie and her three minor children for about a year.

Around 4:00 a.m., Moore and Pullie were upstairs talking about “how [Moore] went to the club,” when they heard the dog barking downstairs in the kitchen. App. 279. Moore later described the dog as “going f***ing crazy.” *Id.* As surveillance video footage shows, two figures entered the parking lot behind the townhome and broke into Pullie’s car, which was parked in a spot next to the townhome’s back door. Pullie later testified she felt “terrified” that she was “in harm’s way.” App. 181. She also “felt like someone was at [her] back door.” App. 184. So she and Moore went downstairs, where they saw shadowy figures near the back of the house.

Pullie then went upstairs to grab a handgun that she kept in a safe under her bed. She woke up her children, returned downstairs, and handed Moore the loaded weapon. Pullie left through the front door, taking her children with her. She and the children headed for the family’s other car, which was parked on the street in front of the townhome.

While Pullie left with the children, Moore took the gun and went out the back door of the townhome to confront the trespassers. The two intruders, who had broken into Pullie’s car, ran away at the sight of Moore. While they were fleeing, Moore fired three shots. Moore hit one of the intruders in the back of the thigh. Shortly after hearing the gunshots, Pullie drove her children to her cousin’s house, where she dropped them off.

Later that weekend, Pullie met with a local detective, turned in her gun, and spoke about the

incident. On Monday, Moore called his federal probation officer. He admitted his involvement in the shooting and said that “he fired at individuals he thought were breaking into his residence.” Supp. App. 7.

C

Within weeks, Moore was charged as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment listed Moore’s previous federal convictions for distributing cocaine base and being a felon in possession of a firearm, as well as previous state drug trafficking convictions.

Moore pleaded guilty to violating § 922(g)(1). In doing so, he reserved the right to argue on appeal that § 922(g)(1) is unconstitutional. The District Court entered judgment against Moore, sentencing him to 84 months’ imprisonment followed by 3 years’ supervised release. Moore timely appealed the judgment of conviction.¹

II

A

The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. As an adult citizen, Moore is one of the “people” whom the Second Amendment presumptively protects. *See Lara v. Comm’r Pa. State Police*, 91 F.4th 122, 127 (3d Cir.

¹ The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291. We review the District Court’s legal conclusions de novo and its factual findings for clear error. *See United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011).

2024). And the charge at issue punishes Moore for quintessential Second Amendment conduct: possessing a handgun. *See District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). So the Government bears the burden of justifying its regulation. *See N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).²

B

The Government can satisfy its burden only “by demonstrating that [its regulation] is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 24. To do so, it must “identify a well-established and representative historical analogue,” which need not be “a historical twin” or a “dead ringer.” *Id.* at 30 (emphasis omitted).

In analyzing the Government’s proposed historical analogues, we “must ascertain whether the [challenged] law is ‘relevantly similar’ to laws that our tradition is understood to permit.” *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29). “*Why* and *how* the regulation burdens the right are central to this inquiry.” *Id.* (emphasis added). As compared to its

² That Moore was on supervised release does not relieve the Government of its burden to justify its regulation of Moore’s arms-bearing conduct. To hold otherwise would relegate the Second Amendment to “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Bruen*, 597 U.S. at 70 (cleaned up). The First and Fourth Amendments apply to convicts on parole, probation, and supervised release. *See Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 125 (1977) (First Amendment); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (Fourth Amendment). So too for the Second Amendment.

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historical analogue, a modern regulation must “impose a comparable burden on the right of armed self-defense, and . . . that burden [must be] comparably justified.” *Bruen*, 597 U.S. at 29. In other words, a modern firearms regulation passes constitutional muster only if it is “consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 144 S. Ct. at 1898.

To justify disarming Moore while he was on supervised release, the Government cites the tradition of forfeiture laws, which temporarily disarmed convicts while they completed their sentences. For example, a 1790 Pennsylvania statute provided that “every person convicted of robbery, burglary, sodomy or buggery . . . shall forfeit to the commonwealth all . . . goods and chattels whereof he or she was . . . possessed at the time the crime was committed . . . and be sentenced to undergo a servitude of any term . . . not exceeding ten years.” Act of Apr. 5, 1790, 13 *Statutes at Large of Pennsylvania*, at 511, 511-12 (James T. Mitchell & Henry Flanders eds., 1896).

That 1790 Pennsylvania law is analogous to disarming convicts on supervised release because it burdened arms-bearing conduct in the same way and for the same purpose. The law seized all of the convict’s possessions, including his weapons, as part of his “servitude” or sentence. *Id.* So it was like disarming a convict on supervised release—which is a “part of the same sentence” as a term of imprisonment. *Mont v. United States*, 587 U.S. 514, 524 (2019). And the Pennsylvania law burdened the right to bear arms for the same reasons that we now burden the rights of

convicts on supervised release: to deter criminal conduct, protect the public, and facilitate the convict's rehabilitation. *Compare* 18 U.S.C. § 3583(c) (instructing courts to consider these factors in imposing supervised release), *with* Act of Apr. 5, 1790, 13 *Statutes at Large of Pennsylvania*, at 511 (intending “to reform” and “to deter”).

To be sure, the 1790 Pennsylvania law is not a dead ringer for § 922(g)(1). The old law deprived convicts of all their goods—including their weapons—while § 922(g)(1) deprives them of firearms and ammunition alone. But the founding-era law and the modern statute need not be “identical.” *Rahimi*, 144 S. Ct. at 1901. The old law took the convict's possessions, including his weapons, and then imprisoned him, preventing reacquisition until the sentence was complete. Because it disarmed the convict while he served his criminal sentence, the 1790 Pennsylvania law is sufficiently analogous to § 922(g)(1) as applied to convicts on supervised release.

The relevance of the 1790 law is buttressed by the fact that the Pennsylvania Constitution included a precursor to the federal Constitution's Second Amendment. *Cf. Roth v. United States*, 354 U.S. 476, 482 (1957) (state analogues to First Amendment). The Pennsylvania Constitution of 1776 provided: “the people have a right to bear arms for the defence of themselves and the state.” Pa. Const. of 1776, ch. I, art. XIII. And as revised in 1790, it stated: “the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned.” Pa. Const. of 1790, art. IX, § XXI.

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At the same time that it provided these guarantees, Pennsylvania enacted multiple forfeiture provisions in addition to the 1790 law. For example, the legislature stipulated that counterfeiters were subject to imprisonment “and moreover [were required to] forfeit all [their] . . . goods and chattels.” Act of Nov. 26, 1779, § 2, 10 *Statutes at Large of Pennsylvania*, at 12, 15-16 (James T. Mitchell & Henry Flanders eds., 1904). Likewise, Pennsylvania regulations intended to protect the Philadelphia market from competition required a repeat offender to “forfeit all his goods, and [be] imprisoned at the discretion of the court.” Act of Apr. 5, 1779, 9 *Statutes at Large of Pennsylvania*, at 387, 388-89 (James T. Mitchell & Henry Flanders eds., 1896).

The Pennsylvania forfeiture laws just mentioned were not outliers; they were sufficiently well-established and representative in the late 18th century to serve as historical analogues. *See Bruen*, 597 U.S. at 30. For example, Massachusetts provided:

[A]ll persons who, for the space of one hour after [an anti-riot] proclamation [is] made . . . shall unlawfully, routously, riotously and tumultuously continue together, or shall wilfully . . . hinder any such officer . . . from making the said proclamation, shall forfeit all their . . . goods and chattels to this Commonwealth, or such part thereof as shall be adjudged by the Justices, before whom such offence shall be tried . . . and suffer imprisonment for a term not exceeding twelve months, nor less than six months.

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Act of Oct. 28, 1786, 1 *Laws of the Commonwealth of Massachusetts*, at 346, 347 (J.T. Buckingham ed., 1807); *see also* Mass. Const. of 1780, pt. I, art. XVII (recognizing the “right to keep and to bear arms”). Virginia had a similar penalty for counterfeiting:

[I]f any person within this commonwealth shall forge or counterfeit, alter or erase, any certificate of money . . . , every person so offending, and being lawfully convicted, shall forfeit his whole estate, real and personal, . . . and shall be obliged to serve on board some armed vessel . . . without wages, not exceeding seven years.

Act of May 5, 1777, ch. 5, § 4, 9 *Virginia Statutes at Large*, at 286, 287 (William Waller Hening ed., 1821). Unlike the outlier territorial laws that the Supreme Court has rejected, *see Bruen*, 597 U.S. at 67-68, these forfeiture laws came from populous States that sent the most representatives to the First Congress, *see* U.S. Const. art. I, § 2.

Disarming convicts as part of their sentences continued into the 19th century. For example, Kentucky criminalized “go[ing] with force and arms before courts.” Act of Dec. 19, 1801, § 33, *Collection of All the Public and Permanent Acts of the General Assembly of Kentucky*, at 360, 371 (Harry Toulmin ed., 1802) (capitalization altered). Those who violated that law were required “to forfeit their arms to the commonwealth,” and were “fined and imprisoned at the discretion of a jury.” *Id.* That disarmament was compelled even though the Kentucky Constitution stated that “the rights of the citizens to bear arms in defence of themselves and the State shall not be

questioned.” Ky. Const. of 1799, art. X, § 23. Unlike more general forfeiture laws, which required forfeiture of *all goods*, this law specifically required forfeiture of *arms* as part of a criminal sentence.

Similarly, a founding-era Massachusetts law specifically disarmed offenders as part of their rehabilitation and reintegration into the community. In the wake of Shays’ Rebellion, “the Massachusetts legislature made rebels who had taken up arms against the state swear allegiance and give up their arms for three years before they could be pardoned.” *Folajtar v. Att’y Gen.*, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) (cleaned up). To qualify for pardon, the rebels were required to “deliver up their arms to, and take and subscribe the oath of allegiance, before some Justice of the Peace.” Act of Feb. 16, 1787, ch. VI, 1787 Mass. Acts 555. If the rebels satisfied certain conditions for three years, those arms would be “returned to the . . . persons who delivered the same, at the expiration of the said term of three years.” *Id.* at 556. The temporary disarmament imposed by that law is also akin to disarmament during a criminal sentence.

The bottom line is this: during the founding era, forfeiture laws temporarily disarmed citizens who had committed a wide range of crimes.³ Convicts could be

³ The crimes referenced from the early days of the Republic differ from Moore’s felon-in-possession crime. But they all stand for the proposition that convicts could be disarmed while serving their sentences. So those founding-era laws serve as relevant analogues to § 922(g)(1), as it applies to convicts on supervised release. The context is critical because a law which constitutes an

required to forfeit their weapons and were prevented from reacquiring arms until they had finished serving their sentences. This historical practice of disarming a convict during his sentence—or as part of the process of qualifying for pardon—is like temporarily disarming a convict on supervised release. After all, “[t]he defendant receives a term of supervised release thanks to his initial offense, and . . . it constitutes a part of the final sentence for his crime.” *United States v. Haymond*, 588 U.S. 634, 648 (2019) (plurality opinion); *see also United States v. Island*, 916 F.3d 249, 252 (3d Cir. 2019) (“The supervised release term constitutes part of the original sentence.”) (cleaned up). Consistent with our Nation’s history and tradition of firearms regulation, we hold that convicts may be disarmed while serving their sentences on supervised release.

Moore tries to distinguish supervised release from founding-era forfeiture laws. He argues that supervised release differs materially from forfeiture because supervised release occurs after the term of imprisonment. We disagree primarily because “analogical reasoning under the Second Amendment is n[ot] a regulatory straightjacket.” *Bruen*, 597 U.S. at 30. In addition, Moore’s argument misconstrues the historical record. The forfeiture of property and limitation on rights occurred while the convict was serving out his sentence, not only while he was physically in prison. For example, Virginia convicts served out their sentences by doing forced labor on a ship, not in prison. *See* Act of May 5, 1777, 9 *Virginia*

“an appropriate analogue” in one context may “not [be] a proper historical analogue” in another. *Rahimi*, 144 S. Ct. at 1902.

Statutes at Large, at 287. And convicts sentenced to prison could serve part of their sentences outside of prison. See Act of Dec. 22, 1787, ch. 11, 1 *Public Acts of the General Assembly of North Carolina*, at 434 (James Iredell and Francois-Xavier Martin, eds. 1804).

Moore also suggests that supervised release cannot be subject to historical analogues because it “is a modern innovation . . . created by the federal government in 1984.” Reply Br. 23 (citing *Haymond*, 588 U.S. at 651-52). This argument is a nonstarter because requiring “regulations identical to ones that could be found in 1791” is just “as mistaken as applying the protections of the [Second Amendment] only to muskets and sabers.” *Rahimi*, 144 S. Ct. at 1898. Although criminal justice worked differently in the founding era than it does today, it is also true that a convict could be temporarily disarmed as part of his sentence. So the “prohibition on the possession of firearms” by a convict subject to a criminal sentence “fits neatly within the tradition” embodied by forfeiture laws. *Rahimi*, 144 S. Ct. at 1901.

Our conclusion is bolstered by the Supreme Court’s recent decision in *Rahimi*. As the Court explained, early American surety and affray laws establish the principle that “[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.” *Rahimi*, 144 S. Ct. at 1901. The Court applied that principle to uphold the federal law prohibiting an individual subject to a domestic violence restraining order from possessing firearms. See *id.* (citing 18 U.S.C. § 922(g)(8)). Taken together, the early American

forfeiture laws—which required forfeiting property in general and arms in particular—likewise yield the principle that a convict may be disarmed while he completes his sentence and reintegrates into society. And this principle justifies applying § 922(g)(1) to Moore, a convict on supervised release.

C

Moore’s other counterarguments are unpersuasive. First, Moore argues that his status as a supervised releasee cannot support his felon-in-possession conviction. According to Moore, we may consider only the facts alleged in the indictment—such as the predicate offenses that made him a felon. But Moore cites no authority to support this proposition. That is unsurprising because an as-applied challenge requires us to ask whether a statute’s “application to a particular person under particular circumstances deprived that person of a constitutional right.” *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (cleaned up). “In order to mount a successful as-applied challenge, [Moore] must show that under these particular circumstances he was deprived of a constitutional right.” *Id.* at 406 (cleaned up). And “these particular circumstances” include facts beyond the predicate offenses alleged in the indictment. So the circumstances of a criminal offense can justify rejecting an as-applied challenge to a conviction regardless of whether they were charged. This is especially so where, as here, no party questions the fact that we deem constitutionally relevant: Moore was on supervised release when he possessed the firearm. *See Moore Br. 5* (conceding this fact).

Moore also argues that § 922(g)(1) violates the Second Amendment as applied to his possession of a firearm for protection at home. He notes that self-defense is the “*central component*” of the right, and “the home” is where the need for self-defense is “most acute.” Moore Br. 44 (quoting *Heller*, 554 U.S. at 599, 628). Those truisms about the core of the Second Amendment do not dictate the outcome here. A prisoner’s cell is his temporary home—and a prisoner may feel the need to defend himself against other prisoners—but that does not entitle him to keep a firearm in prison. “Persons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned.” *State v. Buzzard*, 4 Ark. 18, 21 (Ark. 1842) (opinion of Ringo, C.J.). A prisoner on house arrest does not necessarily have a right to keep a weapon at home for self-defense, even though typical citizens do. The same is true for a prisoner on supervised release.⁴

Because history and tradition support disarming convicts who are completing their sentences, we reject Moore’s as-applied challenge to his conviction for violating § 922(g)(1).⁵

* * *

⁴ Of course, the doctrine of necessity or justification “is a valid defense to a felon-in-possession charge.” *United States v. Alston*, 526 F.3d 91, 94 (3d Cir. 2008). But Moore failed to preserve the argument that this defense applies.

⁵ Since we reject Moore’s as-applied challenge to § 922(g)(1), his facial challenge also fails: he cannot “establish that no set of circumstances exists under which the Act would be valid.” *Rahimi*, 144 S. Ct. at 1898 (cleaned up).

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A convict completing his sentence on supervised release does not have a Second Amendment right to possess a firearm. So 18 U.S.C. § 922(g)(1) is constitutional as applied to Moore, and we will affirm his judgment of conviction.

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Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 23-1843

UNITED STATES OF AMERICA,
Appellee,

v.

DIONTAI MOORE,
Appellant.

Filed: Oct. 9, 2024

Before: Chagares, *Chief Judge*, Jordan, Hardiman,
Shwartz, Krause, Restrepo, Bibas, Porter, Matey,
Phipps, Freeman, Montgomery-Reeves, Smith, and
Fisher,* *Circuit Judges*.

ORDER

The petition for rehearing in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

* The votes of Judge Smith and Fisher are limited to panel rehearing.

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decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman

Circuit Judge

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Appendix C

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

No. 21-121

UNITED STATES OF AMERICA,

v.

DIONTAI MOORE,

Defendant.

Filed: June 1, 2022

MEMORANDUM OPINION

Before the Court are a Motion for Discovery (ECF No. 40) and a Motion to Dismiss Indictment (ECF No. 42) filed by Defendant Diontai Moore. The Motions have been fully briefed and are ripe for disposition. For the reasons that follow, the Court will deny the Motion to Dismiss Indictment, and will deny the remaining relief requested by way of the Motion for Discovery.

I. Motion to Dismiss Indictment

Defendant avers that, in *Binderup v. Att’y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), a majority of the United States Court of Appeals for the Third Circuit agreed that it would violate the Second Amendment to apply § 922(g)(1) to individuals convicted of certain nonviolent state law misdemeanors. Mot. to Dismiss

3, ECF No. 42. Defendant argues that, accordingly, his past convictions, which Defendant asserts do not involve violent conduct, cannot serve as a basis to deny him—permanently and totally—of his Second Amendment rights, and that Section 922(g)(1) is unconstitutional as applied to him, under the circumstances of this case, and that the Indictment must be dismissed. *Id.* Of course, Defendant’s past convictions are not state law misdemeanor convictions, but rather are state and federal felony convictions, including: January 2006 and February 2006 Pennsylvania convictions for possession with intent to deliver heroin, an October 2009 federal conviction for distribution of cocaine base, and a May 2015 federal conviction for being a felon in possession of a firearm and/or ammunition, i.e. the same offense with which he is charged in this matter. *Id.* at 7. Defendant does not dispute that these prior convictions meet the traditional definition of a felony for purposes of Section 922(g). *Id.* The Government has further provided:

This case is the third federal felony case in which [Defendant] has been charged. The first two led to convictions for which he was sentenced to 72 months (distribution of cocaine base at Cr. No. 07-33) and 60 months (possession of a firearm and/or ammunition by a convicted felon at Cr. No. 14-110), respectively. Notably, the second federal conviction served as the basis for a supervised release violation at the first federal case number. Moreover, the first federal case served as the basis for a violation of the parole he was serving in a state felony drug

conviction from 2006 for possessing with the intent to distribute heroin.

Omnibus Resp. 12, ECF No. 46.

In *Binderup*, the Third Circuit explained as follows:

[T]he following is the law of our Circuit: (1) the two-step [*United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)] framework controls all Second Amendment challenges, including as-applied challenges to § 922(g)(1); (2) a challenger will satisfy the first step of that framework only if he proves that the law or regulation at issue burdens conduct protected by the Second Amendment; (3) to satisfy step one in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime; (4) evidence of a challenger's rehabilitation or his likelihood of recidivism is not relevant to the step-one analysis; (5) as the narrowest ground supporting the Court's judgments for *Binderup* and *Suarez*, the considerations discussed above will determine whether crimes are serious (i.e., disqualifying) at step one; and (6) if a challenger makes the necessary step-one showing, the burden shifts to the Government at step two to prove that the regulation at issue survives intermediate scrutiny.

Binderup, 836 F.3d at 356; *see also Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 901-02 (3d Cir. 2020), *cert. denied sub nom. Folajtar v. Garland*, 141 S. Ct. 2511, 209 L. Ed. 2d 546 (2021) ("As noted, we

typically would proceed under the first step of *Marzzarella* to determine: (1) whether persons with felony convictions fall within the historical class of those barred from Second Amendment protection; and (2) whether Folajtar, as one convicted of a federal tax fraud felony, can distinguish herself from that class. As we explain below, our precedents instruct we can collapse these two questions into one: Has the plaintiff overcome the generally conclusive rule that a felony conviction is serious, so that it falls outside the historical class of offenses that render felons excluded from Second Amendment protections?”).

In arguing that Section 922(g)(1) is unconstitutional as applied, Defendant relies on argument that his past convictions were for non-violent offenses. Mot. to Dismiss 7, ECF No. 42. However, the relevant standard under *Binderup* is whether the crimes are “serious,” not whether they are violent. *See Folajtar*, 980 F.3d at 902 (“[W]e made clear in *Binderup* that the exclusion applies to all serious crimes, and there ten judges agreed that ‘the correct test at step one for challenges to § 922(g)(1) is whether the offense is “serious,” not whether the offense is violent.’” (quoting *Holloway v. Att’y Gen.*, 948 F.3d 164, 171 n.7 (3d Cir. 2020))). Further, “the legislature’s designation of an offense as a felony is generally conclusive in determining whether that offense is serious.” *Folajtar*, 980 F.3d at 900. In *Folajtar*, the Third Circuit found tax fraud to constitute a “serious” offense. Possession with intent to deliver heroin, cocaine base distribution, and illegal firearm possession are felonies that could not reasonably be considered non-serious offenses “so exceptional” that they “fall outside the historical bar.”

Folajtar, 980 F.3d at 910. These are serious, felony offenses involving dangerous drugs and weapons for which the penalties prescribed and imposed were severe. Defendant acknowledges the seriousness of these convictions. *See* Supplemental Br. 3, ECF No. 57 (“Mr. Moore recognizes that his prior felony convictions are serious and they are ‘generally conclusive’ evidence that those convictions bar him from Second Amendment protection.”). The Court must find that each of these four felony convictions constitutes a serious crime.

In *Binderup*, the Third Circuit also explicitly rejected any assertion that “the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes.” *Binderup*, 836 F.3d at 349. Defendant disagrees with that holding, but this Court will not depart from the holding in *Binderup*. In arguing that Section 922(g)(1) is unconstitutional as applied in this case, Defendant relies only on assertions of his purported rehabilitation, an avenue that the Third Circuit has explicitly stated is irrelevant at the first step of the *Marzzarella* framework, and that his felony convictions were non-violent, which the Third Circuit has held is not alone sufficient to render a conviction non-serious. In this case, the Court’s inquiry ends with its determination that Defendant has been convicted of a serious offense. It is unquestionable that Defendant has been convicted of multiple serious offenses, and Section 922(g)(1) is thus constitutional as applied in this case. While Defendant invites the

Court to consider the facts of the present case,¹ his purported rehabilitation, and the fact that his felony convictions were non-violent, he presents no compelling argument whatsoever that could support a finding that his prior felony convictions, which are the focus of the first step of the *Marzzarella* framework, were not serious in nature. Accordingly, Defendant's Motion will be denied on that basis, and the Court need not, and will not, proceed to the second step of the *Marzzarella* framework.

With respect to Defendant's assertion that Section 922(g)(1) unconstitutionally exceeds the federal government's powers under the Commerce Clause, Defendant asserts that the Government's evidence is insufficient as a matter of law to establish that Defendant possessed a firearm "in or affecting commerce." Mot. to Dismiss 12, ECF No. 42. Defendant acknowledges that the Third Circuit has ruled that 18 U.S.C. § 922(g)(1) is constitutional and

¹ In particular, Defendant relies on his assertion that he believes he will prove successful on his justification defense in the present case. *See* Supplemental Br. 3-5, ECF No. 57. With respect to his as-applied challenge to Section 922(g)(1), Defendant's citation to the facts of the present case is misplaced. *See Binderup*, 836 F.3d at 350. ("[O]nly the seriousness of the purportedly disqualifying offense determines the constitutional sweep of statutes like § 922(g)(1) at step one." (emphasis added)); *see also id.* at 356 ("[T]o satisfy step one in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime (emphasis added)). Nothing herein prevents Defendant from presenting his justification defense at trial in the present action, but the Court looks only to the disqualifying offense, or in this case offenses, at step one in determining whether Section 922(g)(1) is constitutional as applied.

has reaffirmed that holding in *United States v. Singletary*, 268 F.3d 196 (3d Cir. 2001) following the Supreme Court's decisions in the "*Lopez* trilogy," upon which Defendant relies. Mot. to Dismiss 12-13, ECF No. 42. Defendant's argument relies on an assertion that Defendant believes that the United States Supreme Court will overrule *Scarborough v. United States*, 431 U.S. 563 (1977), and Defendant states that he "therefore raises the issue now, in order to preserve his jurisdictional claims for appellate review." *Id.* The Court acknowledges Defendant's efforts to preserve issues for appeal, but, given that Defendant acknowledges that his argument is contrary to Third Circuit precedent, the Court will deny the Motion to Dismiss to the extent that it argues that Section 922(g)(1) unconstitutionally exceeds the federal government's powers under the Commerce Clause.

Finally, Defendant asserts that the Indictment must be dismissed as a violation of the doctrine of corpus delicti. Mot. to Dismiss 18, ECF No. 42. This argument is tied in with Defendant's assertion in the Motion for Discovery that he should be provided with transcripts of the grand jury proceedings in this matter.² Defendant asserts that the Government may not rely only on a confession for proof of an offense, here, possession of a firearm, and further asserts that Defense Counsel is unclear what, if any, evidence establishes Defendant's possession of a firearm apart

² See Mot. for Discovery 12, ECF No. 40 ("The exculpatory evidence in this case, that Mr. Moore acted in self-defense, should have been presented to the grand jury, and Mr. Moore asks this Court to inspect the grand jury transcripts to determine whether the government adhered to its policy.").

from Defendant's own statement to police, which resulted in a decision not to charge him in a shooting. *Id.* at 18-19.

The Government asserts that it has provided the following evidentiary disclosures in this case:

[A]ll ShotSpotter reports regarding the March 6, 2021 incident; interview reports of both [Defendant] and Ms. Pullie; security video footage from four different angles from before, during, and after [Defendant's] firing of a gun; police reports from the responding agency, the Pittsburgh Bureau of Police; and an audio/visual recording of Defendant's confession to law enforcement in the presence of his defense attorney.

Omnibus Resp. 6, ECF No. 26. The Government further avers:

The Indictment itself (Doc. No. 3) provides the identification of the specific firearm Moore is charged with unlawfully possessing, and as the [D]efendant knows, that firearm is now in the possession of the Government. Moreover, the disclosed Rule 16 materials make plain that days before the [D]efendant made any admissions to law enforcement, officers had already responded to UPMC Children's Hospital to interview the gunshot wound victim; viewed video footage of the [D]efendant firing the weapon at that victim who was retreating from him; reviewed ShotSpotter data; and recovered 3 spent shell casings consistent with the number of shots fired and location of the shots fired.

[Defendant's] confession is certainly a piece of the admissible evidence against him. It is disingenuous, however, to pretend that it is the sole piece of admissible evidence against him. Contrary to his argument, the doctrine of corpus delicti bars neither the admissibility of the defendant's confessions nor the return of an Indictment against him.

Id. at 16. The Government also asserts that some of the discovery Defendant has received, including the video evidence from the night in question referenced above, was introduced at Defendant's detention hearing in a pending supervised release case before this Court at 14-cr-110. *Id.* at 14.

As such, the Government avers that it has provided Defendant with more evidence than simply Defendant's confession to police. Defendant's argument seems to be related to his assertion in the Motion for Discovery that the Government should have provided some evidence to the grand jury that Defendant acted in self-defense on the night in question. To the extent that this argument relies on an assertion that the Government did not present evidence as to Defendant's potential justification defense, Defendant himself acknowledges that he "understands that this Court cannot grant dismissal of an indictment where a prosecutor fails to introduce exculpatory evidence to the grand jury." Mot. for Discovery 12, ECF No. 40. Defendant has also argued that review of the grand jury records, at least by the Court during an in-camera inspection, is appropriate to see whether the Government followed their own policy requiring them to present evidence to the grand

jury where, as here, a prosecutor is aware of evidence that “directly negates the guilt of a subject of the investigation.” *Id.*

Initially, the Court notes that it is Defendant, not the Government, that will bear the burden of proving the affirmative defense of justification at trial. *See United States v. Alston*, 526 F.3d 91, 95 (3d Cir. 2008). The Court agrees with the Government that Defendant:

does not identify any specific direct evidence in support of this self-defense claim—such as a statement made during his confession—that “should have been presented to the grand jury.” But even if he had, the government had no burden to present such evidence (if it existed) at the time of the presentment of the case to the grand jury.

Omnibus Resp. 17, ECF No. 42. To the extent that Defendant “seeks a preemptive conclusion that the [G]overnment will be unable to meet its burden to prove him guilty beyond a reasonable doubt, the Court lacks the authority to make that determination prior to trial.” *United States v. Terry*, No. 2:20-CR-43-NR, 2021 WL 2261585, at *3 (W.D. Pa. June 3, 2021). Further, “for better or worse, ‘investigators and prosecutors need not present exculpatory evidence to grand juries.’” *Terry*, 2021 WL 2261585, at *4 (quoting *Costino v. Anderson*, 786 Fed. App’x. 344, 348 (3d Cir. 2019)).

The justification defense will ultimately be an issue for the jury, and not the grand jury, to decide. Defendant seemingly seeks an early determination as to his justification defense, and the Court declines any

invitation to consider that issue at this juncture. To the extent the Motion to Dismiss asserts that the Indictment violates the doctrine of corpus delicti, the Motion is denied.

II. Motion for Discovery

With respect to the Motion for Discovery, the Court notes that it has already denied this Motion without prejudice in part with respect to the Motion's more general requests for reasons explained on the record during oral argument on the Motion. The parties have conferred with respect to the specific discovery requests set forth at page 2 of the Motion for Discovery, and have informed the Court that the only specific request still at issue is request no. 7, which is Defendant's request for grand jury information and transcripts. Supplemental Br. 5, ECF No. 57.

Federal Rule of Criminal Procedure 6(e)(3)(E)(i) provides that a court can grant disclosure of grand jury information "in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). "As a matter of public policy, grand jury proceedings generally must remain secret except where there is a compelling necessity." *United States v. Watson*, No. 2:20-CR-112-NR, 2020 WL 7074623, at *10 (W.D. Pa. Dec. 3, 2020) (quoting *United States v. McDowell*, 888 F.2d 285, 289 (3d Cir. 1989)). To obtain the testimony, a party must show "a particularized need for that information which outweighs the public interest in secrecy." *United States v. Miner*, 299 F. App'x 110, 111 (3d Cir. 2008) (citations omitted).

Defendant's Motion for Discovery requests a copy of the transcript of the grand jury proceedings in this case, including the charge to the grand jury, and he

argues that the same may be necessary to develop the claims in his Motion to Dismiss and his planned defense at trial. Mot. for Discovery 11, ECF No. 40. He also requests that the Court perform an in-camera inspection of the grand jury transcripts to determine whether the Government introduced exculpatory evidence that Defendant asserts “directly negates the guilt of a subject of the investigation.” *Id.* at 12. Defendant also argues that the need for disclosure in this case outweighs the need for secrecy. *Id.* at 13. The Government counters that the grand jury transcripts are protected by an “obligation of secrecy” under Federal Rule of Criminal Procedure 6(e), and that Defendant has not established a compelling necessity for disclosure of grand jury transcripts and his motion seeking the same should be denied. Omnibus Resp. 7-8, ECF No. 46.

In response to the Motion for Discovery, and as described above, the Government states that it has made extensive productions in this case consistent with Rule 16, that it intends to continue to comply with Rule 16, and that, should it become aware of any *Brady* evidence, the government will disclose it sufficiently in advance of trial to allow the Defendant to make effective use of it. The Government represented that it recognizes and intends to adhere, at the appropriate times, to its discovery obligations under Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, (Jencks) 18 U.S.C. § 3500, and *Brady/Giglio*. As noted during oral argument on Defendant’s Motion, Defendant asks the Court to compel the Government to do what it is already obligated to do, that is, comply with the law, but fails to provide any true suggestion of noncompliance on

the Government's part. Defendant does not articulate a particularized need for grand jury transcripts, but rather simply asks that the Government produce all discoverable evidence. *See* Supplemental Br. 6, ECF No. 57 ("Information favorable to this affirmative defense must be disclosed under DOJ guidelines, regardless of the government attorney's personal opinion about whether Mr. Moore will ultimately succeed at trial. If any information presented to the grand jury shows Mr. Moore's lack of knowledge of Ms. Pullie's firearm or supports his belief that he and his family were under threat of death or serious injury, that is *Brady* information that must be disclosed." (footnote omitted)). Of course, the Government is already obligated to comply with the law, and the Court finds that Defendant fails to articulate a compelling necessity for disclosure of grand jury transcripts in this matter.

As noted, the Government was not required to present exculpatory evidence to the grand jury, and any failure to do so would not entitle Defendant to dismissal of the Indictment. Accordingly, the same is not a basis to compel disclosure of grand jury information or transcripts. Moreover, the Government has acknowledged its discovery obligations. The Court notes that the Government proceeds at its own peril to the extent that it withholds information subject to discovery on the basis that it believes the same is not subject to discovery. However, Defendant articulates no compelling necessity for the disclosure of grand jury information or transcripts at this time. The request for grand jury information will be denied. As noted with respect to Defendant's more general requests, the Motion for Discovery was denied without

prejudice as premature. Defendant may, after reviewing the discovery provided by the Government in this case and conferring with the Government, file a renewed motion addressing specific areas of any purported noncompliance.

III. Conclusion

For the reasons discussed above, the Court will deny Defendant's Motion to Dismiss Indictment, and will deny the Motion for Discovery with respect to its only remaining outstanding request, that is, the request for grand jury information and transcripts. An appropriate Order of Court follows.

BY THE COURT:

s/ Robert J. Colville

Robert J. Colville

United States District
Judge

App-32

Appendix D

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

No. 21-121

UNITED STATES OF AMERICA,

v.

DIONTAI MOORE,

Defendant.

Filed: Nov. 9, 2022

MEMORANDUM ORDER

AND NOW, this 9th day of November, 2022, upon consideration of Defendant's "Motion for Reconsideration of Motion to Dismiss Indictment Following *Bruen*" (ECF No. 67), it is hereby ORDERED that Defendant's Motion is denied. Defendant, relying on the Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), argues that the Court should revisit its prior Order denying Defendant's Motion to Dismiss Indictment (ECF No. 42) on the basis that, following *Bruen*, 18 U.S.C. § 922(g)(1) is unconstitutional on its face, or, alternatively, unconstitutional as applied to Defendant. The Court joins the many district courts,

including three Judges of this District,¹ in rejecting Defendant's constitutional challenges to Section 922(g)(1).

With respect to Defendant's facial challenge, the Court agrees with the well-reasoned analyses set forth by Judge Schwab in *Young*, Judge Ranjan in *Reese*, and Judge Robert D. Mariani of the United States District Court for the Middle District of Pennsylvania in *United States v. Minter*, No. 3:22-CR-135, 2022 WL 10662252 (M.D. Pa. Oct. 18, 2022), and adopts the same reasoning in rejecting Defendant's facial challenge. Turning to Defendant's as-applied challenge, Defendant again relies on argument that his past convictions were for non-violent offenses. The Court again notes that Defendant's past convictions are serious state and federal felony convictions, including: January 2006 and February 2006 Pennsylvania convictions for possession with intent to deliver heroin, an October 2009 federal conviction for distribution of cocaine base, and a May 2015 federal conviction for being a felon in possession of a firearm and/or ammunition. In *Young*, Judge Schwab considered an as-applied challenge brought by a Defendant who had four prior felony convictions for drug trafficking. In rejecting that challenge, he explained:

In Defendant's brief, he cites to the dissent written by then-Judge Barrett in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019). The dissent states: "History is consistent with

¹ See *United States v. Young*, No. 22-54 (W.D. Pa. Nov. 7, 2022); *United States v. Reese*, No. 19-257 (W.D. Pa. Nov. 8, 2022); *United States v. Law*, No. 20-341 (W.D. Pa. Oct. 27, 2022).

common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*.” *Id.* at 451. Then-Judge Barrett explained that “founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety,” and approved of precedent permitting laws banning firearms from those who have committed violent crimes or drug offenses. *Id.* at 466. Among Defendant’s prior felony convictions, according to the Indictment, are the four felony drug offenses. Accordingly, even under the most expansive reading of the Second Amendment, Section 922(g)(1) is constitutional as applied to Defendant, given his prior drug trafficking felony convictions.

Young, Docket No. 47 at 24; *see also Minter*, 2022 WL 10662252, at *4 (“This Court further notes that the *Bruen* Court broadly cited to ‘law-abiding’ citizens, declining to signal any deficiency in a state’s failure to draw a distinction between individuals who may be considered non-law-abiding due to violent, as opposed to non-violent, crimes.”). There is no basis to conclude that Section 922(g)(1) is unconstitutional as applied in this case, and Defendant’s Motion for Reconsideration is hereby denied.

Appendix E

**CONSTITUTIONAL AND STATUTORY
PRIVISIONS**

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

18 U.S.C. §922

(g) It shall be unlawful for any person--

- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) who, being an alien--
 - (A) is illegally or unlawfully in the United States; or
 - (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- (6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

No. 24-_____

IN THE
Supreme Court of the United States

DANIEL RUTHERFORD
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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January 30, 2025

QUESTION PRESENTED

The compassionate-release statute permits courts to reduce a prisoner's sentence if the court finds that "extraordinary and compelling reasons" warrant relief. 18 U.S.C. § 3582(c)(1)(A). Congress placed only two limits on what can count as an "extraordinary and compelling reason": (1) it must be "consistent with" "applicable policy statements" from the U.S. Sentencing Commission, *id.*; and (2) "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," 28 U.S.C. § 994(t).

Sections 401 and 403 of the First Step Act of 2018 reduced penalties for certain drug and firearm offenses going forward. Because of these changes, individuals sentenced today for these offenses often face mandatory minimum terms of imprisonment decades shorter than they would have received before the First Step Act.

The question presented is:

Whether, as four circuits permit but six others prohibit, a district court may consider disparities created by the First Step Act's prospective changes in sentencing law when deciding if "extraordinary and compelling reasons" warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

PARTIES TO THE PROCEEDINGS

Petitioner Daniel Rutherford was the defendant and movant in the district court and the appellant in the court of appeals.

Respondent United States of America was the plaintiff and respondent in the district court and the appellee in the court of appeals.

RELATED CASES

Decisions Under Review:

United States v. Rutherford, 2023 WL 3136125 (E.D. Pa. Apr. 27, 2023) (No. 05-cr-0126-JMY-1)

United States v. Rutherford, 120 F.4th 360 (3d Cir. Nov. 1, 2024) (No. 23-1904)

Prior, Related Decisions:

United States v. Rutherford, 2006 WL 7349954 (E.D. Pa. Jan. 25, 2006) (No. 05-cr-0126-1)

United States v. Rutherford, 236 F. App'x 835 (3d Cir. June 26, 2007) (No. 06-1437)

Rutherford v. United States, 552 U.S. 1127 (U.S. Jan. 7, 2008) (No. 07-7858) (denying certiorari)

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Petitioner Daniel Rutherford petitions for a writ of certiorari to review the judgment of the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-36a) is reported at 120 F.4th 360. The district court’s memorandum (App. 37a-47a) is not reported but is available at 2023 WL 3136125.

JURISDICTION

The Third Circuit entered judgment on November 1, 2024. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 18 U.S.C. § 3582(c)(1)(A), and 28 U.S.C. § 994(t) are reproduced at App. 48a-54a.

INTRODUCTION

This case presents a recognized conflict over a significant question of sentencing law: whether courts may consider the First Step Act’s prospective changes in sentencing law when deciding whether “extraordinary and compelling reasons” justify a sentence reduction under the compassionate-release statute, 18 U.S.C. § 3582(c)(1)(A)(i). The courts of appeals have divided 6-4 over that question.

The compassionate-release statute allows a district court to reduce a defendant’s sentence if the court finds that (1) “extraordinary and compelling reasons” exist; (2) the reduction is “consistent with” “applicable” policy statements issued by the U.S. Sentencing Commission; and (3) the sentencing factors under 18 U.S.C. § 3553(a) favor relief. 18 U.S.C. § 3582(c)(1)(A)(i). In 2018, Congress passed the First Step Act, which

prospectively reduced penalties for certain drug and firearm offenses.

The First, Fourth, Ninth, and Tenth Circuits allow district courts to consider—as one of several case-specific factors—the fact that a defendant would have received a significantly lower sentence if sentenced today, as a result of the First Step Act’s changes. These circuits reason that the operative statutory text—the phrase “extraordinary and compelling”—is flexible and expansive. They also reason that Congress has spoken explicitly to exclude another consideration from the extraordinary-and-compelling analysis (“[r]ehabilitation . . . alone”) but has never enacted a similar prohibition on considering changes in law. By contrast, the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits have held that courts may never consider the First Step Act’s changes—either alone or with other factors—because doing so would undermine Congress’s nonretroactivity choices.

In April 2023, the Sentencing Commission issued a policy statement agreeing with the first group of circuits. But in the decision below, the Third Circuit (one of the circuits on the other side of the split) adhered to its previous decision and held that the policy statement exceeded the Commission’s statutory authority. The Third Circuit’s decision cemented the split.

This Court should resolve the circuit conflict in this case. Further percolation will accomplish nothing: courts have divided into two clear camps, and the Commission’s agreement with one has not persuaded the other. Circuits like the Third will continue to follow their previous interpretation of the compassionate-release statute. The circuits with which the Commission agreed also have no basis to change course: they have read the statute to permit what the Commission allows.

The question presented has potentially life-changing effects for thousands of prisoners. And it is uniquely recurring: courts have decided hundreds of motions raising the First Step Act’s changes in the past four years. But as things stand, a defendant’s ability to present their full circumstances depends on geographic happenstance.

There is no reason to further delay review. Dozens of appellate decisions have analyzed this issue. And this case is an optimal vehicle: the decision below turned solely on the legal question presented, and there are no obstacles to reaching it here. Just as importantly, the decision below was incorrect. The Third Circuit, like five other circuits, has created a categorical limit that Congress never legislated to create.

This Court should grant the petition and reverse.

STATEMENT

A. Legal Background

1. Historically, the three branches of government shared responsibility for federal sentencing. See *Mistretta v. United States*, 488 U.S. 361, 363-64 (1989). Congress “fix[ed] the sentence for a federal crime,” the court “imposed a sentence within the statutory range,” and the “Executive Branch’s parole official eventually determined the actual duration of imprisonment.” *Id.* at 364-65. Under that regime, the United States Board of Parole (and later the Parole Commission) could—and “routinely did”—release prisoners before they served half of their sentence. *Barber v. Thomas*, 560 U.S. 474, 482 (2010). Such actions led to “[s]erious disparities in sentences,” which in turn generated “widespread” criticism. *Mistretta*, 488 U.S. at 365-66.

Congress responded to this criticism by overhauling the federal sentencing system in the Sentencing

Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987-2040. In place of the Parole Commission, Congress created the United States Sentencing Commission. Congress directed the Commission “to formulate and constantly refine national sentencing standards,” *Kimbrough v. United States*, 552 U.S. 85, 108 (2007), including through guidelines governing initial sentencing and “policy statements” governing sentence-modification proceedings, 28 U.S.C. § 994(a)(1)-(2).

2. In enacting the Sentencing Reform Act, Congress recognized that there would be “unusual cases” in which “changed circumstances” justified reducing an “unusually long sentence.” S. Rep. No. 98-225, at 55, 121 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3238, 3304. So Congress enacted “safety valves” through which courts could modify a sentence once imposed. *Id.* at 121, *reprinted in* 1984 U.S.C.C.A.N. 3304.

Section 3582(c)(1)(A)(i) is one of those safety valves. This “compassionate release” provision allows a district court to reduce a prisoner’s sentence “if it finds that” “extraordinary and compelling reasons warrant such a reduction,” “after considering the factors set forth in [§] 3553(a) to the extent that they are applicable.” 18 U.S.C. § 3582(c)(1)(A)(i). The reduction must also be “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* § 3582(c)(1)(A).

Congress did not define the phrase “extraordinary and compelling reasons.” It instead instructed the Commission to “promulgat[e] general policy statements” that “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 28 U.S.C. § 994(t). Congress

placed only one limit on that express delegation: “Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” *Id.*

3. For years, § 3582(c)(1)(A)(i)’s safety valve rarely opened. Only the Bureau of Prisons (“BOP”) could file a motion under § 3582(c)(1)(A), and it rarely did. *See United States v. Brooker*, 976 F.3d 228, 231-32 (2d Cir. 2020). As a result, between 1984 and 2018, few motions reached the courts, and scant precedent developed on what counts as an “extraordinary and compelling reason.”

Meanwhile, starting in 2007, the Commission issued policy statements that applied to the few motions the BOP filed. The first identified several “extraordinary and compelling reasons” for a sentence reduction: terminal illness, severe physical or mental decline, and death or incapacitation of the primary caregiver of a prisoner’s child. U.S.S.G. § 1B1.13 cmt. n.1 (Nov. 1, 2007). And the Commission included a catch-all category for “an extraordinary and compelling reason other than, or in combination with,” these examples, “[a]s determined” by the BOP. *Id.* In 2016, the Commission added two additional bases related to age and health of the defendant. *See* U.S.S.G. Suppl. to App. C, Amendment 799 (Nov. 1, 2016).

4. Congress responded to the BOP’s inaction with the First Step Act of 2018, which amended the compassionate-release statute to permit prisoners to file motions after exhausting administrative remedies. *See* Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

With this change, compassionate-release motions finally began to reach federal courts. But the Commission lost a quorum shortly after this change, so it could

not issue a policy statement describing what could count as an “extraordinary and compelling reason” for a prisoner-filed motion. And because the Commission’s previous policy statements referenced only BOP-filed motions (and had a catch-all provision based on BOP discretion), courts found the existing policy statements inapplicable to prisoner-filed motions. *See United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (collecting cases). Without a policy statement, courts had to identify what could constitute an “extraordinary and compelling reason” themselves.

In that vacuum, courts divided over whether non-retroactive changes in law could be considered when deciding compassionate-release motions. Much of the disagreement focused on § 401 and § 403 of the First Step Act, which reduced harsh sentencing schemes for firearm and drug offenses.¹

Section 403 eliminated “stacking” under 18 U.S.C. § 924(c). Section 924(c), which prohibits using or carrying a firearm during certain felonies, previously required 25-year consecutive sentences for each “second or subsequent” § 924(c) conviction—even if they occurred in the same case as a defendant’s first conviction. *See Deal v. United States*, 508 U.S. 129, 132-37 (1993). The First Step Act changed this practice by requiring a “final” § 924(c) conviction before the mandatory 25-year penalties apply. But Congress made the changes apply only to pending or future cases. § 403(a)-(b), 132 Stat. 5221-22. Section 401,

¹ Courts also split on a question not presented here: whether changes in decisional law, as opposed to statutory changes, may be considered. *Compare, e.g., United States v. King*, 40 F.4th 594, 596 (7th Cir. 2022) (no), *cert. denied*, 143 S. Ct. 1784 (2023), *with United States v. Roper*, 72 F.4th 1097, 1102-03 (9th Cir. 2023) (yes; collecting cases).

which reduced drug penalties, also applies only to pending or future cases. § 401(a), (c), 132 Stat. 5220-21.

The courts of appeals split over whether district courts could consider the First Step Act’s prospective sentencing changes when deciding if “extraordinary and compelling reasons” exist for those who received lengthy sentences under the prior regime. *See infra* pp. 12-17. But the government successfully opposed certiorari petitions asking this Court to resolve that split, arguing that it ought to be “addressed by the Sentencing Commission” in the first instance.² Review was premature, the government argued, because “[t]he Commission could . . . promulgate a new policy statement, binding on district courts,” “that rules out the First Step Act’s prospective amendment[s]” “as a possible basis for finding ‘extraordinary and compelling reasons’ for” a sentence reduction, which would “resolve [the] circuit disagreement” and “deprive a decision by this Court . . . of any practical significance.”³

The Commission “respond[ed] to [the] circuit split” in April 2023, once it regained a quorum. Notice, Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254, 28,254, 28,258 (May 3, 2023). It issued a policy statement defining “extraordinary and compelling reasons” for prisoner-filed motions and “agree[ing] with the circuits that authorize a district court to consider non-retroactive changes in the law.”

² U.S. Br. in Opp. 16, *Jarvis v. United States*, No. 21-568 (U.S. Dec. 8, 2021) (“*Jarvis* Opp.”).

³ *Jarvis* Opp. 18; accord U.S. Mem. in Opp. 2, *Watford v. United States*, No. 21-551 (U.S. Dec. 15, 2021); U.S. Mem. in Opp. 2, *Williams v. United States*, No. 21-767 (U.S. Jan. 24, 2022); U.S. Mem. in Opp. 2, *Thacker v. United States*, No. 21-877 (U.S. Feb. 14, 2022).

Id. at 28,258. The Commission explained that it “considered whether the . . . split” “was properly addressed by the Commission” or “by the Supreme Court,” and “was influenced by the fact that on several occasions the Department of Justice successfully opposed Supreme Court review of the issue on the ground that it should be addressed first by the Commission.” *Id.*

Under the new policy statement (known as “(b)(6)”), changes in law (including nonretroactive statutory changes) “may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where” (1) “a defendant received an unusually long sentence,” (2) the defendant “has served at least 10 years of the term of imprisonment,” (3) there is “a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed,” and (4) the court gives “full consideration of the defendant’s individualized circumstances.” U.S.S.G. § 1B1.13(b)(6) (Nov. 1, 2023).

Consistent with longstanding practice, the Commission submitted its amended policy statement to Congress. 88 Fed. Reg. at 28,254; *see* 28 U.S.C. § 994(p). Congress did not disapprove the policy statement, and (b)(6) went into effect on November 1, 2023.

B. Proceedings Below

1. In 2003, Daniel Rutherford—then 22 years old—committed two armed robberies in Philadelphia over five days. App. 12a. A federal jury convicted him of two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); one count of conspiracy to commit Hobbs Act robbery, in violation of § 1951(a); and two counts of using a firearm during a crime of violence, in violation of § 924(c). App. 12a.

The district court sentenced Rutherford to 42.5 years in prison. App. 13a. Section 924(c)’s now-discarded “stacking” provision required the district court to impose a 32-year mandatory minimum: seven years for Rutherford’s “first” § 924(c) conviction and a consecutive 25-year sentence for his “second” one—even though both counts were brought in the same case. App. 13a & n.10. The court imposed an additional 125 months for the robbery conviction. *Id.*

The Third Circuit affirmed Rutherford’s conviction. *United States v. Rutherford*, 236 F. App’x 835 (3d Cir. 2007). Two panel members observed that “Rutherford’s 42-year sentence” “would be unthinkable in many state systems for these underlying facts.” *Id.* at 845 (Ambro, J., concurring, joined by McKee, J.). “By prosecuting Rutherford at the federal level,” Judge Ambro wrote, “the Federal Government has effectively incapacitated [him] for the remainder of his adult life.” *Id.* Rutherford (now 43) has spent more than 19 years in prison.

2. Rutherford moved pro se for compassionate release in April 2021. App. 13a-14a. In arguing that his case was “extraordinary and compelling,” he highlighted that he had received an “unusually long sentence” under § 924(c)’s stacking provision “that Congress has since found too punitive.” C.A. App. 76. Had Rutherford been sentenced after the First Step Act, he would have received a 14-year mandatory minimum for his two § 924(c) convictions—18 years fewer than the 32-year minimum he received in 2006.⁴

⁴ Rutherford’s two § 924(c)(1) counts were for brandishing a firearm. *See Rutherford*, 236 F. App’x at 845 (Ambro, J., concurring). Today, that violation triggers a seven-year mandatory minimum, 18 U.S.C. § 924(c)(1)(A)(ii), and the penalties for both counts run consecutively, *id.* § 924(c)(1)(D)(ii).

App. 13a. He noted that he had completed more than 50 educational courses and received only two minor infractions in the past decade—arguing that those factors “could be considered” “in tandem with other factors” to create an “extraordinary and compelling reason[]” for relief. C.A. App. 63, 82-83, 98-99. Rutherford also highlighted that he had secured employment upon release, and his mother wrote a letter on his behalf pointing out that his sister had died and left behind five children for whom Rutherford could help care if released. *Id.* at 54-55, 90-92.

Two years later, the district court denied Rutherford’s motion. App. 14a. It based its denial solely on *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021). *Andrews*, decided before the Sentencing Commission issued (b)(6), held that district courts may not consider the First Step Act’s nonretroactive changes to § 924(c) when deciding if a defendant’s circumstances are “extraordinary and compelling.” App. 14a. Because the district court held that *Andrews* foreclosed relief, it did not address whether the 18 U.S.C. § 3553(a) sentencing factors supported a reduction. *Id.* The day after the court ruled, the Commission issued (b)(6).

3. On appeal, the government did not dispute that Rutherford satisfied (b)(6) or argue that his motion failed under the § 3553(a) sentencing factors. But it contended that (1) the Third Circuit could not consider (b)(6) because it went into effect while the appeal was pending; and (2) in any event, (b)(6) exceeded the Commission’s authority because *Andrews* “already construed Section 3582(c)(1)(A)(i) to preclude a change in law from qualifying as an extraordinary and compelling reason for a sentence reduction.” U.S. C.A. Br. 12-15, 40 (Feb. 20, 2024).

The Third Circuit affirmed. It rejected the government’s first argument, holding that it could “properly consider the amended policy statement in the first instance.” App. 19a-25a. And it concluded that addressing the policy statement’s effect on its prior decision in *Andrews* would “serve the interests of judicial efficiency” because that issue was a “purely legal” question of “public importance.” App. 23a-24a.

But the Third Circuit agreed with the government’s second argument and held that (b)(6) was invalid as applied to the First Step Act’s changes to § 924(c). App. 26a-36a. *Andrews*, it said, held that “the non-retroactive change to § 924(c), whether by itself or in combination with other factors, cannot be considered in the compassionate release eligibility context.” App. 32a. And the Commission “may not replace a controlling judicial interpretation of an *unambiguous* statute with its own construction.” App. 33a.

Although *Andrews* had described the phrase “extraordinary and compelling” as “amorphous and ambiguous,” the panel in Rutherford’s case noted that *Andrews* also had found that “allowing the change to § 924(c) to be considered” “does not align with ‘the specific directives [that] Congress’ set forth in the First Step Act.” App. 29a-30a, 35a. And “on retroactivity, the change to § 924(c) is not the least ambiguous.” App. 33a-34a. So “the amended Policy Statement conflict[ed] with *Andrews*,” and “*Andrews* controls.” App. 36a. The court thus held that considering § 924(c)’s changes “conflicts with the will of Congress, and thus [(b)(6)] cannot be considered in determining a prisoner’s eligibility for compassionate release.” App. 29a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND PERMANENT CIRCUIT SPLIT

Ten circuits have split 6-4 on the question presented. There is no chance the conflict will resolve itself—the court below rejected the Commission’s attempt “to respond to” “[the] circuit split.” 88 Fed. Reg. at 28,258. The deep division among the courts of appeals will therefore persist until this Court decides the question presented, which it should do now.

For people like Rutherford, the question presented could make the difference between dying in prison and decades of freedom. But as it stands, access to relief depends on where a person is sentenced. Because Rutherford was sentenced in Pennsylvania, he is categorically barred from presenting a full picture of his circumstances—and faces decades more in prison. Had he been sentenced in California, Oklahoma, or any one of the 24 states on the other side of the circuit conflict, he might already be free.

A. The First, Fourth, Ninth, And Tenth Cir- cuits Allow Sentencing Courts To Consider Nonretroactive Changes In Law

The judgment below conflicts with decisions in four federal circuits.

The Ninth Circuit’s decision in *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022), is illustrative. There, after surveying the split, the court “join[ed] the First, Fourth, and Tenth circuits” in finding “no textual basis for precluding district courts from considering non-retroactive changes in sentencing law” “in combination with other factors particular to the individual defendant.” *Id.* at 1095-98. And it rejected the contrary views of circuits like the Third, Sixth, Seventh, and Eighth. *Id.*

Congress, the Ninth Circuit noted, “only placed two limitations directly on extraordinary and compelling reasons: the requirement that district courts are bound by the Sentencing Commission’s policy statement” and “the requirement that ‘rehabilitation alone’ is not extraordinary and compelling.” *Id.* at 1098 (cleaned up). “Neither of these rules” “wholly exclude[s] the consideration of any” particular factor “in combination with other[s].” *Id.* To the contrary, “Congress has never acted to wholly exclude the consideration of any one factor.” *Id.* So “[t]o hold that district courts cannot consider non-retroactive changes in sentencing law would be to create categorical bar against a particular factor, which Congress itself has not done.” *Id.* The Ninth Circuit declined to create such a bar, so district courts in that circuit are free to consider nonretroactive changes in sentencing law when deciding compassionate-release motions.

The First, Fourth, and Tenth Circuits have reached the same conclusion. See *United States v. Ruvalcaba*, 26 F.4th 14, 25 (1st Cir. 2022); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021). The Fourth Circuit recently reiterated its position. See *United States v. Davis*, 99 F.4th 647, 658 (4th Cir. 2024) ((b)(6) “confirm[s] and amplif[ies] this Court’s earlier ruling” “that district courts [may] consider . . . [n]onretroactive changes in law”). These circuits, too, have found “no textual support for concluding that [nonretroactive] changes in the law may never constitute part of a basis for an extraordinary and compelling reason.” *Ruvalcaba*, 26 F.4th at 26; see *McGee*, 992 F.3d at 1047 (“Congress chose not to afford relief to *all* defendants [sentenced] . . . prior to the First Step Act But nothing in . . . the First Step

Act indicates that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i) to *some* of those defendants.”).

Aside from the Fourth Circuit—the first to address this question—judges in each of these circuits have acknowledged the conflict on the issue. *See, e.g., Chen*, 48 F.4th at 1096 (“[C]ircuits are split concerning this issue.”); *Ruvalcaba*, 26 F.4th at 24 (“[C]ourts of appeals have come to . . . different conclusion[s].”); *United States v. Wesley*, 78 F.4th 1221, 1229 n.5 (10th Cir. 2023) (Rossman, J., dissenting from denial of rehearing en banc) (“[f]our of our sister circuits reject the ability of district courts to consider non-retroactive changes in the law,” a view “more narrow[]” “than . . . our own”).⁵

B. The Third, Fifth, Sixth, Seventh, Eighth, And D.C. Circuits Forbid Compassionate Release Based Even Partly On Nonretroactive Changes In Law

The Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, by contrast, forbid district courts from considering nonretroactive changes in law when deciding whether extraordinary and compelling reasons exist.

⁵ In a case involving a decisional change in law—as opposed to a statutory change—the Fifth Circuit recently agreed with this group of circuits. *See United States v. Jean*, 108 F.4th 275, 288, 290 (5th Cir. 2024) (acknowledging the “circuit split” over whether “non-retroactive changes in the law” may be considered), *en banc petition pending*, No. 23-40463 (5th Cir. Sept. 18, 2024). A subsequent panel, however, disagreed with *Jean*, found that *Jean* did not apply to statutory changes in law, and held that the First Step Act’s nonretroactive changes may never be considered. *See United States v. Austin*, --- F.4th ---, 2025 WL 78706, at *2-3 (5th Cir. Jan. 13, 2025).

The en banc Sixth Circuit, for example, held (9-7) that “[n]onretroactive legal developments,” whether “considered alone or together with other factors, cannot amount to an ‘extraordinary and compelling reason’ for a sentence reduction.” *United States v. McCall*, 56 F.4th 1048, 1065-66 (6th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2506 (2023). In the majority’s view, permitting consideration of nonretroactive legal changes would permit “defendants” to “use compassionate release as an end run around Congress’s . . . retroactivity decisions.” *Id.* at 1059 (cleaned up).⁶ The court acknowledged that “the phrase ‘extraordinary and compelling’ does little to illuminate the specific *type* of unique or rare reason that might justify relief.” *Id.* at 1055. But drawing on “background principles” of finality and nonretroactivity, it held that the phrase excluded “prospective changes in federal sentencing law” because those changes are an “expected outcome in our legal system,” and “what is expected cannot be extraordinary.” *Id.* at 1055-56.

The Sixth Circuit found that Congress had “carefully delineated between retroactive and nonretroactive changes to criminal penalties” in the First Step Act. *Id.* at 1057. “[T]he balance Congress struck would come to naught,” the court reasoned, if district courts

⁶ *McCall* “involve[d] a nonretroactive judicial decision, rather than a nonretroactive statute,” but the en banc court saw “no reason to take a different approach” to the two types of law changes. 56 F.4th at 1057. The Sixth Circuit has reached the same conclusion in many cases involving the First Step Act’s nonretroactive changes. *See, e.g., United States v. Jarvis*, 999 F.3d 442, 445-46 (6th Cir. 2021); *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021); *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021). *McCall* and its dissents offer the most in-depth discussion of the issue.

could consider nonretroactive changes in law when deciding whether a defendant is eligible for compassionate release. *Id.*

The Third, Seventh, Eighth, and D.C. Circuits have held the same. See *Andrews*, 12 F.4th at 260-61 (3d Cir.); *United States v. Thacker*, 4 F.4th 569, 573-74 (7th Cir. 2021); *United States v. Crandall*, 25 F.4th 582, 585 (8th Cir. 2022); *United States v. Jenkins*, 50 F.4th 1185, 1198-99 (D.C. Cir. 2022). These circuits agree that considering the First Step Act’s changes “runs headlong into Congress’s judgment that the unamended [§ 924(c)] remains appropriate for previously sentenced defendants.” *Jenkins*, 50 F.4th at 1199; accord *Thacker*, 4 F.4th at 574; *Andrews*, 12 F.4th at 261; *Crandall*, 25 F.4th at 585. The Fifth Circuit, after taking the same view in unreported decisions, recently joined this side of the split in a precedential decision. See *Austin*, 2025 WL 78706, at *1-3.⁷

Each of these circuits, like the Third Circuit below, has acknowledged that “the courts of appeals are split over whether the First Step Act’s nonretroactive changes” may be considered in the extraordinary-and-compelling analysis. App. 8a. See also *Jean*, 108 F.4th at 279 (“appellate courts [have] split on whether district courts could consider non-retroactive changes in the law”); *Jenkins*, 50 F.4th at 1198 (“The circuits have split”); *Crandall*, 25 F.4th at 585 (“[T]here are conflicting decisions in the circuits.”); *Thacker*, 4 F.4th at 575 (“courts have come to principled and . . . different conclusions” “across the country”); *McCall*, 56 F.4th at

⁷ As noted *supra* p. 14 n.5, the Fifth Circuit distinguished a previous panel decision (*Jean*)—which had sided with the other side of the split—and limited *Jean* to decisional changes in law, but not statutory changes in law. See 2025 WL 78706, at *2-3.

1065 (“we cannot reconcile th[e] approach” of the “Fourth,” “First, Ninth, and Tenth Circuits” with the “text of the compassionate-release statute”); *id.* at 1070 n.4 (Moore, J., dissenting) (“The majority’s decision puts us in conflict with these courts and further entrenches the circuit split on this issue.”).

C. The Circuit Conflict Will Persist Until This Court Resolves It

The Commission issued (b)(6) “to respond to [the] circuit split.” 88 Fed. Reg. at 28,258. But the decision below cemented the split. The Third Circuit held that (b)(6) “may not replace a controlling judicial interpretation” of the compassionate-release statute. App. 33a (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263, 2265 (2024); other citations omitted). That ruling confirms that (b)(6) will not harmonize the circuits. Circuits like the Third will continue to hew to their interpretation of the statute. *See also Austin*, 2025 WL 78706, at *2 (“the Commission ‘does not have the authority to amend the statute we construed’”) (citation omitted). The circuits with which the Commission agreed also have no basis to change course—they already have construed the statute to permit what (b)(6) allows. *See, e.g., Davis*, 99 F.4th at 658. So the split will persist until this Court resolves it.

D. The Split Produces Arbitrary Geographic Disparities

The practical effect of the circuit split is that access to life-changing relief turns on geographic happenstance. Consider Rutherford: Because he was sentenced in Philadelphia, Rutherford’s district court must ignore the fact that he is serving a sentence that would be decades shorter today (and one the panel reviewing his direct appeal described as “unthinkable”). Had he been sentenced 100 miles away in Baltimore, a district court could consider that fact.

And that could well make all the difference. Many prisoners similarly situated to Rutherford—but sentenced in other states—have obtained relief. For example, in December 2024, a district court in Oklahoma granted a sentence reduction to Leslie Barkley. *United States v. Barkley*, 2024 WL 5233183, at *4-6 (N.D. Okla. Dec. 27, 2024). Barkley served 20 years of a 519-month sentence (Rutherford has served 19 years of a 509-month sentence); would have received an 18-year-lower mandatory minimum sentence for his two stacked § 924(c) sentences (just like Rutherford); and has demonstrated a strong record of rehabilitation with minimal disciplinary infractions (just like Rutherford). *Id.* Barkley could obtain relief based on this combination of factors, because he was sentenced in Oklahoma; Rutherford could not, because he was sentenced in Philadelphia.⁸

This geographic disparity is arbitrary and unfair. Indeed, it is precisely the type of problem Congress created the Sentencing Commission to resolve—by announcing uniform national standards. But the Third Circuit has guaranteed that the disparity will persist until this Court decides which approach is correct.

⁸ See also, e.g., *United States v. Turner*, 706 F. Supp. 3d 562, 565 (E.D. Va. 2023) (describing a previous order’s grant of sentence reduction to a defendant who received a 32-year mandatory minimum for two § 924(c) stacked charges); *United States v. Smith*, 538 F. Supp. 3d 990, 999-1001 (E.D. Cal. 2021) (granting sentence reduction based in part on two stacked § 924(c) charges); *United States v. Garner*, 2024 WL 4068765, at *3 (S.D. Tex. Sept. 5, 2024) (same); *United States v. Franklin*, 2024 WL 4295912, at *2-3 (S.D. Fla. Sept. 18, 2024) (same); *United States v. Bell*, 2024 WL 3849533, at *5-6 (D. Md. Aug. 16, 2024) (same).

E. Additional Percolation Serves No Purpose

The issue has been exhaustively ventilated. At least 32 precedential appellate decisions (when including those addressing decisional-law changes, which employ the same reasoning) have analyzed whether courts may ever consider changes in law,⁹ and dozens more nonpublished opinions have addressed the issue.

The deep judicial disagreement has been remarkable. The Sixth Circuit produced six dueling published opinions in a single year—creating an “intractable” intra-circuit split that “render[ed] the law on the issue . . . unknowable,” *McCall*, 20 F.4th at 1116 (Kethledge, J., dissenting), and leading to a closely divided en banc decision, *see McCall*, 56 F.4th at 1050; *id.* at 1066 (Moore, J., dissenting); *id.* at 1074 (Gibbons, J.,

⁹ See **1st Cir.:** *Ruvalcaba*, 26 F.4th 14; *United States v. Canales-Ramos*, 19 F.4th 561 (2021); **3d Cir.:** *United States v. Rutherford*, 120 F.4th 360 (2024) (App. 1a-36a); *United States v. Stewart*, 86 F.4th 532 (2023); *Andrews*, 12 F.4th 255; **4th Cir.:** *Davis*, 99 F.4th 647; *McCoy*, 981 F.3d 271; **5th Cir.:** *Austin*, 2025 WL 78706; *Jean*, 108 F.4th 275; *United States v. McMaryion*, 64 F.4th 257 (2023), *withdrawn and superseded by United States v. McMaryion*, 2023 WL 4118015 (June 22, 2023); **6th Cir.:** *McCall*, 56 F.4th 1048 (en banc) (Nalbandian, J.); *United States v. McKinnie*, 24 F.4th 583 (2022); *United States v. McCall*, 20 F.4th 1108 (2021) (panel decision) (Moore, J.); *United States v. Hunter*, 12 F.4th 555 (2021); *Jarvis*, 999 F.3d 442; *Wills*, 997 F.3d 685; *United States v. Owens*, 996 F.3d 755 (2021); *Tomes*, 990 F.3d 500; **7th Cir.:** *United States v. Williams*, 65 F.4th 343 (2023); *United States v. Peoples*, 41 F.4th 837 (2022); *King*, 40 F.4th 594; *United States v. Brock*, 39 F.4th 463 (2022); **8th Cir.:** *United States v. Rodriguez-Mendez*, 65 F.4th 1000 (2023); *United States v. Taylor*, 28 F.4th 929 (2022) (per curiam); *Crandall*, 25 F.4th 582; *United States v. Loggins*, 966 F.3d 891 (2020); **9th Cir.:** *Roper*, 72 F.4th 1097; *Chen*, 48 F.4th 1092; **10th Cir.:** *United States v. Maumau*, 993 F.3d 821 (2021); *McGee*, 992 F.3d 1035; **D.C. Cir.:** *United States v. Wilson*, 77 F.4th 837 (2023), *cert. denied*, 144 S. Ct. 1111 (2024); *Jenkins*, 50 F.4th 1185.

dissenting). The Fifth Circuit has also issued at least six decisions pointing in different directions on the issue.¹⁰ There have been numerous dissenting or concurring opinions across the circuits disagreeing over the issue.¹¹ And the Seventh Circuit has acknowledged “serious arguments” that its previous decisions were inconsistent with this “Court’s decisions [that] have repeatedly rejected . . . judicially imposed categorical bars on what district courts may consider at sentencing.” *Williams*, 65 F.4th at 348-49.

These dueling opinions have drawn many calls for this Court’s review. The Seventh Circuit noted that, although “[t]he Supreme Court has not weighed in on th[e] disagreement,” “the issue is teed up” and “the Court (we hope) will address it soon.” *Id.* Nearly half of the en banc Sixth Circuit acknowledged that the “entrenche[d] . . . circuit split” will not resolve “until the Supreme Court takes [it] up.” *McCall*, 56 F.4th at

¹⁰ Compare *Jean*, 108 F.4th at 285-90, with *Austin*, 2025 WL 78706, at *1-3; *United States v. McMaryion*, 64 F.4th 257 (2023), withdrawn and superseded by 2023 WL 4118015 (5th Cir. June 22, 2023); *United States v. Martinez*, 2024 WL 658952, at *1 (5th Cir. Feb. 16, 2024) (per curiam); *United States v. Cardenas*, 2024 WL 615542, at *2-3 (5th Cir. Feb. 14, 2024) (per curiam); *United States v. Elam*, 2023 WL 6518115, at *2 (5th Cir. Oct. 5, 2023) (per curiam).

¹¹ See, e.g., *Jean*, 108 F.4th at 291 (Smith, J., dissenting); *Jarvis*, 999 F.3d at 446 (Clay, J., dissenting); *Owens*, 996 F.3d at 764 (Thapar, J., dissenting); *Jenkins*, 50 F.4th at 1208 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment); *Maumau*, 993 F.3d at 838 (Tymkovich, J., concurring); *Taylor*, 28 F.4th at 931 (Kelly, J., concurring) (“Had this case been decided [before *Crandall*, 25 F.4th 582], I would have voted to reverse and remand. In my view, sentence disparities such as those created by amendments to § 924(c) are properly considered as part of an individualized assessment of . . . extraordinary and compelling reasons . . .”).

1070 n.4 (Moore, J., dissenting). And Judge Readler recently commented that “the Supreme Court probably will, at some point, take these cases and resolve the issue.” Oral Arg. at 6:28-6:35, *United States v. Bricker*, No. 24-3286 (6th Cir. Oct. 31, 2024)¹²; see *id.* at 59:09-59:11 (“I assume this issue is eventually going to go the Supreme Court.”).

II. THE DECISION BELOW IS INCORRECT

The Third Circuit erroneously created a categorical limit on a sentencing court’s discretion to consider information—disparities created by changes in law—that Congress itself never legislated to create.

District courts always have had “wide discretion in the sources and types of evidence used” in sentence-modification proceedings. *Concepcion v. United States*, 597 U.S. 481, 486 (2022). They “historically have exercised this broad discretion to consider all relevant information,” including “intervening changes of law,” “consistent with their responsibility” to consider “the whole person before them.” *Id.* at 491, 500. “Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.” *Id.* at 491.

Accordingly, this Court has repeatedly rejected “judicially imposed categorical bars on what district courts may consider at sentencing.” *Williams*, 65 F.4th at 349 (collecting cases). And it has repeatedly directed courts not to find such limits in “congressional silence.” *Kimbrough*, 552 U.S. at 103; see *Dean v. United States*, 581 U.S. 62, 68-71 (2017); *Rodriguez*

¹² See https://www.opn.ca6.uscourts.gov/internet/court_audio/audio/10-31-2024%20-%20Thursday/24-3286%2024-3289%2024-5182%20USA%20v%20Jason%20Bricker%20et%20al.mp3.

v. United States, 480 U.S. 522, 524-26 (1987) (per curiam). That is because “Congress is not shy about placing such limits.” *Concepcion*, 597 U.S. at 491, 494-95 (collecting examples of “express” limits).

The Third Circuit violated these principles by creating a categorical limit based primarily on implications drawn from the First Step Act. Its limit has no basis in the text of the compassionate-release statute, the First Step Act, or any other statute. This Court should therefore grant certiorari and reverse.

A. No Statutory Text Forbids Courts From Considering Nonretroactive Changes In Sentencing Law

1. Text. Since 1984, Congress has permitted courts to reduce sentences when “extraordinary and compelling reasons” justify relief. 18 U.S.C. § 3582(c)(1)(A)(i). At the time of enactment, “extraordinary” meant “[o]ut of the ordinary.” *Extraordinary*, *Black’s Law Dictionary* 527 (5th ed. 1979). And “[e]xtraordinary circumstances” encompassed “[e]xtenuating circumstances,” *Extraordinary Circumstances*, *id.*, which in turn described circumstances that call for “reduce[d] . . . punishment,” *Extenuating Circumstances*, *id.* at 524. “Compelling” meant “calling for examination, scrutiny, consideration, or thought.” *Compelling*, *Webster’s Third New International Dictionary* 463 (1981).

Nothing in this text precludes courts from considering changes in law. The words Congress chose are “comprehensive and flexible.” *Extraordinary*, *Black’s Law Dictionary* 527. And they can encompass a “combination of circumstances,” *Extraordinary*, *Webster’s Third New International Dictionary* 807, particularly where, as here, they modify a plural object like “reasons.” They do not, by themselves, impose

categorical limits: to the contrary, the “very nature of ‘extraordinary circumstances’” “makes it impossible to anticipate and define every situation that might” qualify. *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). Congress’s flexible language makes sense: “judges are not soothsayers,” *Jenkins*, 50 F.4th at 1208 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment), and “it is impossible to package all ‘extraordinary and compelling’ circumstances into” a finite set of “neat boxes,” *United States v. Rodriguez*, 451 F. Supp. 3d 392, 397-98 (E.D. Pa. 2020).

2. Context. At the same time, Congress showed that it knew how to speak clearly when it sought to set limits on information a court may consider. In 28 U.S.C. § 994(t), it directly addressed the meaning of the phrase “extraordinary and compelling reasons” and placed only one limit on that phrase: “[r]ehabilitation of the defendant alone” is insufficient.

Not only does § 994(t) show that Congress knew how to speak clearly when it wanted to exclude topics from consideration; it also underscores that courts may consider a *combination* of circumstances. Even when Congress expressly prohibited a consideration, it chose not to do so categorically. Instead, it provided only that “[r]ehabilitation . . . *alone*” does not suffice—meaning it may be considered in conjunction with other factors.

The Third Circuit fashioned a stricter limit than Congress imposed when Congress spoke expressly. There is no basis for doing so. Congress was clear in its disdain for rehabilitation as a valid sentencing consideration, *see Tapia v. United States*, 564 U.S. 319, 324-26 (2011)—far clearer than it was about changes in law. Yet Congress *still* allowed courts to consider rehabilitation alongside other factors.

It would be odd to conclude that Congress intended to categorically exclude changes in law—without ever mentioning them—when it did not do so for rehabilitation.

3. History and Purpose. Allowing district courts to consider disparities created by law changes as one factor among many also “fits seamlessly with the history and purpose of the compassionate-release statute.” *Ruvalcaba*, 26 F.4th at 26. Congress enacted § 3582(c)(1)(A) to serve as a “safety valve” when “the defendant’s circumstances are so changed . . . that it would be inequitable to continue the confinement.” S. Rep. No. 98-225, at 121, *reprinted in* 1984 U.S.C.C.A.N. 3304. Congress contemplated that those “changed circumstances” would include “cases in which . . . extraordinary and compelling circumstances justify a reduction of an unusually long sentence.” *Id.* at 55, *reprinted in* 1984 U.S.C.C.A.N. 3238. *Cf. Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Crim. L. of the S. Comm. on the Judiciary*, 98th Cong. 95 (1983) (statement of John M. Walker, Jr., Treasury Dep’t) (prepared testimony that forthcoming compassionate-release provision would allow reductions for “unjustifiably long sentences” in light of “a change in the circumstances that originally justified imposition of a particular sentence”).

This approach also tracks case law—before and after the Sentencing Reform Act—recognizing that unforeseeable developments creating sentence disparities can justify compassionate release. For example, under a precursor to the compassionate-release statute, 18 U.S.C. § 4205(g) (1976), one court granted compassionate release because post-sentence legal developments caused a defendant to serve “a significantly

longer sentence” than his codefendants. *United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978). Decades later, this Court explained that the compassionate-release statute likewise “provides a mechanism for relief” if a “district court’s failure to anticipate developments that take place after the first sentencing” produces an “unfairness to the defendant.” *Setser v. United States*, 566 U.S. 231, 242-43 (2012) (Scalia, J.) (cleaned up).

Before and after the Sentencing Reform Act, this Court has also stated—in the context of motions raising untimely habeas issues under Federal Rule of Civil Procedure 60(b)(6)—that the phrase “extraordinary circumstances” may encompass “change[s] in governing law.” *Polites v. United States*, 364 U.S. 426, 433 (1960); *see also Buck v. Davis*, 580 U.S. 100, 123, 126 (2017) (post-judgment change in law constituted an “extraordinary circumstance” under Rule 60(b)(6)); *Kemp v. United States*, 596 U.S. 528, 540 (2022) (Sotomayor, J., concurring) (“settled precedents” establish that a “change in controlling law” can constitute an “extraordinary circumstance[.]”).

Finally, Congress enacted the compassionate-release statute against the backdrop of a “longstanding tradition in American law” that courts in sentence-modification proceedings may “consider the ‘fullest information possible,’” including “nonretroactive intervening changes of law.” *Concepcion*, 597 U.S. at 486, 493 (citation omitted). “That discretion . . . is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.” *Id.* at 491. Yet aside from prohibiting “[r]ehabilitation . . . alone,” 28 U.S.C. § 994(t), Congress set no express limit on the phrase “extraordinary and compelling.”

B. The Third Circuit’s Reasoning Lacks Merit

The Third Circuit invoked two sources of law to justify the limit it imposed: the phrase “extraordinary and compelling” and the “will of Congress,” as discerned from prospectivity language in the 2018 First Step Act. App. 29a. Neither source supports the Third Circuit’s limit.

1. The Third Circuit concluded that the First Step Act’s changes “cannot be a basis for compassionate release” because Congress’s “ordinary practice is to apply new penalties” prospectively, and what is “ordinary . . . cannot also be” “extraordinary.” App. 18a-19a. But that argument improperly isolates a single factor in a multi-factor analysis.

The phrase “extraordinary and compelling reasons” contemplates that a *group* of circumstances can, together, take a case out of the ordinary—even if individual factors are ordinary. For example, it is ordinary to get old. And it is ordinary to get sick. But age or health can combine with other factors (like serving a lawful sentence) to create an extraordinary and compelling reason to grant a sentence reduction. The words “extraordinary and compelling” invite courts to “‘assess interactions among a myriad of factors’ as part of an ‘individualized consideration of a defendant’s circumstances.’” *Jenkins*, 50 F.4th at 1208 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Ruvalcaba*, 26 F.4th at 27).

In context-specific inquiries like this one, it is a “persistent error” “to ask whether” a single circumstance “by itself passes some threshold—to put evidence in compartments and ask whether each compartment suffices.” *United States v. Vaughn*, 62 F.4th 1071, 1072 (7th Cir. 2023). That sort of “divide-and-conquer

analysis” ignores that “the whole is often greater than the sum of its parts,” “especially when the parts are viewed in isolation.” *District of Columbia v. Wesby*, 583 U.S. 48, 60-61 (2018).

The Third Circuit committed a similar error here. And its approach, if applied consistently, would destroy settled bases for compassionate release. For example, the Commission permits sentence reductions when an inmate is 65 or older, has a serious age-related illness, and has served 75% of a sentence—even though each of those factors could be called “ordinary” in isolation. U.S.S.G. § 1B1.13(b)(2) (Nov. 1, 2023). Under the Third Circuit’s approach—isolating a factor and asking if it is ordinary in the abstract—this basis for relief (and others) would be impermissible. *See also id.* § 1B1.13(b)(1) (terminal illness).

2. The Third Circuit also relied on the First Step Act—which applied the law change Rutherford invoked prospectively. But nothing in the First Step Act mentions—let alone expressly limits—what information a court may consider when deciding a compassionate-release motion.

a. The First Step Act has two relevant nonretroactivity provisions: § 401(c) and § 403(b). Section 401(a) reduces certain drug-related mandatory minimums, while § 403(a) eliminates the practice of “stacking” § 924(c) charges. 132 Stat. 5220-22. Sections 401(c) and 403(b) apply these changes “to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of the enactment.” *Id.* at 5221-22. This text says nothing about compassionate release.

b. There is no “implicit directive” in that “congressional silence.” *Kimbrough*, 552 U.S. at 103; *see also*

Jama v. Immigration & Customs Enft., 543 U.S. 335, 341 (2005) (“we do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply”). Indeed, this Court has repeatedly rejected similar efforts to read limitations into sentencing statutes based on silent implications from Congress. In *Rodriguez v. United States*, for example, the Court rejected an argument that a newer statute setting penalties for crimes committed on bail impliedly limited an earlier statute—which granted discretion to suspend sentences—because “[n]othing in the language” of the newer law addressed the question. 480 U.S. at 524-25. In *Dean v. United States*, the Court rejected a limit on general discretion to consider information when fashioning sentences under § 3553(a)—based on supposed purposes of § 924(c)’s mandatory-minimum requirements—because the second statute said nothing about the first one. 581 U.S. at 68-71. And in *Concepcion v. United States*, the Court rejected the argument that First Step Act limited information a district court could consider at resentencing—including “nonretroactive intervening changes of law”—because “Congress is not shy about placing such limits” “express[ly]” and had not done so in the First Step Act. 597 U.S. at 493-94.

So too here. Congress knows how to limit the meaning of “extraordinary and compelling.” It did so in § 994(t), which says that “[r]ehabilitation . . . alone” may not suffice. But the First Step Act “says nothing about” what justifies relief under the compassionate-release statute, “much less about what information a court may consider” in a compassionate-release analysis. *Dean*, 581 U.S. at 69. To infer from the First Step Act “that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor,

which Congress itself has not done.” *Chen*, 48 F.4th at 1098.

c. The Third Circuit also improperly relied on the “will of” the 2018 Congress in passing the First Step Act—despite acknowledging that the 2018 Congress did not change the operative text of § 3582(c)(1)(A)(i) and thus left its meaning intact. App. 29a. Even assuming that it is possible to discern the will of an entire Congress, the intent of the 2018 Congress is irrelevant here. What matters is the meaning of “extraordinary and compelling” as it was enacted in 1984, not the unexpressed intent of the 2018 Congress sitting decades later. See *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (“[p]ost-enactment” statements are not “legitimate tool[s] of statutory interpretation”); *Public Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989) (same for “interpretation[s] given by one Congress . . . to an earlier statute”).

d. Finally, the Third Circuit’s ruling rests on a false equivalency: it is not the case that considering law changes (as one of several case-specific factors) would override the First Step Act’s nonretroactivity directives. There is a “salient difference between” “automatic” eligibility for “an entire class of sentences[,] on the one hand,” and permitting courts to consider law changes as one factor among many, on the other. *Chen*, 48 F.4th at 1100 (cleaned up). “For example, if § 403(a)’s changes to § 924(c) stacked sentences had been retroactive, every defendant that received a stacked sentence would be automatically eligible for resentencing under the new law.” *Id.* But “allowing defendants to petition for compassionate release, based in part on the sentencing disparities created by § 403(a), does not automatically make every defendant who received a stacked sentence eligible.” *Id.*

At bottom, the Third Circuit’s ruling assumes that § 401(c) and § 403(b) of the First Step Act contain words they do not have—imposing a silent limit on the information courts adjudicating compassionate-release motions may consider. But Congress did not set such a limit in the First Step Act. And it is not a court’s job to “elaborate unprovided-for exceptions to a text” or “supply words . . . that have been omitted.” Antonin Scalia & Bryan A. Garner, *Reading Law* 93 (2012).

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

As the court below acknowledged, this case presents “a question of public importance” that “will . . . affect[]” “many people in prison.” App. 24a. The Sentencing Commission has estimated that more than 6,000 people are serving sentences under schemes that the First Step Act prospectively altered.¹³ In fiscal year 2021 alone, courts granted 198 motions highlighting stacked § 924(c) penalties or enhanced drug penalties;¹⁴ and from fiscal year 2020 to fiscal year 2024, courts granted 521 such motions.¹⁵ Hundreds more of these motions have been denied in the same period.

¹³ See U.S. Sent’g Comm’n, Estimate of the Impact of Selected Sections of S. 1014, The First Step Act Implementation Act of 2021, at 1 (Oct. 2021), <https://perma.cc/8VC8-25A7>.

¹⁴ See U.S. Sent’g Comm’n, Compassionate Release Data Report Fiscal Years 2020 to 2022, Table 12 (Dec. 2022), <https://perma.cc/7Y7M-866C>.

¹⁵ See *id.*, Tables 10, 12, 14; U.S. Sent’g Comm’n, Compassionate Release Data Report Fiscal Year 2023, Table 10 (Mar. 2024), <https://perma.cc/C3SE-YQTC>; U.S. Sent’g Comm’n, Compassion-

To be sure: not every defendant subject to a changed penalty regime will obtain relief under § 3582(c)(1)(A)(i). Courts have discretion to deny relief by deciding that a person’s individualized circumstances are not extraordinary, notwithstanding a law change, *see, e.g., United States v. Moody*, 115 F.4th 304, 312 (4th Cir. 2024), or that the § 3553(a) factors disfavor relief, *see, e.g., United States v. D’Angelo*, 110 F.4th 42, 53 (1st Cir. 2024). And under the Sentencing Commission’s policy statement, defendants must clear several additional hurdles: they must have served at least 10 years of their sentence; show that they are serving an unusually long sentence; point to a gross disparity between the sentence they received and the one they would be likely to receive today; and establish that all of their individualized circumstances, together, warrant relief. *See* U.S.S.G. § 1B1.13(b)(6) (Nov. 1, 2023).

But until the conflict is resolved, thousands of prisoners are able to access life-changing relief under a standard unavailable to thousands of others. *See also supra* pp. 17-18. As the government recently represented in another case in which this Court granted review, “a legal question that could affect over 100” cases “each year” “is undoubtedly important” enough for certiorari. U.S. Cert Reply 7, *United States v. Taylor*, No. 20-1459 (U.S. June 7, 2021); *see United States v. Taylor, cert. granted*, 141 S. Ct. 2882 (2021). This case—which affects an order of magnitude more cases—is at least as important.

ate Release Data Report Preliminary Fiscal Year 2024 Cumulative Data through 4th Quarter, Table 10 (Oct. 2024), <https://perma.cc/34HQ-BFTM>.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The question was briefed and passed on below. As the Third Circuit acknowledged, it formed the sole basis for decision: “[T]he District Court denied Rutherford’s motion, holding that *Andrews* foreclosed his argument that the First Step Act could constitute an extraordinary and compelling reason.” App. 14a. The Third Circuit affirmed on the same purely legal ground, concluding that “*Andrews* controls” and that, under *Andrews*’ statutory interpretation, “the First Step Act’s change to § 924(c) cannot be considered in the analysis of whether extraordinary and compelling circumstances make a prisoner eligible for compassionate release.” App. 36a. That interpretation is incorrect, and it is cleanly presented here.

Nor do the § 3553(a) sentencing factors present an “alternative ground for affirmance” because they were “neither presented nor passed on below.” *Ayestas v. Davis*, 584 U.S. 28, 47-48 (2018). The courts below did not consider whether the § 3553(a) factors foreclose relief, and the government made no such argument on appeal. Instead, it argued that the discretionary § 3553(a) analysis was not necessary because “Rutherford does not get past the initial threshold” of “set[ting] forth an extraordinary and compelling circumstance.” U.S. C.A. Br. 38. The Third Circuit agreed that the extraordinary-and-compelling standard presented a “threshold eligibility hurdle.” App. 6a.

A reversal clarifying that threshold question could make all the difference for Rutherford. The government did not dispute below that Rutherford meets (b)(6)’s requirements, nor could it: He has served more than 19 years of a 42.5-year sentence the Third

Circuit has described as “unthinkabl[y]” long, and there is a wide gulf between that sentence and the one he would likely receive today.

That the Third Circuit addressed (b)(6)’s validity rather than remand for the district court to do so in the first instance also poses no barrier to review. Appellate courts apply the law in effect when rendering a decision. *See Henderson v. United States*, 568 U.S. 266, 271 (2013). And in any event, the Third Circuit’s holding—and the question presented—turn on the meaning of § 3582(c)(1)’s text, which remains the same after (b)(6). *See* App. 33a (holding that “the [Sentencing] Commission” “plainly ‘may not replace’” the Third Circuit’s previous, “controlling judicial interpretation of an *unambiguous* statute”).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 30, 2025

No.

In the Supreme Court of the United States

MRUGESHKUMAR KUMAR SHAH, PETITIONER,

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Applying the longstanding *Apprendi* rule, this Court in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), held that the Sixth Amendment reserves to juries the determination of any fact underlying a criminal fine. The Court reasoned that “[c]riminal fines, like other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses,” and the allowable amount of a fine “is often calculated by reference to particular facts.” *Id.* at 349.

As two Members of this Court have recognized, “it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order,” and a lower court ruling to the contrary “is worthy of [the Court’s] review.” *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Nevertheless, the Fifth Circuit below held that petitioner must pay tens of thousands of dollars in a criminal restitution penalty, based on facts the jury never found.

The question presented is:

Whether the Sixth Amendment reserves to juries the determination of any fact underlying a criminal restitution order.

PARTIES TO THE PROCEEDINGS

Petitioner Mrugeshkumar Kumar Shah was a defendant and appellant below.

Petitioner's co-defendants at trial were Michael Bassem Rimlawi, Jackson Jacob, Shawn Mark Henry, Iris Kathleen Forrest, Douglas Sung Won, Wilton McPherson Burt, William Daniel Nicholson IV, and Carli Adele Hempel. All of these co-defendants except Nicholson and Hempel were also appellants below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States of America v. Alan Andrew Beauchamp, No. 3:16-cr-516 (Apr. 12, 2021)

United States Court Appeals (5th Cir.):

United States of America v. Mrugeshkumar Kumar Shah, No. 21-10292 (Oct. 2, 2023)

Supreme Court of the United States:

Shawn Mark Henry v. United States, No. 23-716

Jackson Jacob v. United States, No. 23A1059

Michael Bassem Rimlawi v. United States, No. 23A1069

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals and its order denying rehearing en banc (App. 1a-86a) are reported at 95 F.4th 328.

JURISDICTION

The judgment of the court of appeals was entered October 2, 2023. The court of appeals issued a superseding opinion and denied timely petitions for rehearing en banc March 8, 2024. On May 30, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c)(1)(B), provides in relevant part that criminal restitution “shall” be imposed in the full amount of the victim’s loss when “an identifiable victim or victims has suffered a physical injury or pecuniary loss.”

INTRODUCTION

This case presents an important question that has divided Members of this Court and jurists throughout the country: whether the Sixth Amendment reserves to juries the determination of any fact underlying a criminal restitution order. The answer is *yes*.

Applying the longstanding *Apprendi* rule, this Court in *Southern Union Co. v. United States*, 567 U.S. 343 (2012), held that the Sixth Amendment prohibits a court

from ordering a criminal fine based on facts not found by the jury beyond a reasonable doubt. There is no principled reason for a different rule to govern criminal restitution.

Nevertheless, lower courts have resisted that conclusion based on reasoning that Members of this Court, federal court judges, state court judges, and leading criminal law treatises and commentators have said “isn’t well-harmonized with” *Southern Union*, and is “difficult to reconcile with the Constitution’s original meaning.” *E.g., Hester v. United States*, 139 S. Ct. 509, 509-10 (2019) (citations omitted) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); accord LaFave, *Criminal Procedure* § 26.6(c) (“[I]f a judge must impose restitution upon finding loss, a defendant under *Apprendi* * * * should have the right to insist that the government prove that loss beyond a reasonable doubt to a jury.”).

Instead, over multiple powerful dissents, lower courts have clung to their pre-*Southern Union* rulings that judges can find facts underlying criminal restitution orders, and have even read this Court’s silence on the question as tacit approval for such judicial factfinding. Only this Court can correct course now.

The question is recurring and important. While once rare, courts now order restitution in thousands of cases every year. In 2023 alone, federal courts sentenced more than 8,000 criminal defendants to pay more than \$13 billion in restitution. The effects of such massive restitution orders can be profound since inability to pay can result in reincarceration and deprive a defendant of other rights, including the right to carry a firearm, the right to serve on a jury, and the right to vote.

This case presents an ideal vehicle to resolve the question. Petitioner preserved this argument at every stage of the proceedings, and the Fifth Circuit squarely

addressed the issue, holding that it was bound by prior circuit precedent holding that the *Apprendi* rule does not apply to criminal restitution. App. 83a. And the record is clear that the jury never made any of the factual findings underlying the restitution order here.

Indeed, the judicial factfinding in this case illustrates the problems with the lower courts' approach. Adopting the facts set forth in the presentence report, the district court issued a restitution order irreconcilable with the facts found by the jury. The jury convicted petitioner only of charges related to the federal Anti-Kickback Statute, which prohibits physicians from paying or receiving any remuneration for arranging services payable by a *federal* health care program. But the jury rejected charges that petitioner engaged in a conspiracy to make unlawful referrals payable by *private* insurers, which fall outside the Anti-Kickback Statute's reach. The sentencing court, however, ordered petitioner to pay restitution to *private* insurers as the purported "victims." App. 81a-82a. And it did so despite the presentence report's recognition that the only victim of an Anti-Kickback Statute violation—the federal government—suffered no loss as a result of petitioner's conduct. Presentence Investigation Report (PSR) ¶ 111, D. Ct. Dkt. 1194.

Given lower courts' refusal to reengage on this question after *Southern Union*, further percolation is unlikely to result in course correction. This Court should thus grant review to ensure that the right to a jury does not "mean less to people today than it did to those at the time of the Sixth and Seventh Amendment's adoption." *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

STATEMENT

1. Petitioner was a Dallas-area physician who primarily worked out of his self-owned clinic. From 2011 to 2012, petitioner also intermittently provided medical services at Forest Park Medical Center Dallas.

In 2016, the government charged numerous defendants, including the owners and operators of Forest Park, with what it characterized as a scheme to “enrich themselves through out-of-network billing and reimbursement.” App. 100a. The government charged that Forest Park’s owners, operators, and numerous doctors used bribes and kickbacks to steer privately insured patients to the clinic, for whom they could recoup higher out-of-network reimbursement rates. App. 98a-100a.

Though the indictment and trial centered on the owners of Forest Park and other defendant-physicians—who made millions from billing *private* insurers at out-of-network rates—petitioner was swept into the case even though nearly all his referrals involved patients who were not privately insured but rather had medical coverage under the Federal Employees’ Compensation Act (FECA) or similar state workers’ compensation programs. App. 105a. Because the government pays medical costs for FECA beneficiaries on a fixed-fee basis (with no co-pay), the costs it incurred for those patients were the same as they would have been had petitioner performed the procedures at his own clinic rather than refer them to Forest Park. PSR ¶ 111.

The operative indictment included counts under the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, the Travel Act, 18 U.S.C. § 1952, and a conspiracy to violate those statutes. App. 100a-126a. The Anti-Kickback Statute prohibits paying or receiving any remuneration for arranging services payable by a federal health care program. 42 U.S.C. § 1320a-7b(b). It does not cover

privately insured patients. *Id.* The Travel Act prohibits interstate travel with intent to further certain criminal activity; here, an alleged violation of Texas's commercial bribery statute related to kickbacks for privately insured patients. 18 U.S.C. § 1952(a); *see* App. 101a-102a.

2. The jury returned a partial guilty verdict against all defendants. App. 148a-172a. It found that petitioner did not conspire to violate the Travel Act by seeking kickbacks for privately insured patients in violation of Texas's commercial bribery law. App. 150a. But the jury convicted him of violations of the Anti-Kickback Statute and conspiracy to violate the AKS for paying or receiving remuneration for arranging services payable by a federal health care program (FECA). App. 150a-151a, 153a, 156a.

Those Anti-Kickback Statute violations consisted of receiving three payments, totaling \$5,000, for referring FECA beneficiaries to Forest Park. App. 151a, 153a, 156a. The remuneration that petitioner received for these referrals was substantially less than what he would have earned had he performed the procedures at his own clinic, because he would not have had to share the FECA payment. *See* Sent. Tr. 12, D. Ct. Dkt. 1775. As the district court observed at sentencing, petitioner did not “profit[] like some of the other defendants,” who earned millions of dollars from out-of-network reimbursements for privately insured patients. Sent. Tr. 36. Probation and Pretrial Services acknowledged in petitioner's presentence report that referring fixed-fee workers' compensation beneficiaries to Forest Park rather than performing the procedures himself cost the federal government nothing. PSR ¶ 111.

Notwithstanding the jury's determination that petitioner's conviction concerned only referral fees for federally insured patients, the presentence report recommended that the court order petitioner to pay more than \$40,000 in restitution to two *private* insurers under

the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. PSR ¶ 110; *see also* App. 173a. Probation's restitution calculation was not based on any facts found by the jury; indeed, the jury did not convict petitioner of accepting kickbacks for any privately insured patient. Instead, Probation relied on its own assessment of billings for privately insured patients and an analysis by unnamed Probation "agents" who purported to have calculated, without providing any backup, "what the [private] insurance companies would have paid for in-network procedures." PSR ¶ 110.

Petitioner objected to Probation's restitution calculation on the grounds that private insurers cannot be victims of an Anti-Kickback Statute violation and that, in any case, the Sixth Amendment requires the jury to find all facts underlying a restitution order. Sent. Mem. 27-28, D. Ct. Dkt. 1541. At sentencing, the district court adopted Probation's factual findings and calculation without comment, and petitioner timely appealed. Sent. Tr. 37-38.

3. The court of appeals affirmed. App. 1a-85a. It concluded that although the Anti-Kickback Statute does not apply to private insurers, private insurers were "victims" here because they were "within the scope of the conspiracy" and "the MVRA's definition of 'victim' is quite broad." App. 81a. It also rejected petitioner's argument that the Sixth Amendment requires a jury to find facts supporting the allowable amount of restitution as foreclosed by circuit precedent. App. 83a (citing *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014)).

The court of appeals denied rehearing en banc. App. 86a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court’s Sixth Amendment Jurisprudence

A. Like Criminal Fines, A Jury Must Find The Facts Underlying Criminal Restitution

1. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

Since then, the Court has applied this “bright-line rule” to a “variety of sentencing schemes that allowed judges to find facts that increased a defendant’s maximum authorized sentence.” *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012). The Court has thus held that a jury must find any fact necessary to increase the sentencing range under mandatory sentencing guidelines, *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); that a jury must find any fact necessary to establish a statutory minimum, *Alleyne v. United States*, 570 U.S. 99, 116 (2013); that a jury must find any fact necessary to impose a death sentence, *Ring v. Arizona*, 536 U.S. 584, 609 (2002); and, most recently, that a jury must find any fact necessary to increase the statutory maximum and minimum sentences. *Erlinger v. United States*, No. 23-370 (U.S. June 21, 2024), slip op. 11. And, critically, the Court has held that a jury must find any fact necessary to determine the allowable amount of a criminal fine. *Southern Union*, 567 U.S. at 348.

Southern Union controls the question here. In holding that the *Apprendi* rule “applies to sentences of criminal fines,” the Court clarified that the Sixth Amendment governs both custodial and monetary punishments. *Id.* at 346, 348. It explained that it has

“never distinguished one form of punishment from another.” *Id.* at 350. Instead, *Apprendi* and subsequent cases “broadly prohibit judicial factfinding that increases maximum criminal sentences, penalties, or punishments—terms that each undeniably embrace fines.” *Id.* (cleaned up). The Court thus held that facts that increase the allowable amount of monetary penalties must be found by the jury, because “the amount of a fine, like the maximum term of imprisonment * * * is often calculated by reference to particular facts.” *Id.* at 349.

A criminal restitution order is no different. Like a criminal fine, “[t]he purpose of awarding restitution * * * is to mete out appropriate criminal punishment.” *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). And restitution, like a fine, is “calculated by reference to particular facts,” such as “the amount of the defendant’s gain or the victim’s loss.” *Southern Union*, 567 U.S. at 349-50. Under the Mandatory Victims Restitution Act, a sentencing court must impose criminal restitution in the full amount of losses by each victim who was “directly and proximately” harmed by the offense. *See* 18 U.S.C. § 3663A(a)(2), (c)(1)(B), 3664(f)(1)(A).

“[B]efore [restitution] may be imposed, the court must identify the ‘victim’ entitled to payment,” which can “become[] more complicated when the offense relates to the interests of the public in general, as do many regulatory offenses.” LaFave, *Criminal Procedure* § 26.6(c). “Once the victim is identified, the court must determine precisely what losses can be considered in measuring the amount of restitution.” *Id.* Those facts determine the mandatory amount of any criminal restitution order, and thus have “the effect of increasing *both* the maximum and minimum sentences” a criminal defendant faces. *Erlinger*, slip op. 11.

In this case, the sentencing court, not the jury, determined these facts. Despite the jury’s determination

that petitioner had obtained improper referral fees only for *federally* insured patients, the sentencing court adopted the presentence report's finding that the "victims" were two *private* insurers. PSR ¶ 110; *see also* App. 81a-82a. Relying on an unspecified analysis by Probation "agents," the sentencing court then calculated restitution based on the amount *private* insurers would have lost using reimbursement rates for privately insured patients. PSR ¶ 110. But the jury found no harm to any private insurer. To the contrary, the jury's verdict *precludes* such a finding because it rejected the only charges against petitioner related to privately insured patients and convicted him under the Anti-Kickback Statute alone. App. 150a. That statute, under the government's own characterization in the indictment, covers only services for which payment may be made under a "Federal health care program." App. 100a-101a; *see* 42 U.S.C. § 1320a-7b(b). Yet the district court imposed restitution based on the court's factfinding about privately insured patients. And the court of appeals approved that restitution order under the mistaken view that because the MVRA is "quite broad," the district court had carte blanche to award restitution to private insurers based on judicial factfinding.

In short, the jury did not find that petitioner victimized any private insurer—the jury rejected such a finding—but the sentencing court nevertheless ordered restitution based on its own finding that private insurers were victims and that they suffered an amount of loss never determined by the jury.

Had the sentencing court considered only the loss to the actual "victim" for Anti-Kickback Statute offenses—the federal government—the allowable restitution amount would have been zero. As Probation acknowledged in petitioner's presentence report, referring fixed-fee workers' compensation beneficiaries

to Forest Park rather than performing the procedures at his own clinic did not affect what the government (or beneficiaries) paid. PSR ¶ 111.

These are the precise circumstances where the *Apprendi* rule reserves factfinding to the jury. “If a judge is prohibited from imposing any restitution at all without first finding some loss, or, if a judge must impose restitution upon finding loss, a defendant under *Apprendi* * * * should have the right to insist that the government prove that loss beyond a reasonable doubt.” LaFave, *supra*, § 26.6(c). Like criminal fines, there is “no principled basis under *Apprendi* for treating [criminal restitution] differently” from other forms of punishment. *Southern Union*, 567 U.S. at 349.

2. Any other view is “difficult to reconcile with the Constitution’s original meaning.” *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). “[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law.” *Southern Union*, 567 U.S. at 353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)). And “as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury.” *Hester*, 139 S. Ct. at 511; *see also* James Barta, *Guarding the Rights of the Accused and Accuser: The Jury’s Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 473 n.111 (2014).

Practice was no different in America before the Founding. As Justice Thomas (joined by Justice Scalia) explained at length in his concurring opinion in *Apprendi*, early American larceny statutes required the value of stolen goods—which set the maximum monetary penalty—to be alleged in the indictment and proved to the jury. *See Apprendi*, 530 U.S. at 502 (Thomas, J.,

concurring); *see also Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (same). As punishment, these statutes typically prescribed criminal restitution to victims rather than a fine payable to the government. *See Barta, supra*, at 474. Massachusetts’s 1785 criminal larceny statute, for example, required actual restitution or a payment of treble damages to the victim upon conviction. *See Act of March 15, 1785*, 1785 Mass. Sess. Laws 263, 264. Courts likewise held that no such restitution could be ordered unless the property’s value was alleged in the indictment and proved to the jury at trial. *See Commonwealth v. Smith*, 1 Mass. 245, 246 (1804).

This well-established understanding of the jury right endured through the Republic’s early years. The Crimes Act of 1790, for example—the very first federal criminal statute—imposed a penalty for certain larceny offenses of “four-fold value of the property so stolen.” 1 Stat. 112, 116. The practice of the time, as the Court explained in *Southern Union*, was consistent with *Apprendi* and required that the value of the stolen goods be alleged in the indictment and proved to the jury. *See* 567 U.S. at 357. Today, the monetary penalty that the Crimes Act prescribed more closely resembles criminal restitution than a fine: the proceeds were to be divided among “the owner of the goods” and the private prosecutor who brought the case. *See* 1 Stat. 116. Thus, not only *Southern Union*’s reasoning, but also the historical examples on which the Court relied, show that the jury right applies to criminal restitution just as it does to criminal fines.

Throughout the nineteenth century, courts continued to hold “that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered.” *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). In *Schoonover v.*

State, 17 Ohio St. 294, 298 (1867), for example, the Ohio Supreme Court explained that when a statute provides for restitution based on “the value of the property stolen,” “unless such value be found in the verdict, the judgment of restitution can not be rendered.” And in *State v. Somerville*, 21 Me. 20, 22 (1842), the Supreme Judicial Court of Maine held that property subject to criminal restitution “must be ascertained from the allegations in the indictment and from the finding of the jury.”

Consistent practice from pre-1789 England through the Civil War thus reflects that the allowable amount of criminal restitution was reserved to the jury at common law. No basis exists in this historical tradition to distinguish criminal restitution from criminal fines for purposes of the Sixth Amendment’s jury right.

B. The Reasoning Underlying The Court Of Appeals Decisions Is Inconsistent And Wrong

Despite this Court’s precedents and the historical treatment of restitution as an issue reserved to the jury, lower courts “have followed one of two analytical paths” to conclude that juries need not find facts supporting restitution. *State v. Robison*, 314 Kan. 245, 249 (2021); accord James Bertucci, *Apprendi-Land Opens its Borders: Will the Supreme Court’s Decision in Southern Union Co. v. United States Extend Apprendi’s Reach to Restitution?*, 58 St. Louis U. L.J. 582 (2014) (discussing the conflicting rationales employed by lower courts).

First, relying on *Apprendi*’s statement that judicial factfinding is prohibited when it increases a penalty beyond a “statutory maximum,” the Fifth Circuit and other courts have concluded that the Mandatory Victims Restitution Act does not set a “statutory maximum” because it requires restitution only for a specific sum—the amount of the victim’s loss. See *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014) (restitution

falls outside *Apprendi* “because no statutory maximum applies to restitution.”); App 83a.

Second, other courts have held that restitution falls outside *Apprendi* based on the supposition that restitution is a civil remedy, not a criminal penalty. Bertucci, *supra*, at 582 (surveying decisions).

As Members of this Court have observed, both rationales are “doubtful” under this Court’s decisions and “difficult to reconcile with the Constitution’s original meaning.” *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

1. The Fifth Circuit and other lower courts holding that criminal restitution is exempt from *Apprendi* because the Mandatory Victims Restitution Act prescribes no statutory maximum are incorrect, as a matter of both precedent and first principles. By its terms, the statute allows (and indeed, requires) restitution only in the amount of the victim’s loss. 18 U.S.C. § 3663A(b). The amount of the victim’s loss is thus the statutory maximum; that is, “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Southern Union*, 567 U.S. at 348 (quoting *Blakely*, 542 U.S. at 303). A restitution order that exceeds the victim’s loss imposes a penalty beyond what the statute permits. *See Lagos v. United States*, 584 U.S. 577, 585 (2018) (holding that a defendant was “not obliged to pay” any amount of restitution exceeding the properly computed loss). Absent further factfinding, therefore, “the statutory maximum for restitution is usually *zero*, because a court can’t award *any* restitution without finding additional facts about the victim’s loss.” *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And because the penalty authorized by statute depends on determination of a fact (the amount of loss), “[t]he Sixth Amendment

reserves to juries [that] determination.” *Southern Union*, 567 U.S. at 346.

That the Mandatory Victims Restitution Act prescribes a specific restitution amount rather than a range makes no difference. Tautologically, a statute that prescribes a *specific* penalty also prescribes the *maximum* penalty. This Court has never limited *Apprendi* to sentencing regimes in which trial courts have sentencing discretion. “To the contrary, *Apprendi*’s ‘core concern’ is to reserve to the jury ‘the determination of facts that warrant punishment for a specific statutory offense.’” *Southern Union*, 567 U.S. at 349 (quoting *Ice*, 555 U.S. at 170). It applies to any “‘fact that increases’ a defendant’s exposure to punishment.” *Erlinger*, slip op. 10 (quoting *United States v. Haymond*, 588 U.S. 634, 642 (2019)). There is no doubt that if Congress imposed a similar determinate scheme for custodial sentences (for example, one requiring one day of imprisonment for each dollar the victim lost), *Apprendi* would require the jury to find the facts supporting the sentence. And under *Southern Union*, custodial and monetary penalties are treated alike.

The Mandatory Victims Restitution Act’s sentencing regime also closely mirrors those the Court in *Southern Union* held would require jury findings. Allowable criminal fines under numerous federal statutes are “often calculated by reference to * * * the victim’s loss.” *Id.* at 349-50 & n.4; *see, e.g.*, 18 U.S.C. §§ 201(b), 645, 3571(d). Jurors must find the amount of the victim’s loss “[i]n all such cases.” *Southern Union*, 567 U.S. at 350. And decisions applying early American larceny statutes illustrate that this principle accords with “the historical role of the jury at common law,” too. *Southern Union*, 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170). Laws like Massachusetts’s criminal larceny statute provided for specific criminal restitution amounts—not a discretionary

range—yet courts consistently required the amount of the victim’s loss to be alleged in the indictment and proved to the jury. *See Smith*, 1 Mass. at 246. And as the Court recently recognized, common-law crimes throughout much of American history typically “carried ‘specific sanctions, and once the facts of the offense were determined by the jury, the judge was meant simply to impose the prescribed sentence.’” *Erlinger*, slip op. 7 (cleaned up) (quoting *Haymond*, 588 U.S. at 642). These determinate sentencing regimes have never been understood to be an exception to the general rule that juries must find all facts underlying an allowable criminal sentence.

2. Nor is criminal restitution exempt from *Apprendi* because it is civil in nature rather than criminal. For one, the Sixth Amendment right to a jury applies “[i]n all criminal *prosecutions*.” U.S. Const. Amend. VI (emphasis added). Restitution indisputably is imposed as part of a criminal prosecution; it is “imposed by the Government ‘at the culmination of a criminal proceeding and requires conviction of an underlying’ crime.” *Paroline v. United States*, 572 U.S. 434, 456 (2014) (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)).

Beyond that, this Court has repeatedly held that criminal restitution “serves punitive purposes” in addition to compensatory ones. *Id.* “The purpose of awarding restitution is * * * to mete out appropriate criminal punishment.” *Pasquantino*, 544 U.S. at 365. Indeed, “[t]he victim has no control over the amount of restitution awarded or over the decision to award restitution.” *Kelly v. Robinson*, 479 U.S. 36, 52 (1986).

“Federal statutes, too, describe restitution as a ‘penalty’ imposed on the defendant as part of his criminal sentence * * * .” *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari). And it is significant that Congress chose to

place the Mandatory Victims Restitution Act in Title 18 along with other criminal penalties—a choice this Court has held is “relevant in determining whether its content is civil or criminal in nature.” *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 659 (2015). For these reasons, criminal restitution may even implicate the Eighth Amendment’s Excessive Fines Clause in extreme cases. *Paroline*, 572 U.S. at 456. And even if criminal restitution could plausibly be viewed as a civil remedy, the Seventh Amendment would guarantee a jury determination. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

Were there any doubt based on recent precedent that criminal restitution is a criminal penalty, history from the Founding era would dispel it. Early American larceny statutes requiring criminal restitution (like the English laws that preceded them) treated it like any other penalty, often discussing it in the same provision and with the same terms. *See, e.g.*, Act of March 15, 1785, 1785 Mass. Sess. Laws 264 (listing criminal restitution among other “punishment”); Crimes Act of 1790, 1 Stat. 112, 116 (describing money to be paid to the owner of stolen goods as a “fine”). Indeed, the Massachusetts Supreme Judicial Court expressly rejected the argument that restitution under the State’s 1785 larceny statute was something other than “what the law contemplates as *punishment*,” calling that suggestion “a mere play upon words.” *Commonwealth v. Andrews*, 2 Mass. 14, 29-30 (1806). The cases applying those laws also required that the facts supporting criminal restitution, like those supporting other criminal penalties, be alleged in the indictment and proved to the jury. *See Smith*, 1 Mass. at 246; *Southern Union*, 567 U.S. at 357 (discussing application of the Crimes Act). Like in many jurisdictions today, those who failed to pay criminal restitution were subject to custodial

penalties without further trial. *See* 1785 Mass. Sess. Laws 264 (allowing for sentence of three years hard labor if convicted person failed to pay restitution).

For these reasons, even courts finding restitution exempt from *Apprendi* under the “statutory maximum” theory discussed above have rejected the notion that restitution is a civil remedy, though there is a split on the issue. *E.g.*, *United States v. Leahy*, 438 F.3d 328, 334 (3d Cir. 2006) (en banc) (“Of the other Courts of Appeals that have addressed this issue, only the Seventh and Tenth Circuits have held that restitution is a civil rather than a criminal penalty.”).

C. The Question Presented Has Divided Members Of This Court And Lower Courts

Members of this Court and judges of federal and state appellate courts have made compelling arguments that allowing judges to make factual findings supporting criminal restitution is contrary to *Southern Union* and ignores the Constitution’s original meaning. Nevertheless, most courts have clung to their pre-*Southern Union* rulings—even after acknowledging that these decisions are not “well-harmonized with *Southern Union*” and “might have come out differently” had *Southern Union* been decided first. *E.g.*, *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013).

The powerful dissenting voices confirm that the issue is important and warrants this Court’s attention. So do state court decisions that have split on the question in fractured opinions. At a minimum, the availability of the critical right to a jury—“the heart of our criminal justice system,” *Erlinger*, slip op. 7—merits this Court’s review.

1. As noted, Members of this Court have expressed serious concerns with decisions holding that the Sixth Amendment does not apply to criminal restitution. *Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by

Sotomayor, J., dissenting from denial of certiorari). A contrary ruling, they explained is “worthy of [the Court’s] review” because the two principal bases underlying lower court decisions “seem[] doubtful” and are “difficult to reconcile with the Constitution’s original meaning.” *Id.* at 511-12.

Court of appeals judges, even before *Southern Union*, have all but called out for this Court’s review of decisions finding restitution outside the Sixth Amendment. In a sharply divided en banc decision of the Third Circuit, for instance, the majority found restitution exempt from the *Apprendi* rule over the vigorous dissent of five members of the court. *Leahy*, 438 F.3d at 339-48 (McKee, J., dissenting). Judge McKee persuasively explained that *Apprendi* and the historic treatment of criminal restitution as an issue reserved for juries undercut the two primary rationales courts have relied on to the contrary. Joined by four other judges, Judge McKee concluded that “given the Court’s recent jurisprudence, we are not at liberty to rationalize a distinction between punishment in the form of incarceration on the one hand, and punishment in the form of restitution on the other * * * . [A]ny such distinction must be drawn by the Court in the first instance, and not by us.” *Id.* at 348.

Likewise, Eighth Circuit judges are divided on the question. *United States v. Carruth*, 418 F.3d 900, 904-06 (8th Cir. 2005) (Bye, J., dissenting). Judge Bye aptly observed, that “[o]nce we recognize restitution as being a ‘criminal penalty’ the proverbial *Apprendi* dominoes begin to fall.” *Id.* at 906. State court judges too have vigorously dissented in decisions finding criminal restitution not subject to the Sixth Amendment. *See*

Robison, 314 Kan. at 258-259 (Rosen, J., dissenting and adopting dissenting opinions from court of appeals).¹

The divergent views—and conflicting rationales underlying lower court decisions—are reason enough for this Court to address the question.

2. Review would also resolve a state court split. The Kansas Supreme Court, in a fractured opinion, has held that the Constitution does not require juries to find facts underlying criminal restitution, *see Robison*, 314 Kan. at 258-259. By contrast, the Iowa Supreme Court, in a fractured decision, has held that “restitution must be based on jury findings.” *State v. Davison*, 973 N.W.2d 276, 279 (Iowa 2022).

3. At a minimum, this Court should grant review because its previous denials of certiorari on the issue are being misread as an implicit holding that it views criminal restitution outside the Sixth Amendment’s protection.

As the Supreme Court of Kansas recently explained, “[d]espite the nonuniform approach taken by federal circuits, the Supreme Court has remained silent on whether criminal restitution triggers the right to a jury as contemplated in *Apprendi*, even when presented with opportunities to take up the question * * * . We see no reason we should take up that mantle in its place.”

¹ Likewise, the leading criminal law treatise and numerous commentators argue that the *Apprendi* rule requires the jury to find facts for restitution, *see LaFave, supra*; William Acker, *The Mandatory Victims Restitution Act is Unconstitutional: Will the Court Say So After Southern Union*, 64 Ala. L. Rev. 803 (2013); Barta, *supra*; Cortney Lollar, *What is Criminal Restitution*, 100 Iowa L. Rev. 93 (2014); Laura Appleman, *Retributive Justice and Hidden Sentencing*, 68 Ohio St. L.F. 1307 (2007); Melanie Wilson, *In Booker’s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 Ind. L. Rev. 369 (2006); *accord Hester*, 139 S. Ct. at 511 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing commentary).

Robison, 314 Kan. at 250; see also *United States v. Kluge*, 2023 WL 3434035, at *2 (M.D. Fla. May 12, 2023) (“[T]he Supreme Court (fairly) recently denied a petition for a writ of certiorari on whether *Apprendi* applies to the imposition of criminal restitution. So until either the Supreme Court or Eleventh Circuit say otherwise, *Dohrman* remains binding precedent and forecloses Defendant’s argument.” (citations omitted)).

But a denial of certiorari, of course, says nothing of the merits. See *Ramos v. Louisiana*, 590 U.S. 83, 105 n.56 (2020) (“The significance of a denial of a petition for certiorari ought no longer require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim.” (cleaned up)). And the number of decisions refusing to faithfully apply *Apprendi* does not mean those decisions are correct. As Judge McKee observed, “before *Booker* was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that *Apprendi* does not apply to the federal sentencing guidelines.” *Leahy*, 438 F.3d at 345 (McKee, J., concurring in part and dissenting in part). Just this Term, the Court granted certiorari and reversed in *Erlinger*, where, like here, “the courts of appeals ha[d] uniformly persisted” in refusing to apply *Apprendi* consistent with this Court’s precedents. Pet. at 19, *Erlinger v. United States*, No. 23-370.

The lower courts’ holdings require review precisely because of this inertia. Only this Court can correct course now and bring treatment of criminal restitution back into alignment with what the Sixth Amendment and longstanding notions of the jury right require. The right to a jury—“the heart of our criminal justice system,” *Erlinger*, slip op. 7—deserves more than reliance on this Court’s silence.

II. This Case Provides An Ideal Vehicle To Address This Recurring Question Of Exceptional Importance

A. The question presented is recurring and exceedingly important. “Today, every jurisdiction provides for victim restitution to be included in a criminal sentence.” LaFave, *supra*, § 26.6(c). And the federal statute here, the Mandatory Victims Restitution Act, has resulted in an extraordinary increase in restitution in federal criminal sentencing. “Before the passage of * * * the Mandatory Victims Restitution Act of 1996, 110 Stat. 1227, restitution orders were comparatively rare. But from 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay \$33.9 billion in restitution.” *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) (citing Gretta L. Goodwin, GAO, *Federal Criminal Restitution* 25 (Feb. 2018)); Bertucci, *supra*, at 568 (“The authorization and use of restitution in the United States’ federal criminal system was infrequent through most of the twentieth century.”).

In 2023, federal courts sentenced 8,019 criminal defendants to pay more than \$13 billion in restitution. *See* United States Sentencing Commission, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics, tbl. 17. The average restitution ordered was \$1,628,250. Remarkably, as of 2023, federal defendants owed more than \$111 billion in unpaid criminal restitution to third parties. *See* Department of Justice, 2023 U.S. Attorneys’ Annual Statistical Report, tbl. 8B.

“Although frequently ordered as part of a criminal sentence, restitution often is not paid.” LaFave, *supra*, § 26.6(c). “More than 90% of criminal restitution ordered in federal court is never collected.” *Id.* at n.46.70.

The question is thus of significant importance because “[f]ailure or inability to pay restitution can result in suspension of the right to vote, continued court

supervision, or even reincarceration.” *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); *see also* Gretta L. Goodwin, GAO, *Federal Criminal Restitution: Department of Justice Has Ongoing Efforts to Improve Its Oversight of the Collection of Restitution and Tracking the Use of Forfeited Assets* 3 (Sept. 2020). Those consequences are particularly troubling in the context of the Mandatory Victims Restitution Act, where restitution is mandatory and courts are not permitted to take an offender’s economic circumstances into account. *See* 18 U.S.C. §§ 3663A, 3664(f)(1)(A). The question is thus critically important to defendants and the administration of the criminal justice system.

B. This case presents an optimal vehicle to resolve the question. The *Apprendi* issue was cleanly raised at every stage of this case, and the court of appeals rejected petitioner’s argument based on circuit precedent holding that restitution need not be proved to a jury. *See* App. 83a.

Beyond that, this case illustrates the problems with the status quo. Here, as in most cases, the presentence report and government’s accompanying sentencing memorandum are “the sole ‘evidentiary’ source[s] for the restitution order.” Acker, *supra*, at 819. Presentence reports are routinely based on hearsay and facts not found by a jury at trial. *See id.* As a result, trial judges regularly adopt “bureaucratically prepared, hearsay-riddled” reports to order restitution. *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part)).

Here, by adopting the unarticulated “analysis” in the presentence report, the sentencing court issued a restitution order based not only on untested facts, but on facts that contradicted the jury’s verdict. The court ordered petitioner to pay “victims” who suffered no loss

from the conduct underlying the verdict against him—private insurance companies—when petitioner was convicted of charges relating to the Anti-Kickback Statute, which applies only to federally insured patients. *See* App.150a. And it ordered restitution despite the presentence report’s recognition that the sole cognizable victim under the Anti-Kickback Statute—the federal government—suffered no loss as a result of petitioner’s conduct. This case thus presents a compelling backdrop to consider the question.

* * * * *

More than a decade has passed since this Court held in *Southern Union* that “[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant’s maximum potential sentence”—including monetary penalties. 567 U.S. at 346. Yet lower courts continue to resist applying that straightforward rule to the billions of dollars in criminal restitution imposed each year without the protection of the jury trial right. It is time for this Court to step in and restore the “jury’s historic role as a bulwark between the State and the accused.” *Id.* at 350.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JULY 8, 2024

**In the
Supreme Court of the United States**

DAVID ASA VILLARREAL,
Petitioner,

v.

TEXAS,
Respondent.

**On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court abridges the defendant's Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess.

RELATED PROCEEDINGS

Court of Criminal Appeals of Texas: *Villarreal v. State*, No. PD-0048-20 (Oct. 9, 2024)

Court of Appeals of Texas: *Villarreal v. State*, No. 04-18-00484-CR (Dec. 27, 2019)

Texas District Court, 186th Judicial District, Bexar County: *Villarreal v. State*, No. 2016-CR-0549 (June 25, 2018)

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PETITION FOR A WRIT OF CERTIORARI

David Asa Villarreal respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas will be published at --- S.W.3d --- (Tex. Crim. App. 2024) and is currently available at 2024 WL 4446740). The opinion of the Court of Appeals of Texas is published at 596 S.W.3d 338 (Tex. App. 2019).

JURISDICTION

The Court of Criminal Appeals entered its judgment on October 9, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.”

STATEMENT

In *Geders v. United States*, 425 U.S. 80 (1976), the Court unanimously held that a trial court abridges the defendant’s Sixth Amendment right to counsel by barring the defendant from conferring with his counsel during an overnight recess that takes place in the middle of the defendant’s testimony. The question in this case is whether the outcome is any different where the trial court’s order bars the defendant from conferring with counsel about defend-

ant's testimony but allows the defendant to confer with counsel about other matters. This question has given rise to a deep lower court conflict. It has been 36 years since the Court last addressed the Sixth Amendment implications of such orders barring attorney-client consultation during a trial. *See Perry v. Leeke*, 488 U.S. 272 (1989). The Court should grant certiorari and reverse.

1. David Villarreal was on trial for murder. He was the only defense witness at the guilt phase. His direct testimony began shortly before noon. App. 5a. After about an hour, in the middle of Villarreal's testimony, the trial court declared a recess and dismissed the jury for the day, because the court had a previously scheduled administrative commitment. *Id.*

The court instructed Villarreal and his attorneys that during the ensuing 24-hour recess, they should pretend that Villarreal was still on the witness stand and should not discuss any topics that would be off-limits in that context, particularly Villarreal's testimony:

THE COURT: Mr. Villarreal, we're in an unusual situation. **You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of the trial and in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a [Sixth] Amendment right to talk to your attorney.**

So I'm really going to put the burden on [Defense Counsel #1] to tell you the truth. [Defense Counsel #1] and [Defense Counsel #2], too, as well. **I'm going to ask that both of you pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.**

Now, Mr. Villarreal, if -- puts us in an odd situation. **But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both [Defense Counsel #1] and [Defense Counsel #2] to use your best judgment in talking to the defendant because you can't -- you couldn't confer with him while he was on the stand about his testimony.** So I'm going to leave it to both of your good judgment of how you manage that, if for some reason he believes that he needs to confer.

[DEFENSE COUNSEL #1]: All right. So just so I am clear and don't violate any court orders, that -- because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

THE COURT: Let me help you with that. **For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury.**

[DEFENSE COUNSEL #1]: Okay.

THE COURT: **His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that -- manage his testimony in front of the jury? Does that make sense to you?**

[DEFENSE COUNSEL #1]: Sure, it does.

[DEFENSE COUNSEL #2]: We aren't going to talk to him about the facts that he testified about.

THE COURT: All right. Fair enough. But at the same time -- **I'm going to put the burden on the lawyers, not on him, because he has a constitutional right to confer with you. At the same time, all lawyers are under -- they're under different rules than the defendants are.**

[DEFENSE COUNSEL #1]: Certainly.

THE COURT: And not that I'm saying this about Mr. Villarreal, but, you know, if - - for instance, his attorney-client privilege is safe, but if any defendant or potential client or something like that, comes to a lawyer and talks about committing a future crime, there's no privilege --

[DEFENSE COUNSEL #1]: Sure.

THE COURT: -- for that. And so I'm just using that as an analogy.

[DEFENSE COUNSEL #1]: Sure.

THE COURT: **And you're going to have to decide, if he asks you any questions and such, is this something that is going to be**

considered to be conferring with him on the witness stand while the jury is there or not.

[DEFENSE COUNSEL #1]: Okay. All right. I understand the Court's judgment and just -- just for in the future, I'm just going to make an objection under the Sixth Amendment that the Court's order infringes on our right to confer with our client without his defense.

THE COURT: Objection noted. All right. Folks, then we will see you-all again tomorrow.

Id. at 6a-8a (boldface and brackets supplied by the Court of Criminal Appeals).

Villarreal resumed his testimony approximately 24 hours later. *Id.* at 8a. He was convicted of murder and sentenced to a 60-year prison term. *Id.* at 41a.

2. A divided Court of Appeals of Texas affirmed. *Id.* at 41a-69a.

a. The Court of Appeals began by observing that this Court has decided two cases involving the constitutionality of limitations on a defendant's ability to confer with counsel during a recess. *Id.* at 46a-48a. *Geders v. United States*, 425 U.S. 80 (1976), held that a trial court violates the Sixth Amendment by prohibiting the defendant from speaking with his counsel during an *overnight* recess between the defendant's direct and cross-examination. *Id.* at 46a-47a. But *Perry v. Leeke*, 488 U.S. 272 (1989), held that a trial court does not violate the Sixth Amendment by prohibiting the defendant from consulting his counsel during a *fifteen-minute* recess between his direct and cross-examination. *Id.* at 47a.

The Court of Appeals noted that in Villarreal’s case, “the trial court tried to thread the needle” between *Geder* and *Perry* by allowing Villarreal to speak with his counsel during the overnight recess, but not about any matters that they would not be allowed to discuss while Villarreal was still on the stand. *Id.* at 48a. The Court of Appeals observed that “[i]n the years since the *Perry* decision, the Supreme Court has not squarely addressed the precise question here—*i.e.*, whether the trial court abuses its discretion by permitting the defendant to consult his counsel during an overnight recess about any topic except his ongoing testimony.” *Id.*

Without any guidance on the question from this Court, the Court of Appeals explained, “courts in other states and the federal circuit courts of appeals have addressed it and reached opposing conclusions.” *Id.*

On one side of the conflict, “[s]everal state supreme courts have held that while the trial court may not prohibit all communications between a testifying defendant and his attorney during an overnight recess, it may prohibit communications specifically about the defendant’s ongoing testimony.” *Id.* at 49a (citing *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996 (Ohio 2006); and *Webb v. State*, 663 A.2d 452 (Del. 1995)).

On the other side, “several federal circuit courts of appeals have held any restriction on communication with counsel during an overnight recess is impermissible.” App. 49a (citing *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th

Cir. 2006); *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000); and *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990)).

The Court of Appeals sided with the former group of decisions. “Although *Geders* instructs that the trial court had no discretion to prohibit Villarreal and his attorneys from discussing ‘anything,’” the Court of Appeals reasoned, “it did not do so. Rather, the trial court expressly recognized Villarreal’s constitutional right to confer with his counsel and put the onus on counsel to ensure any discussions avoided the topic of Villarreal’s testimony.” App. 49a-50a.

b. Justice Martinez dissented. *Id.* at 50a-69a.

Like the Court of Appeals majority, Justice Martinez recognized that the issue is “governed by two seminal Supreme Court cases,” *Geders* and *Perry*. *Id.* at 52a. In *Perry*, she explained, this Court held that “an overnight recess is an ‘interruption ... of a different character’ and, thus, a defendant has a constitutionally protected right to discuss a ‘variety of trial-related matters’ during an overnight recess that ‘will inevitably include some consideration of the defendant’s ongoing testimony.’” *Id.* at 56a-57a (quoting *Perry*, 488 U.S. at 281, 284). She concluded that “[c]onsultation between a defense attorney and his client cannot be neatly divided into discussions about testimony and those about other matters.” App. 57a (internal quotation marks omitted).

Justice Martinez pointed out that Villarreal’s case was a good example of the impossibility of partitioning a lawyer’s advice to the defendant into two categories, one involving testimony and the other encompassing everything else. “Here,” she noted,

the overnight recess occurred after the State had rested and during Villarreal's direct-examination while Villarreal was testifying to the alleged altercation that precipitated the stabbing of the victim. Discussions between Villarreal and his counsel, as *Perry* recognized, would thus inevitably include some consideration of Villarreal's testimony, particularly since the entirety of the defense's case-in-chief rested solely on Villarreal's testimony of self-defense. This is supported by the fact that on the day following the overnight recess, Villarreal's testimony on direct concerned the defensive wounds Villarreal had allegedly received from the altercation that led to the stabbing of the victim. Thus, the trial court's order prevented Villarreal from conferring with counsel about defensive matters that were inextricably intertwined with his previous testimony on direct. Because Villarreal's entire defensive theory hinged on his testimony, Villarreal may have needed advice on demeanor or speaking style, a task made more difficult if specific testimony could not be mentioned.

Id. at 57a-58a (citations and internal quotation marks omitted).

Justice Martinez therefore concluded that "the trial court's order prohibiting Villarreal from conferring with his attorney during an overnight recess deprived him of his Sixth Amendment right to assistance of counsel." *Id.* at 61a.

3. A divided Court of Criminal Appeals of Texas affirmed. *Id.* at 2a-40a.

a. The Court of Criminal Appeals, like the Court of Appeals, framed the issue as governed by the “two guideposts” erected by this Court, *Geders* and *Perry*. *Id.* at 2a-3a. According to *Perry*, “[a] no-conferral order during a 15-minute recess does not violate the Sixth Amendment right to counsel.” *Id.* at 3a. But according to *Geders*, “a no-conferral order during an overnight recess violates this constitutional right.” *Id.*

“This case provides a twist,” the court continued, “with the trial judge issuing a limited no-conferral order during an overnight recess. The order restricted Appellant’s ability to confer with counsel regarding his ongoing testimony, while allowing discussion on all other aspects of the criminal proceeding.” *Id.*

Like the Court of Appeals, the Court of Criminal Appeals recognized the conflict among the lower courts on this question. The court observed that “[o]ur sister state supreme courts have generally agreed that such a situation does not violate the right to counsel.” *Id.* at 3a & n.1 (citing *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996 (Ohio 2006); and *Bailey v. State*, 422 A.2d 956 (Del. 1980), but noting that two state high courts have reached the opposite holding—*People v. Joseph*, 646 N.E.2d 807 (N.Y. 1994), and *Petty v. United States*, 317 A.3d 351 (D.C. Ct App. 2024)). The court acknowledged that “federal circuits have reached the opposite conclusion”—that is, they found a Sixth Amendment violation in these circumstances. App. 3a-4a & n.2 (citing *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006); *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000); *United States v. Cobb*, 905 F.2d 784 (4th

Cir. 1990); and *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986)).

The Court of Criminal Appeals concluded: “We side with our sister states and hold that Appellant’s Sixth Amendment right to counsel was not violated under these facts.” App. 4a.

The court conceded that “[a]t first glance, the length of the recess appears to be the determining variable between *Geders* and *Perry*.” *Id.* at 11a. “However,” the court continued, “the type of communication being restricted is the true controlling factor.” *Id.* The court determined that “when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.” *Id.* (quoting *Perry*, 488 U.S. at 281). “But a court may not block ‘matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.’” App. 11a (quoting *Perry*, 488 U.S. at 284).

The Court of Criminal Appeals held that “the trial judge’s order did not intrude upon constitutionally protected communications between Appellant and counsel during the overnight recess.” App. 15a. The court concluded that “the language used by the judge complied with *Perry*,” because the judge “cabined his admonishments to conferring about the ongoing testimony.” *Id.* The trial court’s order “allowed counsel to discuss whatever issues for the potential punishment phase that arose from Appellant’s testimony until that point (and everything else that occurred so far at the trial).” *Id.* at 16a.

b. Judge Yeary concurred. *Id.* at 18a-21a. He accepted that the majority opinion had done “the best

it can with what the United States Supreme Court has given it to work with.” *Id.* at 18a. “This does not mean it is an ideal choice,” he continued. *Id.* at 19a. “The line between defense counsel conferring with his client about the content and direction of his ongoing testimony and conferring about the derivative effects of that ongoing testimony is a nebulous one at best,” he worried. *Id.* (brackets and internal quotation marks omitted). He predicted that this line would prove unworkable in practice. “I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction,” he explained. *Id.* “How is the most ethically compliant lawyer supposed to determine how to communicate with his client about information made relevant by the day’s testimony or the significance of the day’s events or trial tactics or the advisability mid-trial of negotiating a plea bargain without some reference, however fleeting or indirect, to the substance or tenor of his client’s as-yet-unfinished appearance on the witness stand?” *Id.* (brackets and internal quotation marks omitted).

Judge Yeary lamented that “the Supreme Court’s guidance in this area is, in my view, no better than that offered by Justice Potter Stewart for identifying ‘hard-core pornography’: ‘I know it when I see it.’” *Id.* at 20a (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). Judge Yeary invited this Court “to revisit this area of the law and draw a bright line rule.” App. 20a. “For evidence of why,” he suggested, “just look at the varied opinions cited in footnotes 1 and 2 of the Court’s opinion,” the decisions constituting the lower court conflict. *Id.* He concluded that “[t]his is no way to navigate a right

as important as the constitutional right to counsel.” *Id.* at 21a.

c. Judge Keel concurred, joined by Judge McClure. *Id.* at 21a-26a.

Judge Keel concluded that under *Geders* and *Perry*, “during an overnight break, a defendant has a right to unrestricted access to his attorney, even if his testimony is ongoing; forbidding his attorneys from talking with him about anything overnight—even his testimony—violates the Sixth Amendment right to counsel.” *Id.* at 21a. He reasoned that “[n]ormal consultation overnight includes discussions about various trial-related topics, including those made relevant by the defendant’s testimony.” *Id.* at 22a. He summarized the line drawn by *Geders* and *Perry* as “[s]hort recess—no right [to consult with counsel]. Overnight recess—unrestricted right.” *Id.* at 23a.

Judge Keel nevertheless concurred in the judgment because he considered the error harmless. *Id.* at 25a.

d. Judge Walker dissented. *Id.* at 26a-40a.

Judge Walker agreed with Judge Keel that in navigating between *Geders* and *Perry*, “all that matters is the length of the recess.” *Id.* at 32a. He explained that “[t]he significance of *Perry* is the fact that the recess was only a fifteen-minute break in the testimony, such that the only thing that would be discussed would be the ongoing testimony.” *Id.* Under *Geders*, by contrast, “[w]here the recess is long enough, such that how the trial was going and trial strategy would be discussed in addition to the testimony, there can be no conferral ban.” *Id.*

During an overnight recess, Judge Walker continued, any discussion of trial strategy between a defendant and counsel would “inevitably include some consideration of the defendant’s ongoing testimony.” *Id.* (quoting *Geders*, 425 U.S. at 91). He concluded that “[t]he trial court’s overnight prohibition was essentially the same as the unconstitutional order in *Geders*.” App. 37a.

Judge Walker added that because *Geders* treated the deprivation of the right to counsel as a structural error requiring reversal, the same outcome was required in this case. *Id.* at 37a-39a.

REASONS FOR GRANTING THE WRIT

It has been a few decades since the Court decided *Geders* and *Perry*. In that time, the lower courts have divided over whether a trial court may bar the defendant from discussing his testimony with counsel during an overnight recess. As Judge Yeary suggested below, it is time for the Court to resolve the conflict. This case provides an ideal opportunity.

I. The lower courts are divided 9-4 over whether a trial court abridges the defendant’s Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant’s testimony during an overnight recess.

The decision below deepens a preexisting conflict among the lower courts over whether the Sixth Amendment guarantees a defendant the right to confer with his attorney about matters relating to his testimony during an overnight recess. Both decisions

below recognized this conflict, *id.* at 3a-4a, 48a-49a, but they understated its magnitude. On one side of the split, six federal circuits and three state high courts hold that the Sixth Amendment does guarantee such a right. On the other side, four state high courts—now including the Texas Court of Criminal Appeals because of the decision below—hold that the Sixth Amendment does not guarantee this right.

These cases all involved the same fact pattern as our case. In each, the trial court declared an overnight recess in the middle of the defendant's testimony. In each, the trial court ordered the defendant and his counsel not to discuss matters relating to the defendant's testimony during the recess. In nine jurisdictions, the trial court's order was held to violate the Sixth Amendment, while in the other four it was held not to.

A. Nine lower courts hold that the Sixth Amendment guarantees a defendant the right to confer with his attorney about his testimony during an overnight recess.

This issue has been addressed by six of the federal courts of appeals. All six held that the Sixth Amendment bars a trial court from prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess. These six circuits are joined by three state high courts which have reached the same holding. These decisions are all based on the same rationale: Banning the discussion of testimony prevents counsel from offering advice on a wide range of important subjects, because the defendant's testimony is inti-

mately connected with virtually every aspect of the defense.

In *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 132 (2d Cir. 2007) (Calabresi, J.), the Second Circuit observed that “all of the federal circuit courts that have considered the issue have concluded that under *Perry* and *Geders* a district court may not order a defendant to refrain from discussing his ongoing testimony with counsel during an overnight recess, even if all other communication is allowed.” The Second Circuit agreed with this consensus. *Id.* at 133. The court explained that “a defendant’s constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony. Thus, a ban on discussing testimony during a substantial recess does materially impede communication of a constitutional quality.” *Id.* (internal quotation marks omitted). On the facts of the case, however, the Second Circuit found that the trial court cured the Sixth Amendment violation by rescinding the ban on consultation shortly after imposing it, which allowed the defendant plenty of time during the overnight recess to confer with his attorney about his testimony. *Id.* at 135-36.

In *United States v. Cobb*, 905 F.2d 784, 791 (4th Cir. 1990), the Fourth Circuit held that “the trial court’s order prohibiting [the defendant] from discussing his cross-examination testimony with his attorney during the weekend recess deprived him of his Sixth Amendment right to counsel.” The Fourth Circuit explained that it would be impossible in practice to separate matters relating to testimony

from other matters. “To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy,” the court observed. *Id.* at 792. “To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?” *Id.*

In *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (Posner, J.), the Seventh Circuit described the trial court’s order barring discussion of the defendant’s testimony as a “serious error.” The Seventh Circuit held that “while the judge may instruct the lawyer not to coach his client, he may not forbid all consideration of the defendant’s ongoing testimony during a substantial recess, since that would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence.” *Id.* (citation and internal quotation marks omitted).

In *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006), the Ninth Circuit likewise held that an order barring the defendant from discussing his testimony during an overnight recess abridged the defendant’s Sixth Amendment right to counsel. “We conclude that any overnight ban on communication falls on the *Geders* side of the line and violates the Sixth Amendment,” the court explained. *Id.* at 651. “That seems the fairer reading of *Perry*, which only permitted prohibitions on communication between a defendant and his lawyer during a brief recess.” *Id.* (footnote and internal quotation marks omitted).

The Ninth Circuit pointed out that “*Perry* recognized a defendant has a constitutional right to discuss matters other than his own testimony with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain, during an overnight recess.” *Id.* (footnote and internal quotation marks omitted). “And it conceded that such discussions will inevitably include some consideration of defendant’s ongoing testimony.” *Id.* (footnote and internal quotation marks omitted). “Indeed,” the Ninth Circuit observed, “it is hard to see how a defendant’s lawyer could ask him for the name of a witness who could corroborate his testimony or advise him to change his plea after disastrous testimony, subjects *Perry* expressly says a defendant has a right to discuss with his lawyer during an overnight recess, without discussing the testimony itself.” *Id.*

In *United States v. Cavallo*, 790 F.3d 1202, 1212 (11th Cir. 2015), the trial court instructed the defendant that during the overnight recess he could not discuss his testimony with anyone, but that he could confer with his lawyer about his “constitutional rights.” While the Eleventh Circuit was uncertain about what this order meant, *id.* at 1216, the court held that it was inconsistent with *Geders* if it meant that the defendant and his lawyer could not discuss the defendant’s testimony, even if they could discuss a broad array of other subjects. *Id.* (citing *Perry*’s observation, 488 U.S. at 284, that “the ‘fact that such discussions will inevitably include some consideration of the defendant’s ongoing testimony does not compromise’ a defendant’s right to assistance of counsel during an overnight recess”). *See also United*

States v. Romano, 736 F.2d 1432, 1436-37 (11th Cir. 1984) (similarly finding a Sixth Amendment violation where the trial court barred the defendant from discussing his testimony with counsel during an overnight recess), *vacated on other grounds*, 755 F.2d 1401 (11th Cir. 1985).

In *Mudd v. United States*, 798 F.2d 1509, 1510 (D.C. Cir. 1986), the D.C. Circuit held that “an order that denies a criminal defendant the right to consult with counsel during a substantial trial recess, even though limited to a discussion of testimony, is inconsistent with the sixth amendment of the Constitution.” The court observed:

While the order in this case was indeed more limited than the one in *Geders*, the interference with sixth amendment rights was not significantly diminished. Even though Mudd was free to discuss strategy and tactics, there are obvious, legitimate reasons he may have needed to consult with counsel about his upcoming cross-examination. For example, Mudd’s lawyer may have wanted to warn defendant about certain questions that would raise self-incrimination concerns, or questions that could lead Mudd to mention excluded evidence. More generally, defendant may have needed advice on demeanor or speaking style, a task made more difficult if specific testimony could not be mentioned. While many of the benefits of counsel outlined by *Geders* are not related to testimony *per se*, an order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court’s directive. Con-

sultation between lawyers and clients cannot be neatly divided into discussions about “testimony” and those about “other” matters.

Id. at 1512. *See also id.* at 1515 (Scalia, J., concurring in part and concurring in the judgment) (“I agree with the majority that the District Court’s order prohibiting defendant from discussing his testimony with his attorney during a weekend recess was not significantly less invasive of sixth amendment rights than the order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders*.”).

These six circuits are joined by the high courts of New Jersey, New York, and the District of Columbia, which have likewise held that a trial court may not bar a defendant and his counsel from discussing the defendant’s testimony during an overnight recess.

In *State v. Fusco*, 461 A.2d 1169, 1174 (N.J. 1983), the New Jersey Supreme Court held that “an order prohibiting a defendant during an overnight recess from discussing his own testimony with his attorney is a violation of the defendant’s right to the assistance of counsel as guaranteed by the federal and state constitutions.” The court rejected the state’s contention “that *Geders* is distinguishable from this case because the trial court’s order here prohibited defendant from discussing only his testimony and did not, as in *Geders*, prevent him from discussing anything with his attorney. We are unconvinced by this argument and find the *Geders* analysis equally applicable to this case.” *Id.* at 1173. As the court explained,

A defendant’s own testimony can be a critical part of his defense. It is defendant’s opportuni-

ty to tell his story in his own words. It is a chance for defendant to display his own demeanor and testimonial qualities to the finder of fact who will ultimately determine the credibility of his defense. To allow a defendant the opportunity to confer with counsel during an overnight recess about everything but his own testimony is to deny the defendant the right to discuss the very thing he wants most to discuss with counsel. Further, defendant's right to discuss his testimony with counsel is most crucial when defendant is in the midst of, or about to begin, testimony on cross-examination. A lay defendant, unfamiliar with the techniques of a skillful cross-examiner, may become confused under the pressure of the prosecutor's questions and be unable to testify fully and well.

Id. at 1173-74.

In *People v. Joseph*, 646 N.E.2d 807, 807 (N.Y. 1994), the New York Court of Appeals held that "the trial court denied defendant his right to counsel under both the Sixth Amendment of the Federal Constitution and article I, § 6 of the New York State Constitution by forbidding him from discussing his trial testimony with his attorney during a weekend recess." The court, quoting *Geders*, explained that during an overnight recess, "[t]he lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events." *Id.* at 808 (quoting *Geders*, 425 U.S. at 88). See also *People v. Umali*,

888 N.E.2d 1046, 1050 (N.Y. 2008) (“It is well settled that a court cannot prohibit defense counsel from speaking to a defendant about his trial testimony during a recess unless the break is one of very short duration.”).

The District of Columbia Court of Appeals reached the same holding in *Martin v. United States*, 991 A.2d 791 (D.C. Ct. App. 2010). The court explained that “the defendant does have a constitutionally protected right to discuss a ‘variety of trial-related matters’ during a substantial recess that ‘will *inevitably* include some consideration of the defendant’s ongoing testimony.’” *Id.* at 794 (quoting *Perry*, 488 U.S. at 284). *See also Petty v. United States*, 317 A.3d 351, 352 (D.C. Ct. App. 2024) (per curiam) (reversing where the trial court prohibited the defendant from conferring with his attorney about his testimony during an overnight recess).

These nine courts have all addressed the same fact pattern that is present in our case, in which a defendant is prohibited from discussing his testimony with his attorney during an overnight recess. Had our case arisen in any of these jurisdictions, Mr. Villarreal’s conviction would have been reversed.

B. Four lower courts hold that the Sixth Amendment does not guarantee this right.

In the decision below, the Texas Court of Criminal Appeals joined the Delaware, Kentucky, and Ohio Supreme Courts on the other side of the split.

In *Bailey v. State*, 422 A.2d 956 (Del. 1980), the Delaware Supreme Court distinguished a blanket ban on a defendant’s consultation with counsel from

a ban on discussion of the defendant's testimony. "In our view, a testimonial limitation does not constitute a per se Sixth Amendment infringement of a defendant's right of access to counsel," the court reasoned. *Id.* at 960. The court concluded that "the Trial Judge's testimonial limitation ruling was not erroneous under *Geders* because the *Geders* holding does not apply to the present facts." *Id.* at 961. *See also Webb v. State*, 663 A.2d 452, 459 (Del. 1995) ("the Superior Court's initial admonition to Webb that he was 'not to discuss [his] testimony with anyone' because he was '[s]till subject to [his] oath[] and the cross-examination will start tomorrow' would have been proper as within the trial court's discretion"); *id.* at 460 ("If it is unavoidable that an evening recess interrupt the defendant's cross-examination, trial judges should be especially vigilant in giving unmistakably clear and limited instructions that the defendant-witness may not discuss his or her testimony with counsel, but that instruction should not permit any inference that the defendant and counsel may not discuss other matters.").

In *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008), the Kentucky Supreme Court agreed that a trial court may prohibit the defendant from discussing his testimony with counsel during an overnight recess. "*Geders* involved a trial court's complete denial of a defendant's right to consult with his attorneys during an overnight recess," the court explained. *Id.* at 553. "By contrast, the case at hand involves a trial court's permitting the defendant to have contact with his attorneys during an overnight recess while limiting that contact by telling the attorneys to not discuss their client's ongoing testimo-

ny.” *Id.* The Kentucky Supreme Court concluded that “[s]ince the trial judge’s actions attempted to protect the integrity of the proceedings and did not impermissibly limit all attorney-client contact,” the court’s order did not abridge the Sixth Amendment right to counsel. *Id.* at 554.

The Ohio Supreme Court reached the same holding in *State v. Conway*, 842 N.E.2d 996 (Ohio 2006). The court reasoned that “*Geders* concerned a complete deprivation of access to counsel. This matter is not analogous to *Geders* because the trial court did not restrict Conway’s access to his lawyers during the overnight recess.” *Id.* at 1021. “Although Conway was prohibited from discussing his uncompleted testimony with counsel, the trial court did not order him not to meet or consult with counsel about other matters during the overnight recess.” *Id.*

Below, the Texas Court of Criminal Appeals cited these decisions and concluded: “We side with our sister states and hold that Appellant’s Sixth Amendment right to counsel was not violated.” App. 4a.

Both courts below acknowledged the existence of this split. *Id.* at 3a-4a, 48a-49a. So did then-Judge Sotomayor, who noted for the Second Circuit that “[c]ourts have ... disagreed with respect to whether an overnight restriction on communications that only bars discussion of a defendant’s testimony will satisfy the demands of the Sixth Amendment under *Geders* and *Perry*.” *Serrano v. Fischer*, 412 F.3d 292, 300 (2d Cir. 2005).

The lower courts are thus divided 9-4. A conflict of this magnitude will never be resolved without this Court’s intervention.

II. The decision below is wrong.

Certiorari is also warranted because the court below erred in holding that the Sixth Amendment permits a trial court to prohibit the defendant from discussing his testimony with counsel during an overnight recess.

A. The decision below is contrary to this Court's precedents.

To begin with, the decision below is inconsistent with this Court's precedents. In *Geders*, the Court explained that the importance of consultation with counsel is at its peak during an overnight recess, when the defendant must confer with counsel about a wide range of matters, including the defendant's testimony. As the Court noted,

[i]t is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. *The lawyer may need to obtain from his client information made relevant by the day's testimony*, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Geders, 425 U.S. at 88 (emphasis added).

The Court acknowledged that during an overnight recess, an unethical lawyer might try to “coach” the defendant—that is, he might try to tell the defendant what to say on the stand—but the Court explained that an order prohibiting discussion between the defendant and his counsel is hardly necessary to deter coaching.

There are other ways to deal with the problem of possible improper influence on testimony or “coaching” of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with “coached” witnesses. A prosecutor may cross-examine a defendant as to the extent of any “coaching” during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant’s credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89-90.

The Court added that coaching can also be prevented simply by scheduling the defendant’s testimony to begin early enough in the day that it can be completed before nightfall.

[T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk

high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption.

Id. at 90 (footnote omitted).

The Court accordingly concluded that the importance of the right to confer with counsel during an overnight recess outweighed the risk that an unethical attorney might try to coach the defendant.

There are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel

Id. at 91.

The Court reaffirmed these observations in *Perry*. Although the Court held that a trial court may prohibit consultation between the defendant and his attorney during a 15-minute recess in the middle of the day, *Perry*, 488 U.S. at 281-82, the Court was careful to distinguish a brief daytime recess from a much longer overnight recess. In an overnight recess, the Court explained, there are a wide range of "matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* at

284. The Court made clear that “[t]he fact that *such discussions will inevitably include some consideration of the defendant’s ongoing testimony* does not compromise that basic right.” *Id.* (emphasis added).

After explaining that the defendant has a right to discuss his ongoing testimony with counsel during an overnight recess, the Court noted that during a brief daytime recess “the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony.” *Id.* at 284 n.8. The Court could not have stated the distinction any more clearly. During a brief daytime recess, the trial court may instruct the defendant not to discuss his testimony with counsel, but during an overnight recess, the defendant must be allowed to discuss his testimony with counsel.

Below, the Court of Criminal Appeals misread *Geders* and *Perry*. The court quoted this Court’s admonition in *Perry* that “when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.” App. 11a (quoting *Perry*, 488 U.S. at 281). But the Court of Criminal Appeals overlooked the fact that this passage refers only to a short daytime recess such as the one in *Perry*, not to an overnight recess such as the one in *Geders* and in our case. And the Court of Criminal Appeals ignored the portions of *Geders* and *Perry* quoted above, in which the Court clarified that a defendant *does* have a constitutional right to consult with his lawyer during an overnight recess in the middle of his testimony.

B. The decision below is unworkable.

The rule adopted by the court below is also unworkable in practice. When a defendant confers with his attorney, the defendant's testimony permeates every aspect of counsel's advice. There is no way to separate discussions of testimony from discussions of trial strategy. Prohibiting counsel from discussing the defendant's testimony during an overnight recess is tantamount to preventing counsel from doing his or her job.

This was the view of Justice Marshall, who of course had considerable experience as a trial lawyer, including in criminal cases. Justice Marshall doubted "that it is possible to distinguish discussions regarding trial strategy from discussions regarding testimony." *Perry*, 488 U.S. at 295 n.8 (Marshall, J., dissenting). He gave an example in which

counsel's direct examination of the defendant inadvertently elicits damaging information that can be effectively neutralized on redirect only if the defendant has the opportunity to explain his direct testimony to counsel. If a recess were called, the ensuing attorney-defendant discussion would seem to be as much about trial strategy as about upcoming testimony. Without a chance to speak with the defendant, counsel will be hampered in knowing whether redirect is even advisable.

Id.

There are many similar circumstances in which, during an overnight recess, counsel will have a legitimate reason to discuss the defendant's testimony. Counsel may need to caution the defendant not to

mention excluded evidence. *Santos*, 201 F.3d at 965. Counsel may need to explain to the defendant that his testimony has been so damaging that it would be wise to change his plea. *Sandoval-Mendoza*, 472 F.3d at 651. As Judge Calabresi observed for the Second Circuit, “a defendant’s constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony.” *Triumph Capital Grp.*, 487 F.3d at 133.

The rule adopted by the court below would also be extraordinarily difficult to administer. It requires trial courts (and appellate courts reviewing convictions) to make metaphysical distinctions between discussions about the defendant’s testimony and discussions about general trial strategy. For example, if the defendant’s testimony makes defense counsel realize that it will be important to call an additional witness, may defense counsel discuss this with the defendant? If the defendant’s testimony causes defense counsel to reevaluate the desirability of a plea agreement, may defense counsel so advise the defendant? All sorts of questions like these will arise, questions that will depend on what exactly it means for the defendant and his attorney to discuss his testimony. The rule adopted by most of the lower courts is far easier to administer, because it does not require courts to make these fine distinctions.

The rule adopted by the court below also threatens the “sanctity of the attorney-client relationship,” *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988). The only way the trial court could enforce it would be to interrogate the defendant and his counsel each

morning about what they discussed the previous evening, which would destroy the confidentiality of these discussions. The rule adopted by most of the lower courts, which does not require courts to poke their noses into these discussions, gives appropriate respect to the confidential relationship between a defendant and his counsel.

The only conceivable reason to forbid the defendant from discussing his testimony with counsel is to prevent coaching. As the Court explained in *Geders*, however, there are less intrusive ways to prevent coaching, including cross-examination by the prosecutor and intelligent scheduling by the trial court. Here, for example, the trial court began Mr. Villarreal's testimony at noon, despite knowing that he would call an overnight recess an hour later. A little foresight would have prevented the problem from arising in the first place. As the Court held in *Geders*, a worry about coaching is not a good enough reason to prevent a defendant from conferring with his counsel during an overnight recess.

**III. This is an important issue, and
this case is an excellent vehicle
for resolving it.**

This issue is important. The right to counsel is fundamental, especially in the middle of a criminal trial. *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Overnight recesses "are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier." *Geders*,

425 U.S. at 88. Yet trial courts in several states are barring defendants from discussing their testimony with their attorneys during overnight recesses, because they erroneously believe that this Court approved of such orders in *Perry*. It is long past time that the Court corrected this mistake.

This case is an ideal vehicle for resolving the conflict among the lower courts. The case is on direct appeal, so the Court's review is *de novo*, and there are no procedural hoops to jump through before reaching the question presented. There are no other issues left in the case. The Court's answer to the question presented will determine the outcome of the case. No future case could possibly be a better vehicle than this one.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 24-5438

**IN THE
Supreme Court of the United States**

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2244(b)(1) applies to a claim presented in a second or successive motion to vacate under 28 U.S.C. § 2255.
2. Whether 28 U.S.C. § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over the grant or denial of an authorization by a court of appeals to file a second or successive motion to vacate under 28 U.S.C. § 2255.

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IN THE
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MICHAEL BOWE,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

Petitioner Michael Bowe respectfully requests that the Court vacate the order below issued by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit’s order is reported at 2024 WL 4038107 and reproduced in the Joint Appendix (J.A.) at 72–79. The district court did not issue an opinion.

JURISDICTION

The Eleventh Circuit entered its order on June 27, 2024. Petitioner filed a petition for a writ of certiorari on August 29, 2024, which this Court granted on January 17, 2025. As explained below, this Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Sections 2244, 2254, and 2255 of Title 28 of the United States Code are set out in full in the Appendix.

INTRODUCTION

One provision in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, requires the dismissal of a “claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application.” 28 U.S.C. § 2244(b)(1) (emphasis added). Although state prisoners alone may file a “habeas corpus application under section 2254,” the Eleventh Circuit below held that section 2244(b)(1) also applies to “motions to vacate” filed by federal prisoners under section 2255. The government concedes that this holding contravenes the plain statutory language.

Nonetheless, the government argues that this Court lacks jurisdiction to correct the Eleventh Circuit’s refusal to adhere to AEDPA’s text. But this Court construes limitations on its jurisdiction narrowly, and the government’s argument flouts that settled principle. The government relies on section 2255(h), but that provision makes no mention of the Court’s jurisdiction at all. Nor does section 2255(h)’s qualified reference to section 2244 incorporate a certiorari-stripping provision in section 2244(b)(3)(E). And, in any event, that highly circumscribed provision would still not strip this Court of jurisdiction over this particular case.

In short, this Court has certiorari jurisdiction over this case. And because the Eleventh Circuit relied solely on section 2244(b)(1), this case affords the Court an ideal opportunity to resolve an entrenched circuit conflict over that provision, which has evaded review. Therefore, the Court should effectuate AEDPA’s plain text, hold that section 2244(b)(1) does not apply to federal prisoners, and vacate the contrary decision below.

STATEMENT

I. Statutory Background

Under AEDPA, state and federal prisoners are subject to different statutory provisions and requirements when it comes to seeking post-conviction relief.

A. Prisoners in custody pursuant to a state court judgment must generally seek post-conviction relief in federal court by way of an application for a writ of habeas corpus under 28 U.S.C. § 2254. To file a “second or successive” habeas corpus application under section 2254, state prisoners must satisfy strict gatekeeping requirements found in sections 2244(b)(1) and (b)(2).

The former provides that “[a] claim presented in a second or successive habeas corpus application under section 2254 that *was* presented in a prior application shall be dismissed.” 28 U.S.C. § 2244(b)(1) (emphasis added). The latter requires dismissal of “[a] claim presented in a second or successive habeas corpus application under section 2254 that was *not* presented in a prior application,” unless the claim satisfies one of two substantive criteria. § 2244(b)(2) (emphasis added). The first criterion relates to new rules of constitutional law that are made retroactive by this Court. § 2244(b)(2)(A). The second relates to newly discovered evidence of actual innocence. § 2244(b)(2)(B).

However, before a state prisoner may file a second or successive habeas corpus application in the district court, section 2244(b)(3)(A) requires the prisoner to “move” for authorization “in the appropriate court of appeals.” Section 2244(b)(3)(B) requires that this motion “be determined by a three-judge panel of the court of appeals.” Section 2244(b)(3)(C) provides that the

court of appeals may authorize the filing only if it determines that the applicant makes “a prima facie showing that the application satisfies requirements of this subsection”—*i.e.*, the gatekeeping requirements in sections 2244(b)(1) and (b)(2). And section 2244(b)(3)(D) requires the court of appeals to “grant or deny” authorization within 30 days of the filing.

Finally, section 2244(b)(3)(E) places limitations on subsequent review of the panel’s authorization determination. Specifically, it provides that the “grant or denial of an authorization by a court of appeals . . . shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”

B. Unlike state prisoners, federal prisoners may not file habeas corpus applications under section 2254 at all. Rather, they must generally seek post-conviction relief by way of a “motion to vacate” under 28 U.S.C. § 2255. To file a “second or successive” motion to vacate under section 2255, they must first satisfy strict gatekeeping requirements in section 2255(h).

Those gatekeeping requirements are different from the gatekeeping requirements applicable to state prisoners in sections 2244(b)(1) and (b)(2). Unlike section 2244(b)(1), section 2255(h) does not require the dismissal of a claim that was previously presented in a prior section 2255 motion to vacate. In fact, section 2255(h) does not distinguish between claims that were previously presented and those that were not. Instead, section 2255(h) “enumerate[s] two—and only two—conditions” for second or successive section 2255 motions. *Jones v. Hendrix*, 599 U.S. 465, 477 (2023).

Located in sections 2255(h)(1) and (h)(2), those conditions are similar—but “not identical”—to the state-

prisoner criteria in sections 2244(b)(2)(A) and (B). *Gonzalez v. Crosby*, 545 U.S. 524, 529 n.3 (2005). Section 2255(h)(2) relates to new rules of constitutional law made retroactive by this Court, and it sets out the same criterion as section 2244(b)(2)(A). However, section 2255(h)(1) relates to newly discovered evidence, and it is more lenient than the state-prisoner criterion in section 2244(b)(2)(B). Section 2255(h)(1) omits section 2244(b)(2)(B)’s requirements that the prisoner show both “due diligence” and a “constitutional error.” *Compare* § 2255(h)(1) *with* § 2244(b)(2)(B)(i)–(ii).

While section 2255(h) sets forth its own substantive gatekeeping requirements, it borrows from section 2244 when it comes to the pre-filing authorization requirement. Specifically, section 2255(h) provides that a “second or successive motion [to vacate] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain” one of the two substantive criteria in sections 2255(h)(1) and (h)(2).

Thus, federal prisoners are subject to the provisions in section 2244 governing how a second or successive motion is to be “certified” by a “panel of the appropriate court of appeals.” That means federal prisoners must file a motion for authorization. § 2244(b)(3)(A). That motion must be determined by a three-judge panel. § 2244(b)(3)(B). The panel must determine whether the movant has made a *prima facie* showing satisfying the gatekeeping requirements in section 2255(h). § 2244(b)(3)(C). And the panel must grant or deny authorization within 30 days. § 2244(b)(3)(D).

II. Proceedings Below

In 2008, petitioner pleaded guilty in the Southern District of Florida to three federal crimes: conspiracy to commit Hobbs Act robbery (Count One); attempt to commit Hobbs Act robbery (Count Two); and discharging a firearm during and in relation to a “crime of violence”—*i.e.*, the offenses in Counts One and Two—in violation of 18 U.S.C. § 924(c) (Count Three). J.A. 1–3, 10–11. The district court sentenced him to 168 months in prison on Counts One and Two, and a mandatory consecutive sentence of 120 months in prison on Count Three. J.A. 18–20. Petitioner did not appeal.

Years later, however, intervening changes in the law invalidated the basis of his section 924(c) conviction. That conviction depended on Counts One or Two qualifying as a “crime of violence.” At the time of his conviction, an offense could qualify under either the “elements clause” definition in section 924(c)(3)(A) or the “residual clause” definition in section 924(c)(3)(B). But after his conviction became final, two decisions from this Court established that Counts One and Two did not qualify as a predicate “crime of violence” under either clause. After these decisions, petitioner diligently sought relief by filing, or seeking authorization to file, a motion to vacate his conviction under section 2255.

In *Johnson v. United States*, 576 U.S. 591 (2015), this Court declared unconstitutionally vague the residual clause definition of “violent felony” in the Armed Career Criminal Act. Based on *Johnson*, petitioner filed his first section 2255 motion to vacate his section 924(c) conviction. The district court denied the motion because, even assuming that *Johnson* applied to the residual clause “crime of violence” definition in

section 924(c), petitioner’s conviction remained valid under the elements clause. That was so, the court reasoned, because it was predicated in part on attempted Hobbs Act robbery. And, under circuit precedent at the time, that offense qualified as a “crime of violence” under the elements clause. *See* J.A. 42–43, 46–47.

In *United States v. Davis*, 588 U.S. 445 (2019), the Court declared unconstitutionally vague the residual clause in section 924(c). The Eleventh Circuit then held that *Davis* announced a new rule of constitutional law made retroactive by this Court, satisfying the criteria in section 2255(h)(2). *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019). As a result of that holding, federal prisoners could seek authorization to file second or successive section 2255 motions to vacate their section 924(c) convictions under *Davis*.

Shortly after *Davis*, petitioner sought authorization to do so. However, the Eleventh Circuit denied his request because, under then-existing circuit precedent, attempted Hobbs Act robbery remained a “crime of violence” under the elements clause. Thus, he could not make a “prima facie showing” that his section 924(c) conviction was invalid in light of *Davis*. J.A. 53–54.

That changed after *United States v. Taylor*, 596 U.S. 845 (2022). In that case, this Court squarely held that attempted Hobbs Act robbery was not a “crime of violence” under the elements clause, abrogating the Eleventh Circuit’s contrary precedent. And there was no dispute that conspiracy to commit Hobbs Act robbery also did not qualify under the elements clause. *See Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019); BIO 6. Thus, every possible basis of petitioner’s section 924(c) conviction was invalidated.

Petitioner thereafter submitted another request for authorization to file a successive section 2255 motion based on *Davis*. For individuals with identical *Davis* claims predicated on attempted Hobbs Act robbery (or other federal attempt offenses)—but who had *not* previously sought to present such a claim—the Eleventh Circuit granted their requests for authorization. See Pet. 8 & n.1 (citing six cases). Ironically though, because petitioner had been *more* diligent by seeking to present his *Davis* claim right away, and before this Court’s decision in *Taylor* abrogated erroneous circuit precedent, petitioner’s request was foreclosed by *In re Baptiste*, 828 F.3d 1337, 1339–40 (11th Cir. 2016).

In *Baptiste*, the Eleventh Circuit interpreted 28 U.S.C. § 2244(b)(1). That provision requires the dismissal of a “claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application.” *Baptiste* extended section 2244(b)(1) to claims presented in a second or successive motion to vacate under section 2255. Because the Eleventh Circuit had previously denied petitioner’s *Davis*-based request for authorization, *Baptiste* meant that section 2244(b)(1) would bar his *Davis* claim. And that was so even though the Eleventh Circuit had denied his earlier *Davis*-based request for authorization based on circuit precedent that had since been abrogated by *Taylor*. As a result, and along with petitioner’s request for authorization, he also sought initial hearing en banc, asking the Eleventh Circuit to reconsider and overrule *Baptiste*.

Relying solely on section 2244(b)(1) and *Baptiste*, the Eleventh Circuit dismissed petitioner’s *Davis* claim and his request for authorization for lack of jurisdiction. J.A. 64–65. The court of appeals explained

that it remained bound by *Baptiste* until that case was overruled by this Court or the en banc Eleventh Circuit. *Id.* The court also summarized the arguments presented in his en banc petition and summarily denied that petition without explanation. J.A. 63–65.

Petitioner subsequently filed a petition for a writ of habeas corpus in this Court. Pet. for Writ of Habeas Corpus, *In re Bowe*, 144 S. Ct. 1170 (2024) (No. 22-7871). He emphasized that: the circuits were divided 6–3 on whether section 2244(b)(1) applied to claims by federal prisoners; the federal government had previously conceded that it did not; and Justice Kavanaugh had written separately to opine that the Court should resolve that question in a future case in light of the circuit conflict and the government’s concession. *Avery v. United States*, 140 S. Ct. 1080 (2020) (statement respecting denial of certiorari). Petitioner explained, however, that section 2244(b)(3)(E)’s apparent bar on certiorari review, coupled with the government’s concession, meant that there would be no way for a certiorari petition to present that question for review. As a result, he urged the Court to use his original habeas petition to resolve that circuit conflict.

In February 2024, this Court denied the original habeas petition. Justice Sotomayor, joined by Justice Jackson, issued a statement respecting the denial. *In re Bowe*, 144 S. Ct. at 1170. Although they “join[ed]” Justice Kavanaugh in his “desire for this Court to resolve this [circuit] split,” and although they agreed with petitioner that there were “considerable structural barriers to this Court’s ordinary review via certiorari petition,” they questioned whether petitioner could meet the Court’s “demanding” standard governing original habeas petitions. *Id.* at 1170–71.

The Justices concluded by identifying two alternative ways to resolve the dilemma. First, they noted the government’s “suggest[ion] that a court of appeals seeking clarity could certify the question to this Court.” *Id.* at 1171. Second, they “encourage[d] the courts of appeals to reconsider this question en banc” where they had binding circuit precedent extending section 2244(b)(1) to federal prisoners. *Id.* & n.*.

Petitioner therefore returned to the Eleventh Circuit and asked it to adopt one of those two solutions. He again sought authorization to file a second section 2255 motion based on *Davis*. But in light of *Baptiste*, he also petitioned for initial hearing en banc, again asking the full court to reconsider and overrule *Baptiste*. Alternatively, and in the event the Eleventh Circuit denied his en banc petition, he asked the Eleventh Circuit to certify the section 2244(b)(1) question to this Court. In his motion to certify, he emphasized that one of this Court’s “essential functions” was to ensure the uniformity of federal law, but the section 2244(b)(1) circuit conflict was evading this Court’s review. Motion to Certify at 9, C.A. ECF No. 3 (11th Cir. No. 24-11704) (June 27, 2024). He further observed that, absent certification, this Court would be unable to resolve the circuit conflict. *Id.* at 15. And that inability would present an Article III “Exceptions Clause” problem with section 2244(b)(3)(E)’s bar on certiorari, a problem that this Court had previously avoided in *Felker v. Turpin*, 518 U.S. 651 (1996). *Id.* at 16.

The Eleventh Circuit rejected all of petitioner’s requests. As for his request for authorization, the court again applied its binding precedent in *Baptiste*. Because the court viewed section 2244(b)(1) as jurisdic-

tional, the court believed it could not “consider” petitioner’s claim. J.A. 73; *see* J.A. 78 n.1 (“Lacking jurisdiction, we don’t mean to imply anything about whether Bowe’s *Davis* claim has any merit.”). As a result, the court “dismissed” his claim and his request for authorization for lack of jurisdiction. J.A. 77–79.

As for petitioner’s request to reconsider *Baptiste* en banc, the court of appeals declined to do so—with no active judge even calling for a vote. J.A. 79 n.2, 80. And the court of appeals denied his motion to certify the section 2244(b)(1) question. J.A. 78–79. It emphasized that this Court “has accepted only four certified questions since 1946, and none in the last forty-three years.” J.A. 78. And the court of appeals did not want to “cause a newsworthy event and stir up the bloggers and podcasters by asking the [Supreme] Court to accept a certified question from a court of appeals for only the fifth time in 78 years.” J.A. 79.

This Court subsequently granted certiorari. __ S. Ct. __, 2025 WL 226843 (Jan. 17, 2025) (Mem).

SUMMARY OF ARGUMENT

The government correctly concedes that the Eleventh Circuit legally erred by holding that 28 U.S.C. § 2244(b)(1) applies to second or successive motions under 28 U.S.C. § 2255. This Court has certiorari jurisdiction to correct that error, and it should do so.

I. Section 2244(b)(1) requires the dismissal of a claim “presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application.” By its terms, section 2244(b)(1) does not apply to a claim presented in a second or successive motion to vacate under section 2255.

A. The text could not be plainer: (b)(1) applies only to claims presented in a “habeas corpus application under section 2254.” And only state prisoners may file “habeas corpus application[s] under section 2254.” Federal prisoners, by contrast, must generally file “motions to vacate” under section 2255. Congress has repeatedly drawn that basic distinction in the statutory text, and this Court has recognized it as well. Had Congress intended for (b)(1) to apply to claims presented in a second or successive “motion to vacate under section 2255,” it would have said so. It did not. And federal courts may not re-write AEDPA’s plain text.

B. Nonetheless, six circuits have done just that, substituting their own view for Congress’. But few of them have actually grappled with the statutory text. The Eleventh Circuit has done so, but its own reasoning confirms that (b)(1) does not apply to section 2255 motions. The Eleventh Circuit has relied on section 2255(h), which incorporates certain provisions in section 2244. But nobody believes that section 2255(h) in-

incorporates *all* of section 2244. And the Eleventh Circuit itself has correctly acknowledged that section 2255(h) does not—indeed cannot—incorporate section 2244(b)(2), since those two provisions have conflicting criteria. That acknowledgment is fatal. Because section 2255(h) does not incorporate (b)(2), it does not incorporate (b)(1) either. That is so because (b)(1) and (b)(2) use identical language, referring only to claims presented in a “habeas corpus application under section 2254.” The Eleventh Circuit failed to explain how section 2255(h) could incorporate (b)(1) but not (b)(2).

Unable to square their position with the statutory text, several circuits have openly relied on legislative history and policy. But the legislative history shows that Congress was primarily concerned about abusive filings by *state* prisoners. And AEDPA’s text reflects that overriding concern, repeatedly subjecting state prisoners to stricter requirements than federal prisoners. That differential treatment effectuates one of AEDPA’s core objectives—namely, to promote federalism and comity. And that objective sensibly explains why Congress subjected state prisoners alone to (b)(1).

II. This Court has certiorari jurisdiction to correct the error below and to effectuate (b)(1)’s plain text.

A. Like (b)(1), the certiorari-stripping provision in section 2244(b)(3)(E) does not apply to second or successive section 2255 motions by federal prisoners.

It is well settled that the Court narrowly construes limitations on its jurisdiction, requiring a clear statement from Congress. No such statement exists here.

The government relies on section 2255(h), but that provision makes no mention of the Court’s jurisdiction at all. In stark contrast, section 2244(b)(3)(E) clearly

limits the Court’s jurisdiction with respect to second or successive habeas corpus applications. This contrast reflects a deliberate choice. Congress enacted sections 2255(h) and (b)(3)(E) at the same time in AEDPA. And a Congress that so clearly limited jurisdiction over habeas applications would have done the same for section 2255 motions had it wished to do so.

Unable to identify any jurisdiction-stripping language in section 2255(h) itself, the government argues that section 2255(h) incorporates the certiorari bar in (b)(3)(E). But this roundabout theory of incorporation by implication is not a clear statement from Congress. In fact, section 2255(h) does not incorporate (b)(3)(E)’s certiorari bar at all. Section 2255(h)’s text incorporates only the parts of section 2244 that “provide” for how a second or successive section 2255 motion is to be “certified” by a “panel of the appropriate court of appeals.” The certiorari bar in (b)(3)(E) does no such thing. Indeed, it comes into play only after the court of appeals has made the certification determination.

B. In any event, even if the certiorari bar applied to section 2255 motions, it would not cover *this* case.

The scope of (b)(3)(E) is limited. It bars certiorari review where the court of appeals denies on the merits an authorization request for failure to make a *prima facie* showing satisfying the applicable gatekeeping requirements. Here, by contrast, the court of appeals never even considered the merits of petitioner’s authorization request under the applicable gatekeeping requirements in section 2255(h). Instead, the court dismissed his request for lack of jurisdiction based on a gatekeeping requirement that did not apply—*i.e.*, (b)(1). The certiorari bar does not cover this scenario.

The text of (b)(3)(E) dictates that conclusion for three independent but mutually reinforcing reasons. First, (b)(3)(E) covers only the “grant or denial” of authorization. But here, the court of appeals “dismissed” the authorization request for lack of jurisdiction. Second, (b)(3)(E) covers only the denial of “an authorization.” But here, the court of appeals exceeded the proper scope of the authorization determination by relying on an inapplicable gatekeeping requirement. Third, under (b)(3)(E), “the subject” of the certiorari petition here is the court of appeals’ determination that (b)(1) applied. But this Court’s precedent establishes that (b)(3)(E) does not bar certiorari review of threshold legal questions about whether the gatekeeping requirements are applicable in the first place.

At the very least, the constitutional-avoidance canon requires the Court to exercise jurisdiction here. Applying (b)(3)(E)’s certiorari bar to this case would raise a serious constitutional question under Article III about whether Congress has exceeded its power to make “exceptions” to this Court’s appellate jurisdiction. That is so because one of the Court’s essential functions is to ensure the uniformity of federal law. And applying (b)(3)(E) would prevent the Court from resolving the circuit conflict over (b)(1). Stretching (b)(3)(E) to deprive the Court of jurisdiction over this particular case would trigger (not avoid) this constitutional question. Thus, the Court should narrowly construe (b)(3)(E) and exercise jurisdiction over this case.

* * *

In sum, the Court has certiorari jurisdiction to resolve the circuit conflict. The Court should do so and hold that (b)(1) does not apply to federal prisoners.

ARGUMENT

As the government correctly concedes, the gatekeeping requirement in section 2244(b)(1) unambiguously applies only to state prisoners, not federal prisoners like petitioner. However, six circuits, including the Eleventh Circuit below, have improperly substituted their own policy judgment for the plain statutory text. Thus, the parties agree that the court of appeals legally erred by applying section 2244(b)(1) in this case.

The government, however, contends that this Court is powerless to correct this contravention of AEDPA's text. To the contrary, the Court has jurisdiction for multiple reasons, and it may therefore resolve the circuit conflict over section 2244(b)(1). Accordingly, the Court should hold that section 2244(b)(1) does not apply to federal prisoners and vacate the decision below.

I. Section 2244(b)(1) applies only to state—not federal—prisoners.

In the decision below, the Eleventh Circuit dismissed petitioner's request for authorization based exclusively on 28 U.S.C. § 2244(b)(1). Section 2244(b)(1) provides, in full: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." As explained below, the Eleventh Circuit legally erred by applying (b)(1) in this case because that provision applies only to state, not federal, prisoners.

A. The text of (b)(1) is plain.

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This Court has "stated time and again that

courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). “It is well established that when the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (cleaned up). “When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Germain*, 503 U.S. at 254 (cleaned up). This cardinal canon of construction disposes of this case.

Section 2244(b)(1) is unambiguous: it applies only to state prisoners. It provides that “[a] claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application shall be dismissed.” 28 U.S.C. § 2244(b)(1) (emphasis added). The italicized language makes plain that this provision applies only to second or successive habeas corpus applications filed under 28 U.S.C. § 2254. And, critically, such applications may be filed only by “a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2254(a).

Federal prisoners, by contrast, cannot file habeas corpus applications under section 2254 at all. Rather, they must seek post-conviction relief by way of a “motion to vacate” under 28 U.S.C. § 2255. In enacting section 2255, Congress “rerout[ed] federal prisoners’ collateral attacks” from “habeas proceedings” to a “separate remedial vehicle.” *Jones*, 599 U.S. at 473–74. Accordingly, this Court has recognized the distinction between habeas corpus applications filed by state prisoners under section 2254 and motions to vacate filed by federal prisoners under section 2255. See *Magwood v. Patterson*, 561 U.S. 320, 333 (2010) (“The

requirement of custody pursuant to a state-court judgment distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations—such as § 2255, which allows challenges to the judgments of federal courts.”) (emphasis omitted).

Congress itself repeatedly drew this basic distinction between “habeas corpus applications” and “motions to vacate” under section 2255. For example, in the statutory subsection immediately preceding section 2244(b)(1), Congress limited successive “application[s] for a writ of habeas corpus” by federal prisoners, “except as provided in section 2255.” 28 U.S.C. § 2244(a). Section 2255, in turn, forbids “[a]n application for a writ of habeas corpus” by “a prisoner who is authorized to apply for relief by motion pursuant to this section,” unless the narrow criteria of the saving clause are met. § 2255(e); *see also Jones*, 599 U.S. at 469 (“Since 1948, Congress has provided that a federal prisoner who collaterally attacks his sentence ordinarily must proceed by a motion in the sentencing court under § 2255, rather than by a petition for a writ of habeas corpus.”). Thus, in both sections 2244 and 2255, Congress carefully distinguished between habeas corpus applications and motions to vacate. Yet the plain language of (b)(1) applies only to the former.

Moreover, Congress *was* explicit when it wanted one of AEDPA’s provisions to apply to both habeas corpus applications and motions to vacate under section 2255. Congress did so, for example, when requiring certificates of appealability (COA). *See* 28 U.S.C. § 2253(c)(1) (requiring a COA from: “(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a

State court; or (B) the final order in a proceeding under section 2255”). And, as another example, Congress did so again when requiring that courts prioritize capital cases. *See* 28 U.S.C. § 2266(a) (“The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.”).

These other provisions in AEDPA confirm that, “[h]ad Congress wished” for section 2244(b)(1) to apply to *both* habeas corpus applications under section 2254 and motions to vacate under section 2255, “it easily could have done so.” *Jones*, 599 U.S. at 478. But federal courts are not permitted to “re-write the statute” by adding such language to the text. *Dodd v. United States*, 545 U.S. 353, 359 (2005). Rather, their “sole function is to apply the law as [they] find it.” *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) (cleaned up). Put simply, then, the bottom line here is that, “[b]ecause the plain language” of section 2244(b)(1) “is unambiguous, [the] inquiry begins with the statutory text, and ends there as well.” *Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, 583 U.S. 109, 127 (2018) (cleaned up).

B. The contrary reasoning of six circuits is atextual and unpersuasive.

Despite the foregoing, six circuits have held that section 2244(b)(1) applies to federal prisoners. However, that holding originated almost by accident, with little to no reasoning at all. *See, e.g., Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002); *Green v. United States*, 397 F.3d 101, 102 n.1 (2d Cir. 2005); *see also Williams v. United States*, 927 F.3d, 427, 435–36 (6th Cir. 2019)

(declining to follow earlier cases that had “suggested (though without any explanation) that § 2244(b)(1) *does* apply in § 2255 cases”). And the few circuits that have offered reasoning have failed to meaningfully engage with the statutory text, relying instead on a mistaken view of both legislative history and policy.

1. As for the text, these circuits have relied on section 2255(h), which provides that “[a] second or successive motion [to vacate] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain” one of two substantive criteria. The Eleventh Circuit, for example, relied on this provision in *Baptiste*. 828 F.3d at 1339. But the Eleventh Circuit’s own reasoning confirms that section 2255(h) does not—indeed cannot—incorporate (b)(1).

Most importantly, the Eleventh Circuit has correctly acknowledged that “§ 2255(h) cannot and does not incorporate § 2244(b)(2).” *In re Bradford*, 830 F.3d 1273, 1277 n.2 (11th Cir. 2016). That is because the substantive criteria for federal prisoners in section 2255(h)(1) differ from the corresponding criteria for state prisoners in (b)(2). In particular, the newly discovered evidence criteria in section 2255(h)(1) for federal prisoners are different from (and more lenient than) the corresponding criteria for state prisoners in (b)(2)(B).

To file a second or successive section 2255 motion, federal prisoners must show “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.” 28 U.S.C. § 2255(h)(1). But state prisoners

must show more. On top of section 2255(h)(1)’s already strict standard of actual innocence, state prisoners must *also* show: that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence,” 28 U.S.C. § 2244(b)(2)(B)(i); and that, “but for [some] constitutional error,” no reasonable factfinder would have found the applicant guilty, § 2244(b)(2)(B)(ii).

Given that section 2255(h) has its own substantive criteria for federal prisoners that differ from the substantive criteria for state prisoners in section 2244(b)(2), section 2255(h) cannot incorporate (b)(2). Otherwise, section 2255(h) would be “at war with itself.” *United States, ex rel. Polanksy v. Exec. Health Res., Inc.*, 599 U.S. 419, 434 (2023) (citation omitted). And this Court has repeatedly refused to “attribut[e] to Congress an intention to render a statute so internally inconsistent.” *Jones*, 599 U.S. at 479 (citation omitted); see *Groff v. DeJoy*, 600 U.S. 447, 472 (2023); *Santos-Zacaria v. Garland*, 598 U.S. 411, 429 (2023).

Critically, because section 2255(h) does not incorporate (b)(2), it cannot incorporate section 2244(b)(1) either. Sections 2244(b)(1) and (b)(2) “work in tandem to establish the requirements for authorizing a second or successive § 2254 application.” *In re Graham*, 61 F.4th 433, 439 (4th Cir. 2023). They are mirror images of each other, and they use identical language—both dealing with the situation where a “claim [is] presented in a second or successive habeas corpus application under section 2254.” 28 U.S.C. §§ 2244(b)(1), (b)(2). They differ only in that the former provision applies where the claim “*was* presented in prior applica-

tion,” § 2244(b)(1) (emphasis added), whereas the latter applies where the claim “was *not* presented in a prior application,” § 2244(b)(2) (emphasis added).

Given that (b)(1) and (b)(2) use the same language dealing with “habeas corpus application[s] under section 2254,” there is simply “no reason to credit the cross-reference to § 2254 in § 2244(b)(2) but ignore it in § 2244(b)(1).” *Jones v. United States*, 36 F.4th 974, 983 (9th Cir. 2022). Indeed, “the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.” *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (cleaned up). And that rule applies with particular force here given that (b)(1) and (b)(2) stand side-by-side and use the identical phrase.

Ignoring that rule, the Eleventh Circuit concluded that “[t]he fact that § 2255(h) does not incorporate § 2244(b)(2) does not prevent it from incorporating every other part of § 2244(b).” *Bradford*, 830 F.3d at 1276 n.1. But the court failed to acknowledge that (b)(1) and (b)(2) use identical language. And the court ultimately made no effort to explain how section 2255(h) could incorporate (b)(1) but not (b)(2). There is simply no textual justification for that incongruity.

2. Lacking textual support for their position, some circuits have reasoned that “the legislative history does not distinguish between second or successive motions by federal and by state prisoners.” *In re Bourgeois*, 902 F.3d 446, 448 (5th Cir. 2018) (citation omitted). But, in fact, members of Congress were heavily focused on the need to “stop the endless, pointless, and abusive delays currently available to those in our *State* court system to avoid the carrying out of a death

sentence.” 142 Cong. Rec. 4595 (Mar. 13, 1996) (statement of Rep. Barr) (emphasis added); *see, e.g.*, 142 Cong. Rec. 7564 (April 16, 1996) (statement of Sen. Thurmond, co-sponsor of AEDPA) (“[T]he current habeas system has robbed the State criminal justice system of any sense of finality.”); 142 Cong. Rec. 7553 (April 16, 1996) (statement of Sen. Biden) (“If it is in Federal court, there is no evidence of delay on habeas corpus to begin with.”). This concern reflected the fact that, at the time, “[m]ost capital cases [we]re State cases.” 142 Cong. Rec. 7559 (April 16, 1996) (statement of Sen. Hatch); *see* Capital Punishment 1995 at 1, U.S. Department of Justice, Bureau of Justice Statistics (noting 3,046 state prisoners on death row, as compared to 8 federal prisoners on death row).

This overriding concern about state prisoners is reflected in the statutory text itself, which is the “authoritative statement” of Congress’ intent. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (citation omitted). Indeed, section 2244(b)(1) is just one example where the text subjects state prisoners to more stringent requirements than federal prisoners.

Take, for example, the substantive gatekeeping criteria governing second or successive petitions. As explained above, the newly discovered evidence criteria is stricter for state prisoners than for federal prisoners. It would have been most simple for Congress to subject state and federal prisoners to the same substantive criteria for successive petitions. Instead, AEDPA imposed both a due-diligence requirement and a constitutional-error requirement for state prisoners but not federal prisoners. Given that state prisoners alone are subject to the strict gatekeeping requirements in section 2244(b)(2), it would be perfectly

congruous for state prisoners alone to be subject to the strict gatekeeping requirement in section 2244(b)(1).

Consider also section 2244(c), which applies only “[i]n a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2244(c). That provision “embodies a recognition that if this Court has ‘actually adjudicated’ a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled. A subsequent application for habeas corpus raising the same claims would serve no valid purpose and would add unnecessarily to an already overburdened system of criminal justice.” *Neil v. Biggers*, 409 U.S. 188, 191 (1972). Congress adopted this particular form of collateral estoppel only for state prisoners, even though federal prisoners also seek direct review in this Court. That choice fully accords with petitioner’s interpretation of section 2244(b)(1). Similar to section 2244(c), (b)(1) bars state prisoners alone from presenting a federal claim in a second or successive federal habeas proceeding that has already been rejected in a prior federal habeas proceeding.

Finally, AEDPA otherwise imposes numerous requirements on state prisoners that do not apply to federal prisoners. State prisoners must exhaust their remedies in state court. 28 U.S.C. § 2254(b)–(c). For any claim adjudicated on the merits in state court, state prisoners cannot obtain relief in federal court unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined” by this Court, or “was based on an unreasonable determination of the facts in light of the evidence presented in” state court. § 2254(d). And where state prisoners fail to develop

the factual basis of their claim in state court, they cannot even obtain a hearing in federal court unless they meet one of two criteria similar to those governing successive applications. § 2254(e)(2). None of these strict textual requirements apply to federal prisoners.

3. Lastly, and remarkably, some courts of appeals have expressly relied on policy considerations. In particular, these courts have reasoned that, “[a]lthough § 2244(b)(1) explicitly applies to petitions filed under § 2254, which applies to state prisoners, it would be odd indeed if Congress had intended” it to apply only to state prisoners but not federal prisoners. *Baptiste*, 828 F.3d at 1339; *accord Bourgeois*, 902 F.3d at 448. But courts may not discard the statutory text and substitute their own policy judgment for that of Congress. And this Court has taken pains to enforce that prohibition with AEDPA. *See, e.g., Dodd*, 545 U.S. at 359–60 (adhering to AEDPA’s plain text notwithstanding its “potential for harsh result in some cases”).

In any event, there is nothing “odd” about treating state and federal prisoners differently. To the contrary, the reason why the statutory text repeatedly subjects state prisoners to stricter requirements than federal prisoners is because state prisoners squarely implicate AEDPA’s objectives “to advance the principles of comity, finality, and federalism.” *Shoop v. Twyford*, 596 U.S. 811, 818 (2022) (cleaned up). Most importantly here, AEDPA’s concern with federalism and comity applies exclusively to state prisoners.

“AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights.” *Burt v. Titlow*, 571 U.S. 12, 19 (2013). “Recognizing the duty and ability

of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief” for state prisoners. *Id.* After all, “[f]ederal habeas review of state convictions frustrates both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation omitted). Indeed, it “intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Id.* (citation omitted).

Many of AEDPA’s requirements for state prisoners reflect this respect for state sovereignty. “The exhaustion requirement of § 2254(b) ensures that state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment.” *Duncan v. Walker*, 533 U.S. 167, 178–79 (2001). The strict standards in section 2254(d) for obtaining federal habeas relief “reflect a presumption that state courts know and follow the law.” *Woods v. Donald*, 575 U.S. 312, 316 (2015) (cleaned up). And the strict limitations in section 2254(e)(2) on developing and considering new evidence in a federal habeas proceeding likewise promote federalism and comity by “ensur[ing] that the state trial on the merits is the main event, so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing.” *Shoop*, 596 U.S. at 819 (cleaned up); see *Shinn v. Ramirez*, 596 U.S. 366, 381–82 (2022).

Similar federalism and comity concerns explain why section 2244(b)(1) applies only to state (not federal) prisoners. Allowing a federal habeas court to review a state judgment even once creates tension with state

sovereignty. But, in enacting (b)(1), Congress determined that allowing a federal habeas court to review the same federal claim a *second* time would go too far. That second layer of federal review would presume that state courts could not properly adjudicate federal claims. AEDPA squarely rejected such a presumption.

In stark contrast, no federalism or comity concerns arise at all when federal prisoners collaterally attack a federal judgment in federal court. Allowing federal prisoners to present a federal claim in federal court that they had previously presented in federal court would not implicate or conflict with any state interests. The interests are purely “federal.” Thus, “no . . . federalism concern” exists. *Taylor*, 596 U.S. at 859.

In that regard, “[i]t would be passing strange to interpret a statute seeking to promote federalism and comity as requiring” that statute’s identical application to state and federal prisoners. *McQuiggin v. Perkins*, 569 U.S. 383, 394 (2013). To account for federalism and comity, Congress subjected state prisoners to limitations that federal prisoners are not. The plain text of (b)(1) reflects that sensible policy choice by Congress, and federal courts are required to honor it.

II. This Court has certiorari jurisdiction.

Because the Eleventh Circuit below erroneously applied section 2244(b)(1) to petitioner’s case, the only remaining question is whether this Court has jurisdiction to correct that legal error. As explained below, it does—notwithstanding the certiorari-stripping provision in section 2244(b)(3)(E). Like (b)(1), (b)(3)(E)’s certiorari bar does not apply to second or successive section 2255 motions. And even if the certiorari bar

did generally apply to such motions, it would not strip the Court of jurisdiction over this particular case.

A. Section 2244(b)(3)(E)’s certiorari bar does not apply to section 2255 motions.

The analysis is governed by the “basic principle” that the Court “read[s] limitations on [its] jurisdiction to review narrowly.” *Castro v. United States*, 540 U.S. 375, 381 (2003) (quoting *Utah v. Evans*, 536 U.S. 452, 463 (2002)). That principle has great force in this case given “the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.” *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). “Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.” *Id.* at 299.

In *Castro*, the Court applied these established principles to section 2244(b)(3)(E). There, the government advanced a broad interpretation that would have stripped this Court of certiorari jurisdiction over any court of appeals decision that “had the *effect* of denying ‘authorization . . . to file’” a second or successive petition. *Castro*, 540 U.S. at 380. The Court rejected that interpretation because it would have impermissibly “close[d] our doors to a class of habeas petitioners seeking review without any *clear indication* that such was Congress’ intent.” *Id.* at 381 (emphasis added).

The same logic applies here. In arguing that the Court lacks jurisdiction, the government relies on section 2255(h). But nothing in the text of section 2255(h) even mentions this Court’s jurisdiction. That omission stands in stark contrast to section 2244(b)(3)(E),

which clearly limits jurisdiction over successive habeas corpus applications. And the text of section 2255(h) incorporates only the parts of section 2244 that “provide” for how a second or successive section 2255 motion is to be “certified” by a “panel of the appropriate court of appeals. Section 2244(b)(3)(E)’s certiorari bar does no such thing. As a result, section 2255(h) does not extend section 2244(b)(3)(E)’s certiorari bar to second or successive section 2255 motions.

1. Section 2255(h) reflects no intent to strip the Court of jurisdiction.

Far from reflecting a clear intent to limit jurisdiction, section 2255(h) “makes no mention” of this Court’s jurisdiction at all. *Felker*, 518 U.S. at 661. Indeed, section 2255(h) does not even use the words “jurisdiction,” “Supreme Court,” “review,” or “certiorari.” As a textual matter, then, section 2255(h) does not impose any limit, much less a clear limit, on this Court’s jurisdiction as to successive section 2255 motions.

In stark contrast, section 2244(b)(3)(E) *does* clearly limit the Court’s certiorari jurisdiction. That provision uses language that section 2255(h) does not, expressly prohibiting a “petition . . . for a writ of certiorari.” Accordingly, this Court has previously recognized that (b)(3)(E) strips the Court of certiorari jurisdiction as to “state prisoners filing second or successive habeas applications under § 2254.” *Hohn v. United States*, 524 U.S. 236, 249 (1998); *see Felker*, 518 U.S. at 661.

The upshot is that Congress clearly limited the Court’s jurisdiction over habeas corpus applications in section (b)(3)(E) but *not* motions to vacate in section 2255(h). This contrast reflects a deliberate choice. Indeed, Congress enacted sections (b)(3)(E) and 2255(h)

at the same time in AEDPA. *See Jones*, 599 U.S. at 513 (Jackson, J., dissenting) (“Section 2255(h) was enacted in the same Public Law as § 2244(b), a provision that contains analogous second-or-successive petition limitations for *state* prisoners.”). And it is an established “principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

The Court employed this precise reasoning in *Hohn*. There, the Court held that it possessed certiorari jurisdiction to review denials of certificates of appealability (COA). After observing that section (b)(3)(E) and the provision governing COAs were “enacted in the same statute,” the Court “contrast[ed]” the “clear limit” on jurisdiction in the former “with the absence of an analogous limitation to certiorari review” in the latter. *Hohn*, 524 U.S. at 250. The Court concluded that “a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention.” *Id.*

So too here. Had Congress intended to limit this Court’s jurisdiction over successive motions to vacate under section 2255 as well as successive habeas corpus applications, it would have been “just as explicit” in section 2255(h) as it was in (b)(3)(E). *Id.* But Congress included no jurisdiction-stripping language at all in section 2255(h), reflecting that Congress lacked any such intent with respect to motions to vacate.

2. Section 2255(h) does not incorporate by implication the certiorari bar in (b)(3)(E).

Unable to identify any express jurisdiction-stripping language in section 2255(h), the government is forced to rely entirely on its cross reference to section 2244. Again, section 2255(h) provides that “[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain” one of the substantive criteria. Contrary to the government’s argument here, section 2255(h) does not incorporate (b)(3)(E)’s certiorari bar.

a. As an initial matter, the government’s argument is one of incorporation by “implication,” which does not constitute a clear statement of congressional intent required to strip the Court of jurisdiction. *St. Cyr*, 553 U.S. at 299. Not only does section 2255(h) fail to mention this Court or its jurisdiction; it also fails to reference section 2244(b)(3)(E) in particular. Instead, section 2255(h) references “section 2244.” And section 2255(h) clearly does not incorporate the entirety of section 2244. As explained above, section 2255(h) does not incorporate sections 2244(b)(1) and (b)(2). As another example, section 2255(h) does not incorporate section 2244(d) either. On its face, section 2244(d) prescribes a statute of limitations only for state prisoners, and section 2255 motions are governed by a separate statute of limitations set out in section 2255(f).

Because section 2255(h) does not incorporate all of section 2244, and because section 2255(h) does not expressly incorporate (b)(3)(E), the government is unable to point to the “specific and unambiguous statutory directive[]” required to strip this Court of juris-

diction. *St. Cyr*, 553 U.S. at 299. Thus, the government’s effort to find jurisdiction-stripping by way of an implied incorporation fails at the very outset.

b. In any event, the government’s interpretation ignores critical textual limitations in section 2255(h). That provision requires that a second or successive section 2255 motion “be certified as provided in section 2244 by a panel of the appropriate court of appeals.” 28 U.S.C. § 2255(h). Section 2255(h) thus incorporates only the parts of section 2244 that “provide” for how a second or successive section 2255 motion is to be “certified.” And section 2255(h) further hones in on the specific act of certification by expressly identifying the actor who must make that determination: “a panel of the appropriate court of appeals.”

Given these textual limits, section 2255(h) incorporates the following provisions in section 2244(b)(3):

- (b)(3)(A), which provides that the applicant must file a motion for authorization in the court of appeals before he may file a second or successive application in the district court.
- (b)(3)(B), which provides that the motion for authorization must be determined by a three-judge panel of the court of appeals.
- (b)(3)(C), which provides that the applicant must make a prima facie showing that the application satisfies the gatekeeping criteria.
- (b)(3)(D), which provides that the court of appeals must grant or deny the motion for authorization within 30 days after filing.

Sections 2244(b)(3)(A) through (D) share one thing in common: they “provide” for how a motion is to be “certified” by a “panel of the appropriate court of appeals.”

In stark contrast, the certiorari bar in (b)(3)(E) does not “provide” for how a successive section 2255 motion is to be “certified” by “the court of appeals” in any respect. Rather, it addresses an entirely separate and subsequent issue—the ability to seek review of the panel’s certification determination in this Court. As such, it comes in to play only *after* the certification determination has been made. To illustrate the point: if Congress repealed the certiorari bar tomorrow but left (b)(3)(A) through (D) as is, then the process governing the certification determination would not change one wit. The only change would be that parties (in state-prisoner cases) would be able to seek certiorari from the authorization determination. It cannot be that the certiorari bar “provides” for how a motion is to be “certified” when it has no bearing on the certification determination. Rather, the certiorari bar addresses an entirely different act (filing a certiorari petition, not certifying a successive motion) by an entirely different actor (the prisoner, not the panel) in an entirely different court (this Court, not the court of appeals).

The government itself previously adopted a similar understanding of section 2255(h)’s scope. In a merits brief in this Court, the government argued that “[t]he natural reading of Section 2255’s requirement that a second or successive motion be certified ‘as provided’ in Section 2244 is that such a motion is to be certified *in the manner* described in Section 2244. See *Webster’s Third New International Dictionary* 125 (1993) (one meaning of ‘as’ is ‘in the same way or manner’).” Br. for U.S. 14, *Castro v. United States*, 540 U.S. 375

(2003) (No. 02-6883) (June 2003). But if section 2255(h) incorporates only the provisions in section 2244 governing the “manner” of certification, then it would not incorporate the certiorari bar in (b)(3)(E). As explained above, the certiorari bar has no bearing on the certification determination at all, let alone the manner in which that determination must be made.

c. Perhaps sensing the problem, the government’s brief in opposition here made additional arguments.

First, the government observed that petitioner previously assumed that he could not seek certiorari when he filed an original habeas petition in this Court. BIO 12, 15. But, as he has acknowledged, this assumption was mistaken. *See* Cert. Reply 12. And it has no bearing on this Court’s review here because arguments going to a federal “court’s power to hear a case . . . can never be forfeited or waived” by the parties. *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Second, the government argued that (b)(3)(E) is a “key part of the certification procedure” because Congress intended the panel’s “certification decisions generally to be final.” BIO 15–16. But that argument is unmoored from the text of section 2255(h), which does not mention “procedure” or “finality” at all. It serves a far more limited function: to incorporate the parts of section 2244 that “provide” for how a section 2255 motion is to be “certified” by the court of appeals. Thus, this atextual argument does not support extending (b)(3)(E)’s certiorari bar to section 2255 motions.

In any event, there is no support for the government’s suggestion that (b)(3)(E) itself requires the authorization determination to be “final.” To the contrary, every circuit to address the question has held

that, while (b)(3)(E) prohibits parties from petitioning for rehearing, it does not prohibit the court of appeals from *sua sponte* rehearing an authorization determination. *See, e.g., Baptiste*, 828 F.3d at 1340; *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998); *Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997).

Third, the government observed that, unlike other provisions in section 2244, section 2244(b)(3) uses the term “application” without specifying whether it was filed under section 2254 or by a state prisoner. From this, the government leapt to the conclusion that section 2255(h) incorporates all of (b)(3), including the certiorari bar in (b)(3)(E). BIO 16. But that inference misunderstands the reason why section 2255(h) incorporates (b)(3)(A) through (D). Those provisions are instead incorporated because they “provide” for how a second or successive motion is to be “certified” by a “panel of the appropriate court of appeals.” The certiorari bar in (b)(3)(E), by contrast, does no such thing.

B. The certiorari bar in section 2244(b)(3)(E) does not apply to this particular case.

Alternatively, even if section 2255(h) somehow incorporated section 2244(b)(3)(E)’s certiorari bar, the bar would not apply to the particular circumstances of this unusual case. Accordingly, the Court could simply exercise certiorari jurisdiction over this one case and resolve the circuit conflict over section 2244(b)(1)—without addressing whether (b)(3)(E)’s certiorari bar generally applies to section 2255 motions to vacate.

The certiorari bar is circumscribed. It provides only that “[t]he grant or *denial* of an *authorization* by a court of appeals to file a second or successive applica-

tion shall not be appealable and shall not be *the subject* of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E) (emphases added).

As explained below, the italicized text establishes that the certiorari bar applies where the court of appeals denies authorization on the merits for failure to make a prima facie showing satisfying the applicable gatekeeping requirements. But the bar does not apply where, as here, the court of appeals dismisses a request for authorization for lack of jurisdiction based on a requirement that was legally inapplicable. This conclusion follows not only from the statutory text but from this Court’s precedent strictly construing the certiorari bar in (b)(3)(E), the “basic principle” that the Court “read[s] limitations on [its] jurisdiction to review narrowly,” *Castro*, 540 U.S. at 381 (citation omitted), and the canon of constitutional avoidance.

1. The “denial” of “an authorization” is not “the subject” of this certiorari petition.

The text of the certiorari bar does not apply here for three independent but mutually reinforcing reasons.

a. The decision below is not a “grant or denial.”

Section 2244(b) repeatedly differentiates between a “dismissal” and a “denial.” Sections 2244(b)(1) and (b)(2) require a court to “dismiss” a claim that does not satisfy their requirements. By contrast, (b)(3) contemplates the “grant or denial” of authorization to file a second or successive petition in the district court. 28 U.S.C. §§ 2244(b)(3)(D), (E). This textual distinction between the “dismissal” of a claim and the “denial” of authorization to file reflects that Congress understood these actions to be different. Yet Congress wrote (b)(3)(E)’s certiorari bar to encompass only the latter.

Here, the Eleventh Circuit’s decision below is not a “denial” of authorization. The court of appeals did not even consider the merits of petitioner’s authorization request—namely, whether he had made a *prima facie* showing satisfying the applicable requirements for authorization in section 2255(h). Instead, the court of appeals believed that his claim was subject to “dismissal” under (b)(1), and so the court “dismissed” his authorization request for lack of jurisdiction. J.A. 73, 77–79. That jurisdictional “dismissal” is not a “denial.”

The Eleventh Circuit itself has repeatedly recognized and scrupulously applied this basic distinction throughout the life of petitioner’s case. In 2019, it “denied” his authorization request on the merits for failure to make a *prima facie* showing satisfying the gatekeeping requirements in section 2255(h). J.A. 54. By contrast, in 2024 (and in 2022), the Eleventh Circuit “dismissed” petitioner’s claim and his authorization request based on (b)(1). J.A. 64–65, 73, 77–79. Again, in doing so, the court did not consider the merits of his request for authorization and whether he made a *prima facie* showing under section 2255(h). That “dismissal” is therefore not a “denial” under (b)(3)(E). And that is true even though the effect of the dismissal was to prevent petitioner from filing a successive motion.

This conclusion is confirmed by *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), where the Court strictly construed the phrase “grant or denial” in (b)(3)(E). There, a state prisoner sought authorization. But the court of appeals did not consider the merits of his request at all, since it determined that the claim was not “second or successive.” Authorization was therefore unnecessary, and the court of appeals “dismissed” the request and transferred the habeas

application to the district court. *Stewart*, 523 U.S. at 641; *Martinez-Villareal v. Stewart*, 118 F.3d 628, 634–35 (9th Cir. 1997). This Court held that (b)(3)(E) did not bar its review. *Stewart*, 523 U.S. at 641–42. Although the court of appeals “dismissed” the express authorization request (as unnecessary), this Court did not even consider the possibility that such a dismissal constituted a “denial” under (b)(3)(E). And although the court of appeals effectively permitted the applicant to proceed to the district court, this Court held that the court of appeals did not “grant” him authorization (again, since it was unnecessary). *Id.* at 641.

In *Castro*, the Court again declined to rely on the practical effect of the court of appeals’ ruling. On an appeal from the dismissal of a section 2255 motion, the court of appeals concluded that the movant’s claim was “second or successive.” The court of appeals then proceeded to opine that the motion “could not meet the requirements for second or successive motions” under section 2255(h). 540 U.S. at 380. Based on that statement, the government came to this Court and “argue[d] that the Eleventh Circuit’s opinion had the *effect* of denying authorization” for purposes of (b)(3)(E). *Id.* (emphasis in original). This Court rejected that argument because it “stretch[ed] the words of the statute too far.” *Id.* Although the court of appeals had denied the prisoner authorization to file as a practical matter, the Court held that this was not a “statutorily relevant ‘denial’” for purposes of (b)(3)(E). *Id.* (The Court relied on the technical fact that the prisoner had not formally made a request for authorization.).

In short, there was no statutorily relevant “denial” of authorization here. This Court has strictly parsed the phrase “grant or denial” in (b)(3)(E). That phrase

cannot be rewritten to encompass the “dismissal” here given that section 2244(b) repeatedly uses that term elsewhere. And it is insufficient that the practical effect of the Eleventh Circuit’s dismissal prevented petitioner from filing a successive section 2255 motion.

b. The decision below was also not “an authorization” determination subject to the bar in (b)(3)(E).

The certiorari bar in (b)(3)(E) applies only to the grant or denial of “an authorization.” Importantly, the scope of the authorization determination is circumscribed by (b)(3)(C). So where a court of appeals exceeds the scope of the authorization determination in (b)(3)(C), the certiorari bar in (b)(3)(E) does not apply.

Recall that (b)(3)(C) requires the applicant to make a “prima facie showing that the application satisfies the *requirements of this subsection*.” 28 U.S.C. § 2244(b)(3)(C) (emphasis added). For state prisoners, the “requirements of this subsection” are found in (b)(1) and (b)(2). So where a court of appeals denies authorization for failure to make a prima facie showing that the application satisfies those applicable requirements, that constitutes the denial of “an authorization” subject to the certiorari bar in (b)(3)(E).

For federal prisoners, the applicable gatekeeping requirements are found in sections 2255(h)(1) and (h)(2). So where a court of appeals denies certification for failure to make a prima facie showing satisfying those requirements, that constitutes the denial of “an authorization” subject to the certiorari bar in (b)(3)(E) (assuming that it applies to section 2255 motions).

Here again, however, the court of appeals did not even consider whether petitioner satisfied the applicable gatekeeping requirements in section 2255(h).

Rather, the court of appeals dismissed his authorization request based on (b)(1). But, as explained above, (b)(1) does not apply to federal prisoners at all. So the court of appeals dismissed petitioner's request based on a requirement that was legally inapplicable to the authorization determination prescribed by (b)(3)(C). That ruling is therefore not "an authorization" determination subject to the certiorari bar in (b)(3)(E).

c. Finally, that threshold legal ruling on (b)(1) is "the subject" of this certiorari petition, and the certiorari bar does not cover that type of determination.

The certiorari bar in (b)(3)(E) does not strip the Court of jurisdiction over *every* ruling made at the authorization stage. Rather, the certiorari bar strips the Court of jurisdiction only where "the subject" of the certiorari petition is the grant or denial of an authorization. This Court's decision in *Castro* establishes that "the subject" of a certiorari petition for purposes of (b)(3)(E) is the particular legal question on which review is sought. And *Castro* and *Stewart* establish that threshold legal questions about whether the gatekeeping requirements are applicable in the first place do not fall within the scope of the certiorari bar.

As explained above, the court of appeals in *Castro* held that, as a threshold matter, the section 2255 motion was "second or successive." The court of appeals then added that the motion "could not meet the requirements for second or successive motions." *Castro*, 540 U.S. at 380. The prisoner sought certiorari review only on the former threshold legal determination. Although the court of appeals had actually purported to apply the gatekeeping requirements in section

2255(h), this Court nonetheless held that “[t]he ‘subject’ of Castro’s petition is not the Court of Appeals’ ‘denial of an authorization’”; rather, the “subject” was “the lower courts’ refusal to recognize that this § 2255 motion is his first, not his second. That is a very different *question*.” *Id.* (emphasis added); *see also Stewart*, 523 U.S. at 641–42, 645 (holding that (b)(3)(E) did not deprive this Court of certiorari jurisdiction over the court of appeals’ threshold determination that the application was not “second or successive”).

Applying that reasoning here, “the subject” of this certiorari petition is whether (b)(1) applies to federal prisoners. Indeed, that is literally the “question” presented for review. Pet. i. And that is the same type of threshold legal question that this Court reviewed in *Castro* and *Stewart*. Moreover, *Castro*’s logic applies with even greater force because, unlike in *Castro*, the court of appeals here never even considered whether petitioner could satisfy the applicable gatekeeping requirements in section 2255(h). Thus, “the subject” of this petition could not possibly be the denial of a request for authorization. Rather, “the subject” of this petition is the Eleventh Circuit’s threshold legal determination that (b)(1) applies to federal prisoners.

* * *

In short, the text of (b)(3)(E)’s certiorari bar does not cover this unusual case. Petitioner does not seek review of any application of the governing gatekeeping requirements. Again, there was no such application at all. Instead, he seeks review of the Eleventh Circuit’s

threshold determination that the gatekeeping requirement in (b)(1) applied to him in the first place.¹

This distinction makes perfect sense in this context. To streamline the process, Congress did not want this Court to review individualized applications of the gatekeeping requirements. But Congress did not intend to bar certiorari review where, as here, the courts of appeals venture beyond the gatekeeping requirements altogether and deny relief based on legal requirements that do not apply. Were it otherwise, the courts of appeals could deny authorization based on grounds that are legally irrelevant or even entirely arbitrary, and there would be no legal recourse. This Court has previously interpreted (b)(3)(E)’s certiorari bar to avoid “troublesome results” and “procedural

¹ Notably, Congress enacted (b)(3)(E) against the backdrop of decisions by this Court drawing similar distinctions when construing statutes limiting judicial review. *See, e.g., McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491–95 (1991) (interpreting a statutory bar on “judicial review of a determination respecting an application for adjustment of status” to be limited to “review on the merits of a denial of a particular application,” and not legal challenges to the “practices and policies used by the agency in processing applications”); *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 285 (1986) (holding that a statutory bar on judicial “review of individual eligibility determinations” made under federal labor guidelines did not preclude legal “challenges to the federal guidelines themselves” or “claims that [the] program is being operated in contravention of” federal law); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 674–78 (1986) (holding that a statutory bar on judicial review of “any determination” about the “amount” of Medicare benefits or payments did not bar “challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves”).

anomalies.” *Castro*, 540 U.S. at 381. That approach is sound, and the Court should follow it once again here.

2. Applying the certiorari bar to this case would raise a constitutional question under Article III.

If any doubt remains, the constitutional-avoidance canon would require the Court to exercise jurisdiction here in order to ensure the uniformity of federal law.

a. That familiar canon of construction provides that, “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.” *St. Cyr*, 533 U.S. at 299–30 (cleaned up). This “cardinal” and “elementary rule” of construction “has for so long been applied by this Court that it is beyond debate.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted); see *Davis*, 588 U.S. at 494–95 (Kavanaugh, J., dissenting) (collecting cases going back “more than 200 years”).

The Court’s obligation to avoid constructions raising serious constitutional problems when fairly possible “is a categorical one.” *Rust v. Sullivan*, 500 U.S. 173, 190 (1991). That is because the canon “rest[s] on the reasonable presumption that Congress did not intend the alternative [construction] which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Respect for Congress thus requires the Court to “assume” that it “legislates in the light of constitutional limitations.” *Rust*, 500 U.S. at 191. So where a “statute invokes the outer limits of Congress’

power, we expect a clear indication that Congress intended that result.” *St. Cyr*, 533 U.S. at 299.

b. Interpreting (b)(3)(E) to strip this Court of certiorari jurisdiction over this petition would raise a serious constitutional question under Article III § 2.

After prescribing the class of cases over which this Court has original jurisdiction, that constitutional provision otherwise vests this Court with “appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const., art. III § 2. Congress’ power to make “exceptions” to this Court’s appellate jurisdiction, however, “must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.” Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953). Indeed, the Constitution should not be interpreted as “authorizing its own destruction.” *Id.*²

One of this Court’s “essential” and “indispensable” functions in the constitutional plan is to “resolve conflicting interpretations of the federal law.” Leonard G.

² Many scholars have endorsed this sensible limitation. See Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 Colum. L. Rev. 2077, 2089 & n.51 (2023) (citing scholarship). So too has the Executive Branch itself under Attorney General William French Smith. See *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. OLC 13, 21–22 (1982) (“[T]he Exceptions Clause does not authorize Congress to interfere with the Court’s core functions in our constitutional system,” for otherwise Congress “could reduce the Supreme Court to a position of impotence in the tripartite constitutional scheme.”).

Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 161, 166 (1960). After all, the Constitution vests the judicial Power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const., art. III § 1; *see id.* art. I § 8 cl. 9 (“Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court.”). That hierarchal relationship between this “Supreme” Court and “inferior” federal courts “makes little practical sense” unless this Court retains appellate “jurisdiction sufficiently broad to provide general leadership in defining federal law.” Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 835–37 (1994).

c. Applying (b)(3)(E)’s certiorari bar to this case would create (not avoid) a serious constitutional question under Article III’s Exceptions Clause, because it would prevent the Court from resolving an entrenched circuit conflict over a federal statute—namely, (b)(1).

In *Felker*, a case involving a state prisoner, the Court held that (b)(3)(E) did not violate the Exceptions Clause because it did not repeal the Court’s jurisdiction over original habeas petitions, which would permit the Court to exercise its appellate jurisdiction over gatekeeping determinations. 518 U.S. at 661–62. Writing separately, however, three Justices presciently cautioned that, “if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress’s Exceptions Clause power would be open.” *Id.* at 667 (Souter, J., concurring). And, they added, that “question could

arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard.” *Id.*

That describes this case. It is undisputed that the courts of appeals are divided over whether the gatekeeping requirement in (b)(1) applies to federal prisoners. Three Justices have expressly recognized the need for the Court to resolve that conflict. And this case squarely presents that question, since it is the sole basis of the decision below. Given its role in the constitutional plan, this Court must retain authority to ensure the uniform application of this federal law.

However, none of the alternative avenues identified in *Felker* are meaningfully available to the Court here. Most importantly, and unlike state prisoners, it is not clear that federal prisoners can even file original habeas petitions in this Court. In *Jones v. Hendrix*, this Court held that the saving clause in section 2255(e) largely prevents federal prisoners from challenging their convictions or sentences in a habeas corpus application under section 2241. *See* 599 U.S. at 474–76 (identifying very narrow exceptions). And the text of the saving clause in section 2255(e) appears to apply to *all* such applications by federal prisoners—whether filed in the district court or this Court. Thus, while the availability of original habeas petitions saved (b)(3)(E) from violating the Exceptions Clause in *Felker*, it may not do so here. And while state prisoners can still file original habeas petitions, they cannot tee up the circuit split over (b)(1)’s application to federal prisoners.

This Court’s certified-question jurisdiction is not viable either. *See* 28 U.S.C. § 1254(2); Sup. Ct. R. 19. That pathway is available only if a court of appeals

acts first by certifying a question. Relying on this avenue would thus flip the judicial hierarchy, allowing the courts of appeals to control this Court's supervisory function. That result would be especially perverse given that the courts of appeals no longer certify questions at all. This Court has emphasized that doing so is warranted only "in rare instances." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). And the courts of appeals have taken that to heart. Indeed, this Court summarily dismissed the last certificate that a court of appeals issued, *United States v. Seale*, 558 U.S. 985 (2009), and no circuit has dared to issue one since then. As the Eleventh Circuit below recognized, this Court has "accepted only four certified questions since 1946, and none in the last forty-three years." J.A. 78. And even though three Justices had opined that the (b)(1) conflict warranted resolution, the Eleventh Circuit declined to certify it just because it did not want to "cause a newsworthy event." J.A. 79.

Finally, a writ of mandamus is not available in this context either. See 28 U.S.C. § 1651(a). "Mandamus, of course, may never be employed as a substitute for appeal." *Will v. United States*, 389 U.S. 90, 97 (1967). And since it has the "unfortunate consequence of making the judge a litigant," *Ex parte Fahey*, 332 U.S. 259, 260 (1947), mandamus may be used in "only exceptional circumstances amounting to a judicial usurpation of power," *Will*, 389 U.S. at 95, or a "clear abuse of discretion," *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380 (2004). Most importantly here, the right to relief must be "clear and indisputable." *Cheney*, 542 U.S. at 381 (citation omitted). Thus, mandamus would be ill-suited to resolve legal issues that have divided the circuits, as those issues are

hardly “clear and indisputable.” Yet that is the scenario where the Court’s review is needed most of all.

This case again illustrates the point. Despite filing an original habeas petition in this Court, multiple requests for initial hearing en banc, and a motion for a certified question, petitioner has been unable to obtain further review of the (b)(1) question. If (b)(3)(E) now stripped the Court of jurisdiction over this certiorari petition, then the Court would have no way to directly resolve the circuit conflict over the application of the gatekeeping requirement in (b)(1). And the Court’s inability to do so would call into question whether (b)(3)(E) has exceeded Congress’ power under the Exceptions Clause. Rather than stretch the text of (b)(3)(E) to trigger this serious constitutional question, the canon of constitutional avoidance instead requires this Court to adopt petitioner’s interpretation of (b)(3)(E) above. That narrow resolution would permit the Court to exercise certiorari jurisdiction over this case and to resolve the circuit conflict over (b)(1).

CONCLUSION

The order of the Eleventh Circuit should be vacated and the case remanded for further proceedings.

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APPENDIX: STATUTORY PROVISIONS

A. 28 U.S.C. § 2244	2a
B. 28 U.S.C. § 2254	6a
C. 28 U.S.C. § 2255	10a

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A. 28 U.S.C. § 2244

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for

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constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that

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the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United

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States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

B. 28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the

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State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by

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the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this

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section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

C. 28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

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(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under

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this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

No. 23-7483

IN THE
Supreme Court of the United States

EDGARDO ESTERAS,
TIMOTHY MICHAEL JAIMEZ FKA TIMOTHY M.
WATTERS, AND TORIANO A. LEAKS, JR.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

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QUESTION PRESENTED

The supervised-release statute, 18 U.S.C. § 3583(e), lists factors from 18 U.S.C. § 3553(a) for a court to consider when terminating, modifying, or revoking supervised release. In that list, Congress omitted the factors set forth in Section 3553(a)(2)(A)—the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.

The question presented is:

Even though Congress excluded Section 3553(a)(2)(A) from Section 3583(e)'s list of factors to consider when revoking supervised release, may a district court rely on the Section 3553(a)(2)(A) factors when revoking supervised release?

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Cases	
<i>Bittner v. United States</i> , 598 U.S. 85 (2023).....	19, 20, 21
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<i>Cyan, Inc. v. Beaver County Employees Ret. Fund</i> , 583 U.S. 416 (2018).....	18, 30
<i>Gozlon-Peretz v. United States</i> , 498 U.S. 395 (1991).....	20, 25
<i>Int’l Union, Mine Works of Am. v. Bagwell</i> , 512 U.S. 821 (1994).....	28
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<i>Lora v. United States</i> , 599 U.S. 453 (2023).....	35
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	23, 24

Cited Authorities

	<i>Page</i>
<i>Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers,</i> 414 U.S. 453 (1974)	19
<i>Nichols v. United States,</i> 578 U.S. 104 (2016)	16
<i>Rotkiske v. Klemm,</i> 589 U.S. 8 (2019)	16
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<i>Tapia v. United States,</i> 564 U.S. 319 (2011)	7, 17, 18, 23, 24, 33, 34
<i>United States v. Booker,</i> 63 F.4th 1254 (10th Cir. 2023)	19
<i>United States v. Burden,</i> 860 F.3d 45 (2d Cir. 2017)	33
<i>United States v. Crudup,</i> 461 F.3d 433 (4th Cir. 2006)	19
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<i>United States v. Esteras,</i> 88 F.4th 1170 (6th Cir. 2023)	1

Cited Authorities

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<i>United States v. Esteras</i> , 95 F.4th 454 (6th Cir. 2024).....	1
<i>United States v. Granderson</i> , 511 U.S. 39 (1994).....	27, 28
<i>United States v. Haymond</i> , 588 U.S. 634 (2019).....	24, 25, 27, 31
<i>United States v. Jaimez</i> , 95 F.4th 1004 (6th Cir. 2024).....	1
<i>United States v. Johnson</i> , 529 U.S. 53 (2000).....	8, 25
<i>United States v. Lewis</i> , 498 F.3d 393 (6th Cir. 2007)	10, 11, 12
<i>United States v. Miller</i> , 634 F.3d 841 (5th Cir. 2011).....	19
<i>United States v. Miquel</i> , 444 F.3d 1173 (9th Cir. 2006).....	19, 34
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<i>Williams v. Illinois</i> , 567 U.S. 50 (2012).....	33

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18 U.S.C. § 3551	24, 25, 26, 28
18 U.S.C. § 3551(b)	20
18 U.S.C. § 3551(c)	20
18 U.S.C. § 3553(a)	4, 6, 8, 10, 16-18, 20-22, 26, 29, 31, 34
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18 U.S.C. § 3583.	8, 15, 16, 19, 23, 30
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28 U.S.C. § 1254(1).	2
21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. B, tit. III, § 3007, 116 Stat. 1758, 1806 (2002)	30
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006(a)(3)(D), 100 Stat. 3207, 3207-7	29

Cited Authorities

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Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7108(b)(1), 100 Stat. 4181, 4419	30
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7108(b)(3), 100 Stat. 4181, 4419	29
Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1266, 1267.	30
Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987	8, 24
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3562(a), 98 Stat. 1987, 1992	26
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3564(e), 98 Stat. 1987, 1994.	27
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3565(a), 98 Stat. 1987, 1995	27
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3583(c), 98 Stat. 1987, 1999.	26, 27
Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3583(e), 98 Stat. 1987, 2000	26, 27, 28
Supreme Court Rule 12(4)	2

Cited Authorities

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Other Authorities

ANTONIN SCALIA & BRYAN A. GARNER, <i>READING LAW: THE INTERPRETATION OF LEGAL TEXTS</i> (2012)	16
Fiona Doherty, <i>Indeterminate Sentencing Returns: The Invention of Supervised Release</i> , 88 N.Y.U.L. REV. 958 (2013)	25, 28
Reply Brief for the United States, <i>Tapia v. United States</i> , 564 U.S. 319 (2011) (No. 10-5400), 2011 U.S. S. Ct. Briefs LEXIS 451	18
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OPINIONS AND ORDERS BELOW

In *United States v. Esteras*, the original order of the court of appeals (JA 117a-120a) is not published. The amended order of the court of appeals (JA 121a-135a) is reported at 88 F.4th 1163 (6th Cir. 2023). The order of the court of appeals denying Esteras's first petition for rehearing en banc (JA 136a-149a) is reported at 88 F.4th 1170 (6th Cir. 2023). The order of the court of appeals denying Esteras's second petition for rehearing en banc (JA 150a-154a) is reported at 95 F.4th 454 (6th Cir. 2024). The order of the district court (JA 110a-116a) is not published.

In *United States v. Jaimez*, the opinion of the court of appeals (JA 229a-236a) is reported at 95 F.4th 1004 (6th Cir. 2024). The order of the district court (JA 227a-228a) is not published.

In *United States v. Leaks*, the order of the court of appeals (JA 249a-251a) is not published in the Federal Reporter but is available at 2024 WL 2196795. The order of the district court (JA 247a-248a) is not published.

JURISDICTION

In *United States v. Esteras*, the court of appeals initially entered judgment on August 16, 2023. The court denied a timely petition for rehearing and entered an amended order and judgment on December 20, 2023. The court denied a second timely petition for rehearing on March 7, 2024.

In *United States v. Jaimez*, the court of appeals entered judgment on March 12, 2024.

In *United States v. Leaks*, the court of appeals entered judgment on March 6, 2024.

Esteras, Jaimez, and Leaks filed a single petition for a writ of certiorari under Supreme Court Rule 12(4) on May 15, 2024, which was granted on October 21, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3583(e) of Title 18, United States Code, provides:

MODIFICATION OF CONDITIONS OR REVOCATION.—
The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

- (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;
- (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal

Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

Section 3553(a) of Title 18, U.S. Code, provides:

FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title

28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT

Unlike every other sentencing option, Congress intended supervised release to fulfill only nonretributive goals. Congress thus omitted 18 U.S.C. § 3553(a)(2)(A)’s retribution factors from the list for courts to consider when imposing, terminating, modifying, or revoking supervised release, thereby precluding courts from considering those factors.

The Sentencing Reform Act (“SRA”) lists sentencing factors in 18 U.S.C. § 3553(a), and other provisions instruct courts what to do with those factors when considering the four sentencing options—probation, fine, prison, and

supervised release. Supervised release is different from the others. For the first three options, the applicable statutes include Section 3553(a)(2)(A) among the list of factors for courts to consider when imposing the sentence. For supervised release, the statute omits Section 3553(a)(2)(A). *See* 18 U.S.C. § 3583(c). Similarly, when modifying or revoking probation, the applicable statute includes Section 3553(a)(2)(A) among the list of factors for courts to consider. When modifying or revoking supervised release, the statute omits Section 3553(a)(2)(A). *See* 18 U.S.C. § 3583(e). That difference in language indicates a difference in meaning: courts may not consider the Section 3553(a)(2)(A) factors when imposing supervised release (as both this Court and the Government said in *Tapia v. United States*) and may not consider them when modifying or revoking supervised release.

That difference in language is also no accident. Unlike the other three sentencing options, supervised release does not stand alone. It is a discretionary supplement that follows a prison term. A prison term itself fulfills all the sentencing factors, including the need for retributive punishment under Section 3553(a)(2)(A). The purpose of supervised release, as expressed through the statute's text, is to protect the public while providing rehabilitative support as a defendant transitions out of prison and back into society. The sentencing court imposes conditions to further those forward-looking goals. When a person violates the supervised-release conditions, a court may further those goals by, for example, incarcerating the defendant to protect the public or to compel compliance with the conditions imposed. Backward-looking retributive punishment is a matter for a separate prosecution, if appropriate, and not for a revocation proceeding.

In the decisions below, the court of appeals nevertheless held that Section 3583(e) allows courts to consider Section 3553(a)(2)(A)'s retribution factors when revoking supervised release. That conclusion nullifies the textual differences between Section 3583(e) and its neighboring statutes, and it ignores Congress's distinct purposes for supervised release. To give effect to the text and to reflect Congress's intent as expressed in the SRA, this Court should reverse the judgment of the court of appeals and hold that Section 3583(e) precludes courts from considering the Section 3553(a)(2)(A) factors when modifying or revoking supervised release.

I. Legal Background

Through the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, Congress eliminated indeterminate sentencing and parole, replacing that system with determinate sentences (subject to limited exceptions). Recognizing that some offenders would need rehabilitation or other assistance transitioning back into society, Congress created supervised release, a new discretionary supplement to follow a prison sentence. *See* 18 U.S.C. § 3583. Unlike parole, supervised release does not replace a portion of the defendant's prison sentence, but rather supports rehabilitation after a prison sentence is complete. *Id.*; *United States v. Johnson*, 529 U.S. 53, 59 (2000).

In the SRA and subsequent amendments, Congress adopted sentencing factors for courts to consider and specified how those factors apply differently to different sentencing options. *See* 18 U.S.C. §§ 3553(a) (factors); 3562(a) (probation); 3572(a) (fines); 3582(a) (prison);

3583(c) (supervised release). Section 3553(a)(2)(A)—the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment—is included in the list of factors for courts to consider when imposing probation, a fine, or prison. *See* 18 U.S.C. §§ 3562(a) (probation); 3572(a) (fine); 3582(a) (prison). It is omitted from the list of factors to consider when imposing supervised release. *See* 18 U.S.C. § 3583(c). Likewise, Section 3553(a)(2)(A) is included in the list of factors for courts to consider when modifying or revoking probation. *See* 18 U.S.C. §§ 3565(a). It is omitted from the list of factors to consider when modifying or revoking supervised release. *See* 18 U.S.C. § 3583(e).

II. Proceedings Below

Edgardo Esteras, Timothy Jaimez (fka Timothy Watters), and Toriano Leaks, Jr., each were charged with and convicted of a federal crime. After completing a custodial sentence, each began serving a term of supervised release. The district courts later found that each of them violated conditions of supervised release, and the courts revoked supervised release and imposed new terms of incarceration. During their revocation proceedings, the courts expressly relied on one or more of the factors set forth in Section 3553(a)(2)(A). The court of appeals affirmed their sentences.

a. *Edgardo Esteras’s Revocation Proceedings.* After a contested hearing, the district court found that Esteras violated his supervised-release conditions by possessing a firearm. When making its factual findings, the court referred to “the punishment I will issue today.” JA 94a. The court revoked Esteras’s supervised release and varied

upward from the 6-to-12-month advisory guidelines range, sentencing him to 24 months in prison and three years of supervised release. JA 98a, 116a.

Esteras objected that “the Court indicated that it considered factors—the factor in Section 3553(a)(2)(A) as part of its sentence.” JA 105a. The district court confirmed that “part of my contemplation certainly is the need for the sentence imposed, to promote respect for the law”—one of the Section 3553(a)(2)(A) factors. *Id.* In a later written order, the court stated that it “considered the factors and conditions for sentencing listed in 18 U.S.C. § 3553(a) and 3583(d), respectively.” JA 115a. The court specifically noted that it varied upwards and imposed a 24-month prison term to, among other reasons, “promote respect for the law”—one of the Section 3553(a)(2)(A) factors. JA 116a.

Esteras appealed. In an unpublished order, the Sixth Circuit affirmed Esteras’s sentence. Bound by that court’s prior decision in *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), the panel held that “it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in § 3583(e).” JA 119a (quoting *Lewis*, 498 F.3d at 399-400).

Esteras petitioned for rehearing en banc. In response, the panel issued an amended order, and the court denied rehearing en banc. JA 121a-135a; JA 136a-137a. The panel majority reaffirmed the holding in *Lewis* that district courts may consider the Section 3553(a)(2)(A) factors when revoking supervised release. JA 128a. Two judges published dissents from the order denying rehearing en banc. JA 137a-149a. Esteras again petitioned for rehearing

en banc, which the court again denied over two published dissents. JA 150a-154a.

b. *Timothy Jaimez’s Revocation Proceedings.* Jaimez admitted to violating his supervised-release conditions by committing a new offense (a state misdemeanor for attempted trafficking marijuana), associating with convicted felons, and possessing drug paraphernalia. JA 230a. The district court revoked his supervised release and sentenced him to 60 months in prison, the statutory maximum, plus six years of supervised release. JA 215a, 228a.

Jaimez appealed. The Sixth Circuit affirmed. The court noted that the district court “expressly consider[ed]” the Section 3553(a)(2)(A) factors: “the seriousness of his offense, the promotion of respect for the law, and the provision of just punishment.” JA 232a. But the panel majority, relying on *Lewis* and *Esteras*, rejected Jaimez’s argument that the court erred by doing so: “we’ve made clear that district courts may nonetheless consider these factors when imposing revocation sentences.” *Id.*

c. *Toriano Leaks’s Revocation Proceedings.* Leaks admitted to violating his supervised-release conditions by failing to report to the probation office as directed, failing to attend mental-health treatment, failing to work toward his GED, and committing new state offenses, for which the state court sentenced him to a total of four to six years in prison. JA 239a-241a. The district court revoked his supervised release and sentenced him to 12 months in prison, to be served consecutive to his state sentences. JA 244a, 248a. Explaining its decision to order that the sentences run consecutively, the court stated: “Concurrent

time does not punish Mr. Leaks for violating supervision and—and . . . that is not justice.” JA 244a (ellipses in transcript).

Leaks appealed, arguing that the district court erred by basing its sentence on a Section 3553(a)(2)(A) factor: the need to provide just punishment. Relying on *Lewis* and *Esteras*, the Sixth Circuit affirmed. JA 251a.

SUMMARY OF ARGUMENT

By omitting Section 3553(a)(2)(A) from the list of factors to consider when modifying or revoking supervised release, Congress instructed courts not to consider Section 3553(a)(2)(A)’s retribution factors. That is the only conclusion that gives effect to the statutory text, including the text in neighboring statutes that do not omit Section 3553(a)(2)(A). And it reflects Congress’s goals in creating supervised release, as reflected in the text, the history of the Sentencing Reform Act, and subsequent amendments: creating a forward-looking framework for courts to protect the public while assisting offenders as they transition back into society.

a. The analysis can begin and end with the text. Congress omitted Section 3553(a)(2)(A) from the list of factors for courts to consider when imposing supervised release and when modifying or revoking supervised release. That omission was intentional, and courts may not add omitted text to a statute. Additionally, at the same time Congress omitted Section 3553(a)(2)(A)’s retribution factors from the supervised-release statute, it included those factors in the lists for courts to consider when imposing prison, probation, or a fine, and it included

them in the list for courts to consider when modifying or revoking probation. Under the negative-implication canon (*expressio unius est exclusio alterius*), Congress thus further instructed courts not to consider the Section 3553(a)(2)(A) factors when imposing, modifying, or revoking supervised release.

Compare the statutes governing probation revocation and supervised-release revocation. Under the former, courts are to consider “the factors set forth in section 3553(a) to the extent that they are applicable.” 18 U.S.C. § 3565(a). Under the latter, courts are to consider “the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7),” omitting Section 3553(a)(2)(A). 18 U.S.C. § 3583(e). Under the interpretation adopted by the court of appeals, that omission makes no difference, and courts can consider any Section 3553(a) factors in either context. But giving effect to the different language in the two provisions, the text establishes that courts may not consider Section 3553(a)(2)(A)’s retribution factors when modifying or revoking supervised release.

b. That conclusion also reflects the history of the SRA and subsequent amendments. Through the SRA, Congress abolished indeterminate sentencing and the practice of using prison to attempt to rehabilitate offenders before releasing them on parole. It created supervised release as a new discretionary supplement to a fixed prison term, used to encourage rehabilitation and assist newly released inmates as they transition back into society. Reflecting Congress’s rehabilitative goals, the original statute did not even provide a mechanism for revoking supervised release aside from a new prosecution for criminal contempt or a separate offense. And, as

it does to this day, the statute instructed courts not to consider retribution when modifying supervised release by omitting Section 3553(a)(2)(A) from the list of factors for courts to consider.

Subsequent amendments have reaffirmed Congress's nonretributive goals for supervised release. When Congress amended the supervised-release statute to add a revocation mechanism, it maintained the list that excluded Section 3553(a)(2)(A)'s retribution factors. And Congress has three times amended the statute since then to add other forward-looking factors for courts to consider when imposing, terminating, modifying, or revoking supervised release. It has added Section 3553(a)(2)(C) (the need to protect the public) and (a)(7) (the need to provide restitution), but not Section 3553(a)(2)(A).

c. The interpretation adopted by the court of appeals poses constitutional problems. As this Court has said, construing revocation and subsequent imprisonment as punishment for violating supervised-release conditions would raise serious constitutional questions regarding, for example, the jury-trial right and double-jeopardy protection. But the decisions below allow courts to do exactly that.

d. Applying the text as written is not “unworkable,” as the court of appeals said. Excluding the Section 3553(a)(2)(A) factors allows courts to consider all relevant information when modifying or revoking supervised release, filtered through only the purposes of sentencing that Congress has determined apply in that context: deterrence, incapacitation, and rehabilitation, but not retribution. Courts must consider only those purposes

when imposing supervised release, adopting conditions that it deems appropriate for protecting the public while assisting the defendant as he or she transitions back into society. And courts must consider only those purposes when modifying or revoking supervising release, using additional time in custody, if necessary, as a tool to protect the public or compel the defendant into complying with the conditions imposed. If the defendant's conduct is criminal and warrants retributive punishment, a new prosecution is the mechanism, not a revocation sentence. Nothing about this framework is unworkable.

ARGUMENT

I. The plain text of Section 3583 and neighboring statutes dictates that Congress precluded courts from considering Section 3553(a)(2)(A)'s retribution factors when imposing, modifying, or revoking supervised release.

The statutory text alone resolves the question presented. Congress omitted Section 3553(a)(2)(A) from Section 3583's lists of factors for courts to consider when imposing, terminating, modifying, or revoking supervised release. Because courts may not add omitted text to a statute, that omission precludes courts from considering the Section 3553(a)(2)(A) factors. Moreover, while omitting Section 3553(a)(2)(A) from the supervised-release statute, Congress included Section 3553(a)(2)(A) when listing factors for courts to consider in other contexts. Applying the negative-implication canon, and giving effect to the different text in different provisions of the SRA, the omission in Section 3583(e) thus bars consideration of Section 3553(a)(2)(A)'s retribution factors.

a. Congress omitted Section 3553(a)(2)(A) from the list of factors for courts to consider when imposing supervised release and when terminating, modifying, or revoking supervised release. That omission was intentional, and courts may not add omitted text to the statute. The plain text of Section 3583 thus precludes courts from considering Section 3553(a)(2)(A)’s retribution factors.

“It is a fundamental principle of statutory interpretation that ‘absent provision[s] cannot be supplied by the courts.’” *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 94 (2012)). Adding omitted provisions “‘is not a construction of the statute, but, in effect, an enlargement of it by the court.’” *Nichols v. United States*, 578 U.S. 104, 110 (2016) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)). “‘To supply omissions transcends the judicial function.’” *Id.* (quoting *Iselin*, 270 U.S. at 251).

In 18 U.S.C. § 3553(a), Congress set forth factors for courts to consider when deciding what sentence to impose. *See* 18 U.S.C. § 3553(a). Subsection (a)(2) requires courts to consider:

- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. § 3553(a)(2). The subsection (a)(2) factors correspond to “retribution, deterrence, incapacitation, and rehabilitation,” which are “the four purposes of sentencing generally.” *Tapia v. United States*, 564 U.S. 319, 325 (2011).

Section 3583(c) lists factors from Section 3553(a) for courts to consider when imposing supervised release: “the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).” 18 U.S.C. § 3583(c). Congress omitted Section 3553(a)(2)(A) from the list.¹

Through that omission, Congress instructed courts to consider the listed factors, and not Section 3553(a)(2)(A)’s retribution factors, when imposing supervised release. This Court has said as much. *See Tapia*, 564 U.S. at 326 (“These provisions make clear that a particular purpose may apply differently, or not at all, depending on the kind of sentence under consideration. For example, a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release.

1. Congress also omitted Section 3553(a)(3), “the kinds of sentences available,” from the list of factors in Section 3583(c). When a court is considering whether to impose supervised release following a prison term, supervised release is the only sentence available. *See* 18 U.S.C. § 3583(a).

See § 3583(c).” (emphasis in original)); *see also Concepcion v. United States*, 597 U.S. 481, 495 (2022) (same). So has the Government. *See* Reply Brief for the United States, *Tapia v. United States*, 564 U.S. 319 (2011) (No. 10-5400), 2011 U.S. S. Ct. Briefs LEXIS 451, *20 (“Section 3583(c) explicitly lists each Section 3553(a) factor that courts must consider and omits the factors whose consideration Congress intended to preclude. See 18 U.S.C. 3583(c).”).

Similarly, Section 3583(e) lists factors from Section 3553(a) for courts to consider when terminating, modifying, or revoking supervised release. The list is the same as Section 3583(c): “the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).” 18 U.S.C. § 3583(e). Congress omitted Section 3553(a)(2)(A) from that list as well.²

Just as omitting Section 3553(a)(2)(A) from the list of factors in Section 3583(c) means that courts may not consider those factors when imposing supervised release, *Tapia*, 564 U.S. at 326, so does the same omission in Section 3583(e) mean that courts may not consider those factors when terminating, modifying, or revoking supervised release. “The statute says what it says—or perhaps better put here, does not say what it does not say.” *Cyan, Inc. v. Beaver County Employees Ret. Fund*, 583 U.S. 416, 426 (2018). “When sentencing a defendant under § 3583(e), a district court may not consider § 3553(a)(2)(A) because Congress deliberately omitted that factor from

2. Congress again omitted Section 3553(a)(3), “the kinds of sentences available,” from the list of factors in Section 3583(e). Section 3583(e) itself sets forth the options available to the court. *See* 18 U.S.C. § 3583(e).

the permissible factors enumerated in the statute.” *United States v. Miller*, 634 F.3d 841, 844 (5th Cir. 2011); *see also United States v. Booker*, 63 F.4th 1254, 1261 (10th Cir. 2023) (same); *United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006) (same); *United States v. Miquel*, 444 F.3d 1173, 1182 (9th Cir. 2006) (same).

b. The differences between Section 3583 and neighboring provisions confirm this conclusion. When Congress listed factors for courts to consider when sentencing a defendant, it included Section 3553(a)(2)(A)’s retribution factors when imposing prison, probation, or a fine, but not when imposing supervised release. Likewise, Congress included Section 3553(a)(2)(A) in the list of factors to consider when modifying or revoking probation, but not when modifying or revoking supervised release. Under the principle of *expressio unius est exclusio alterius*, the negative-implication canon, Congress thus instructed courts not to consider the Section 3553(a)(2)(A) factors when imposing supervised release under Section 3583(c) or when modifying or revoking supervised release under Section 3583(e). Applying this principle is the only way to give effect to the different language Congress used in the different sections of the SRA.

“When Congress includes particular language in one section of a statute but omits it from a neighbor, [this Court] normally understand[s] that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*).” *Bittner v. United States*, 598 U.S. 85, 94 (2023). The Court has referred to this principle as “an ancient maxim,” *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974), and a “traditional rule of statutory construction,” *Bittner*, 598

U.S. at 94. It has special force where, as here, “Congress includes particular language in one section of a statute but omits it in another section of the same Act.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also* *Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) (same).

Congress drafted and enacted the Sentencing Reform Act of 1984, and has amended it since, against this background. The SRA directs judges to sentence all defendants to prison, probation, or a fine, and allows judges to impose a fine in addition to prison or probation. *See* 18 U.S.C. §§ 3551(b) & (c). The Act permits judges to impose supervised release to follow a prison sentence. *See* 18 U.S.C. § 3583(a). And it specifies which factors apply to the different sentencing options, instructing courts to consider:

- for prison, “the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation,” 18 U.S.C. § 3582(a);
- for fines, eight listed factors “in addition to the factors set forth in section 3553(a),” 18 U.S.C. § 3572(a);
- for probation, “the factors set forth in section 3553(a) to the extent that they are applicable,” 18 U.S.C. § 3562(a); and
- for supervised release, “the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C),

(a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7),” 18 U.S.C. § 3583(c).

Congress omitted Section 3553(a)(2)(A) from the list of factors only in Section 3583(c).

By including Section 3553(a)(2)(A)’s retribution factors in neighboring statutes but not in Section 3583(c), Congress instructed courts not to consider those factors when imposing supervised release. That conclusion flows from a straightforward application of the negative-implication canon. Congress included “particular language”—Section 3553(a)(2)(A)—in not just “one section of a statute” but several sections of the SRA, while “omit[ting] it from a neighbor”—Section 3583(c). *Bittner*, 598 U.S. at 94. That “difference in language . . . convey[s] a difference in meaning (*expressio unius est exclusio alterius*).” *Id.*; *cf. Concepcion*, 597 U.S. at 495 (noting that, in Section 3583(c), Congress “expressly precluded” district courts from considering the Section 3553(a)(2)(A) factors).

The SRA also specifies which factors apply when courts consider whether to modify or revoke probation or supervised release:

- for probation, “after considering the factors set forth in section 3553(a) to the extent that they are applicable,” 18 U.S.C. § 3565(a); and
- for supervised release, “after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7),” 18 U.S.C. § 3583(e).

Congress omitted Section 3553(a)(2)(A) from the list of factors only in Section 3583(e).

By including Section 3553(a)(2)(A)’s retribution factors in a neighboring statute but not in Section 3583(e), Congress instructed courts not to consider those factors when modifying or revoking supervised release. That conclusion again flows from a straightforward application of the negative-implication canon.

That is the only interpretation that gives effect to the textual differences between the statutes governing probation and governing supervised release. When imposing and when modifying or revoking probation, the applicable statute instructs courts to consider “the factors set forth in section 3553(a) to the extent that they are applicable.” 18 U.S.C. §§ 3562(a), 3565(a). When imposing and when modifying or revoking supervised release, though, the statute instructs courts to consider “the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7),” omitting Section 3553(a)(2)(A). 18 U.S.C. §§ 3583(c), (e). If courts could nevertheless consider the (a)(2)(A) factors in supervised-release-revocation proceedings, as the court of appeals concluded, the probation and supervised-release statutes would mean the same thing: consider any Section 3553(a) factors to the extent that they apply.

This Court should “refrain from concluding here that the differing language in the two [provisions] has the same meaning in each.” *Russello*, 464 U.S. at 23. Applying the negative-implication canon and giving effect to the language in each provision of the SRA, the text dictates that courts may not consider Section 3553(a)

(2)(A)’s retribution factors when modifying or revoking supervised release.

II. The history of the Sentencing Reform Act and subsequent amendments further demonstrates that Congress intended to preclude courts from considering Section 3553(a)(2)(A)’s retribution factors when modifying or revoking supervised release.

Although the text alone demonstrates that Section 3583(e) bars courts from considering the Section 3553(a)(2)(A) factors when modifying or revoking supervised release, the history of the SRA and later amendments to Section 3583 confirms this understanding. Congress created supervised release to promote rehabilitation after a prison term. Subsequent amendments reaffirmed Congress’s forward-looking goals, tasking courts with managing a person’s transition back into society after serving their punishment. The revocation provision serves those same goals, giving the sentencing court a tool to compel compliance with the conditions it has determined necessary to rehabilitate the offender and protect the public, but not to impose backward-looking retributive punishment.

a. For most of the 20th century, federal criminal convictions yielded indeterminate sentences. *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Judges imposed prison terms, but parole officials could order a person’s release after serving one-third of the stated term. *Tapia*, 564 U.S. at 323. “Both indeterminate sentencing and parole were based on concepts of the offender’s possible, indeed probable, rehabilitation, a view that it was realistic

to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society.” *Mistretta*, 488 U.S. at 364.

Over time, Congress abandoned that view. “Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases.” *Id.* at 365. “Lawmakers and others increasingly doubted that prison programs could ‘rehabilitate individuals on a routine basis’—or that parole officers could ‘determine accurately whether or when a particular prisoner had been rehabilitated.’” *Tapia*, 564 U.S. at 324 (quoting S. Rep. No. 98-225, at 40 (1983)).

Congress responded by enacting the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. The SRA “overhauled federal sentencing procedures to make prison terms more determinate and abolish the practice of parole.” *United States v. Haymond*, 588 U.S. 634, 651 (2019) (plurality op.). It requires sentencing judges to impose prison, probation, or a fine for every person convicted of a federal offense. *See* 18 U.S.C. § 3551. And, consistent with Congress’s changed view on rehabilitation, the SRA instructs judges imposing prison terms to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. § 3582(a). This provision bars courts “from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation.” *Tapia*, 564 U.S. at 321.

Having eliminated parole, Congress created supervised release as “a unique method of post-confinement

supervision.” *Gozlon-Peretz*, 498 U.S. at 407. Unlike parole, a supervised-release term is a separate part of the sentence, imposed at the judge’s discretion, to follow a determinate prison term. *See* 18 U.S.C. § 3583(c); S. Rep. No. 98-225, at 123 (1983); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U.L. REV. 958, 998 (2013). And unlike parole, “supervised release wasn’t introduced to replace a portion of the defendant’s prison term, only to encourage rehabilitation *after* the completion of his prison term.” *Haymond*, 588 U.S. at 652 (plurality op.) (emphasis in original); *see also Johnson*, 529 U.S. at 59 (“Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”); S. Rep. No. 98-225, at 124 (“[T]he primary goal of such a term is to ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.”).

The SRA’s text reflects Congress’s different goals for the different sentencing provisions. To punish the offender, Congress instructed courts to impose prison, probation, or a fine for every offense. *See* 18 U.S.C. § 3551. And when imposing any of these sanctions, Congress instructed courts to consider all the Section 3553(a)(2) factors, including the retribution factors in Section 3553(a)(2)(A): the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. *See* 18 U.S.C. § 3582(a) (prison); 18 U.S.C. § 3562(a) (probation); 18 U.S.C. § 3572(a) (fine).

Reflecting the rehabilitative goals of supervised release, though, the SRA instructed courts imposing supervised release not to consider the retribution or incapacitation factors in Section 3553(a)(2)(A) or (C), by intentionally omitting those provisions from Section 3583(c)'s list of factors for courts to consider.³ *See* Sentencing Reform Act of 1984, § 3583(c), 98 Stat. at 1999; S. Rep. No. 98-225, at 124 (“The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release.”). And Congress used the same list, reflecting the same goals, when instructing courts what to consider when addressing a violation of supervised release. *See* Sentencing Reform Act of 1984, § 3583(e), 98 Stat. at 2000; *see also* S. Rep. No. 98-225, at 124 (noting that Section 3583(e) directs the court to “consider[] the same factors considered in the original imposition of a term of supervised release”).

Comparing supervised release with probation is again instructive. Because judges may select probation as the complete sentence for an offense, *see* 18 U.S.C. § 3551, Congress instructed courts to consider all the applicable Section 3553(a) factors when imposing it, *see* Sentencing Reform Act of 1984, § 3562(a), 98 Stat. at 1992. But because supervised release follows a prison sentence that the sentencing court has concluded satisfies the Section 3553(a) factors, and because supervised release is a discretionary supplement that fulfills more limited goals, Congress instructed courts not to consider the Section

3. Congress has since amended Section 3583(c) to add Section 3553(a)(2)(C), the need to protect the public, as a permissible factor. *See infra* Section II.d.

3553(a)(2)(A) or (C) factors. *See* Sentencing Reform Act of 1984, § 3583(c), 98 Stat. at 1999; *see also* S. Rep. No. 98-225, at 125 (“The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment.”).

The same distinction between probation and supervised release applies to modification and revocation. Historically, a probation sentence was based on “suspend[ing] . . . a defendant’s prescribed prison term and afford[ing] him a conditional liberty as an ‘act of grace,’ subject to revocation.” *Haymond*, 588 U.S. at 643 (plurality op.). The SRA retained from prior practice that probation “remains conditional and subject to revocation until its expiration or termination.” Sentencing Reform Act of 1984, § 3564(e), 98 Stat. at 1994. Thus, for a probation violation, the SRA instructed courts to consider all the applicable Section 3553(a) factors and allowed courts to either modify the term or revoke probation and conduct a plenary resentencing. *See* Sentencing Reform Act of 1984, § 3565(a), 98 Stat. at 1995. For supervised release, in contrast, the SRA restricted what factors courts may consider—including precluding consideration of Section 3553(a)(2)(A)’s retribution factors—and limited courts’ options for addressing a violation. *See* Sentencing Reform Act of 1984, § 3583(e), 98 Stat. at 2000. Those textual differences convey different meanings that reflect Congress’s different goals.

This Court has recognized the differences between probation and supervised release in the SRA. *United*

States v. Granderson, 511 U.S. 39, 50 (1994) (“Supervised release, in contrast to probation, is not a punishment in lieu of incarceration.”). It has also refused to construe “differently worded probation and supervised release revocation provisions . . . *in pari materia*.” *Id.* at 51. It should refuse to do so here as well.

b. Consistent with the rehabilitative goals of supervised release, the SRA originally did not include revocation as an option for a court to address a violation. As first enacted, Section 3583(e) stated that a court “may, after considering the factors set forth in section 3553(a) (1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6),” terminate supervised release, modify the conditions, or “treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.” Sentencing Reform Act of 1984, § 3583(e), 98 Stat. at 2000. If a violation constituted a new criminal offense, the defendant could also be prosecuted for that offense. *See* S. Rep. No. 98-225, at 125. Once charged with contempt or another offense, the defendant was entitled to full criminal due-process protections, including the right to a jury trial if facing imprisonment for more than six months. *See Int’l Union, Mine Works of Am. v. Bagwell*, 512 U.S. 821, 826-27 (1994). If convicted, the defendant would face a new sentencing hearing where the court could consider all the relevant sentencing factors, including the retribution factors under Section 3553(a)(2)(A). *See* 18 U.S.C. § 3551. But the SRA did not provide a truncated proceeding by which a court could impose time in custody for violating supervised-release conditions. *See* Doherty, *supra*, at 999-1000.

The original structure of the SRA thus confirms again that, when Congress omitted Section 3553(a)(2)(A) from

the list in Section 3583(e), it meant to instruct courts not to consider those factors. When considering whether to terminate or modify supervised release, retributive punishment was beside the point, and the court could consider only the listed factors. Only after a separate conviction for criminal contempt or a new offense would Section 3553(a)(2)(A) come back into play.

c. Before the SRA took effect, Congress amended Section 3583(e) to add a revocation option. Even then, it did not amend Section 3583(e)'s list of factors for courts to consider and thus reaffirmed that Section 3553(a)(2)(A)'s retribution factors remained impermissible.

The Anti-Drug Abuse Act of 1986 added new paragraph (4) to Section 3583(e), permitting a court to:

revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission.

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006(a)(3)(D), 100 Stat. 3207, 3207-7. Congress later deleted paragraph (3) and its reference to criminal contempt. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7108(b)(3), 100 Stat. 4181, 4419.

Neither amendment added Section 3553(a)(2)(A) to Section 3583(e)'s list of factors to consider.

Although the 1986 amendment provided a more direct procedure to imprison those who violated supervised-release conditions, it did not indicate that retribution was a permissible consideration. By continuing Section 3553(a)(2)(A) as an omitted factor in Section 3583(e)'s list, the 1986 amendment maintained the prior meaning of that omission and provided further evidence that Congress did not intend Section 3583(e) to include retributive punishment. The statute continued to “say[] what it says—or perhaps better put here . . . not say what it does not say.” *Cyan, Inc.*, 583 U.S. at 426.

d. Since the SRA took effect in 1987, Congress has repeatedly amended Section 3583 to revise the factors for courts to consider when imposing, terminating, modifying, or revoking supervised release, but it has never added Section 3553(a)(2)(A)'s retribution factors. The Sentencing Act of 1987 added Section 3553(a)(2)(C), the need to protect the public, as a factor listed in Section 3583(c) for courts to consider when imposing supervised release. *See* Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1266, 1267. The Anti-Drug Abuse Act of 1988 added the same provision to Section 3583(e)'s list of factors to consider when modifying or revoking supervised release. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7108(b)(1), 100 Stat. at 4419. And in 2002, Congress added Section 3553(a)(7), the need to provide restitution, to both Section 3583(c) and (e). *See* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. B, tit. III, § 3007, 116 Stat. 1758, 1806 (2002).

Congress thus has shown repeatedly that it adds factors to Section 3583(c) and (e) when it means to instruct courts to consider those factors. None of those amendments would be necessary if, as the court of appeals held, Sections 3583(c) and (e) already permitted courts to consider any Section 3553(a) factor.

III. The interpretation adopted by the court of appeals would raise serious constitutional questions.

Construing Section 3583(e) as the court of appeals did would threaten to violate the Constitution. If left to stand, the decisions below would allow district courts to impose retributive punishment for violating supervised-release conditions. As this Court has observed, “construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release” would raise “serious constitutional questions.” *Johnson v. United States*, 529 U.S. 694, 700 (2000). For one, “violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt.” *Id.*; *see also Haymond*, 588 U.S. at 650 (plurality op.) (“If the government were right, a jury’s conviction on one crime would . . . permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment.”); 21 U.S.C. § 841 (authorizing a supervised release term of up to life for distributing any amount of a controlled substance in schedules I through IV). Also, “[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense.” *Johnson*, 529 U.S. at 700.

“Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.” *Id.* But the same difficulties arise if courts expressly impose retributive punishment for a violation, as happened here. *See* JA 244a. The statute as written raises no such problems. As the text dictates and as Congress intended, Section 3583(e) precludes courts from considering the retribution factors in Section 3553(a)(2)(A) when revoking supervised release.

IV. In the plain text of Section 3583(e), Congress provided a workable, forward-looking framework for courts to follow when modifying or revoking supervised release.

The court of appeals concluded that it would be “unworkable” for courts to avoid considering Section 3553(a)(2)(A)’s retribution factors both when imposing supervised release and when modifying or revoking supervised release. *See* JA 128a, 130a. That is mistaken.

Take Section 3583(c) first, which governs what factors courts may consider when imposing supervised release. Applying the text’s plain meaning, courts may not consider the Section 3553(a)(2)(A) factors when imposing supervised release. The court of appeals suggested this would be possible only if the judge “adjourn[ed] the hearing after imposing a sentence,” then “start[ed] over with a new unblemished inquiry into the right term of supervised release.” JA 130a. It reasoned that “Congress could not have expected courts to wipe their minds of these concerns when they move from one type of sentence to the other.” *Id.*

This Court has twice said otherwise. *See Concepcion*, 597 U.S. at 495; *Tapia*, 564 U.S. at 326. Nothing about that is unworkable. Judges are well able to apply different considerations for different purposes. *Cf. Williams v. Illinois*, 567 U.S. 50, 69 (2012) (“When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.”). And other courts of appeals have laid out workable guidelines for ensuring that sentencing courts differentiate between their reasons for prison and for supervised release. *See, e.g., United States v. Wilcher*, 91 F.4th 864, 872 (7th Cir. 2024) (“To help navigate this area, we have encouraged district courts to separate out their discussions of prison time and supervised release when the reason for imposing one cannot apply to the other.”); *United States v. Burden*, 860 F.3d 45, 57 (2d Cir. 2017) (noting that, when a court bases its prison sentence substantially on the Section 3553(a)(2)(A) factors, “it would be advisable for the district court to separately state its reasons for the term of supervised release imposed”).

Concerning modifying or revoking supervised release under Section 3583(e), the court of appeals said that disregarding the Section 3553(a)(2)(A) factors would be unworkable in a different way—because “the purportedly forbidden considerations mentioned in § 3553(a)(2)(A) tend to be essentially redundant with the permitted ones.” JA 128a (internal quotation marks omitted). But that reasoning proves the opposite, and it highlights the importance of applying the text as written, consistent with Congress’s intent. If other factors address much of what Section 3553(a)(2)(A) covers, there is little reason to rely

on the (a)(2)(A) factors. And what (a)(2)(A) covers that is not covered by the other factors is crucial: factors related to retributive punishment. *See* 18 U.S.C. § 3553(a)(2)(A) (“the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”); *Tapia*, 564 U.S. at 325 (noting that Section 3553(a)(2)(A) reflects retribution as a purpose of sentencing).

Excluding the Section 3553(a)(2)(A) factors thus allows courts to consider all relevant information, but filtered through only the purposes of sentencing that Congress has determined apply when modifying or revoking supervised release: deterrence, incapacitation, and rehabilitation, but not retribution. *See Tapia*, 564 U.S. at 325. For example, courts may consider “the nature and circumstances of the offense,” 18 U.S.C. § 3553(a)(1), as it relates to any other permissible factor. But the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), is not the same as the nature and circumstances, and Congress distinguished between the two by placing them in separate subsections in Section 3553(a). *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (opinion of Scalia, J.) (noting the “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”). The nature and circumstances of the offense may relate to any sentencing purpose; in Section 3553(a)(2)(A), seriousness relates to retributive punishment. *See Tapia*, 564 U.S. at 325; *Miqbel*, 444 F.3d at 1182 (noting that the need to promote respect for the law and reflect the seriousness of the offense “is often intertwined with the concept of punishment, as it is in § 3553(a)(2)(A) itself”). Congress excluded the latter, and any overlap between Section 3553(a)(2)(A) and the other factors makes it all the more important for courts to

avoid relying on the impermissible consideration inherent to (a)(2)(A): retributive punishment.

Nothing about Section 3583(c) or (e) as written is unworkable. District courts simply must rely only on the listed factors, fulfilling Congress’s forward-looking goals for supervised release. Retributive punishment is an inherently backward-looking analysis, examining what a person did and determining what sanction is appropriate in retribution. Supervised release is a forward-looking project, giving courts tools to manage a person’s transition back into society by imposing conditions to rehabilitate the offender and protect the public. *See* 18 U.S.C. § 3583(c). Section 3583(e) gives courts an additional tool to compel compliance with those conditions, allowing modification or revocation based on those same goals—for example, to provide needed correctional treatment, 18 U.S.C. § 3553(a)(2)(D), or to protect the public from further offenses, 18 U.S.C. § 3553(a)(2)(C). *See* 18 U.S.C. § 3583(e). Viewing supervised release as a forward-looking project, as Congress intended, does not present courts with an unworkable task. It reflects Congress’s statutory design, and courts “must implement the design Congress chose.” *Lora v. United States*, 599 U.S. 453, 464 (2023).

This Court should give effect to the SRA’s text and hold that 18 U.S.C. § 3583(e) precludes district courts from considering Section 3553(a)(2)(A)’s retribution factors when modifying or revoking supervised release.

CONCLUSION

The judgments of the court of appeals should be reversed.

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Nos. 23-1002, 23-1150

In the Supreme Court of the United States

TONY R. HEWITT,

Petitioner,

v.

UNITED STATES
OF AMERICA,
Respondent.

COREY D. DUFFEY
and JARVIS D. ROSS,
Petitioners,

v.

UNITED STATES
OF AMERICA,
Respondent.

**On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

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QUESTION PRESENTED

Whether the First Step Act's sentencing reduction provisions apply to a defendant originally sentenced before the FSA's enactment when that sentence is judicially vacated and the defendant is resentenced to a new term of imprisonment after the FSA's enactment.

PARTIES TO THE PROCEEDING

Petitioner Tony R. Hewitt was appellant below. Corey Deyon Duffey and Jarvis Dupree Ross, petitioners in the consolidated case, also were appellants below. The United States of America, respondent on review in both cases, was the appellee below.

RELATED PROCEEDINGS

U.S. Supreme Court:

- *Duffey v. United States*, No. 23-1150 (July 2, 2024) (petition for writ of certiorari granted)
- *Hewitt v. United States*, No. 11-10019 (May 29, 2012) (denying petition for certiorari)

United States Court of Appeals (5th Cir.):

- *United States v. Duffey*, 456 F. App'x 434 (Jan. 3, 2012) (affirming in part, reversing in part, and remanding for resentencing)
- *United States v. Ross*, 582 F. App'x 528 (No. 12-11021) (Oct. 8, 2014) (affirming sentences)
- *In re Hewitt*, No. 20-10501 (Jan. 28, 2021) (granting leave to file section 2255 request)
- *United States v. Duffey*, 92 F.4th 304 (No. 22-10265) (Feb. 2, 2024) (affirming resentencing)

United States District Court (N.D. Tex.):

- *United States v. Hewitt*, No. 3:08-cr-167-B-BH (May 7, 2010) (judgment and sentencing)
- *United States v. Hewitt*, No. 3:08-cv-167-B-BH (Dec. 6, 2012) (resentencing)
- *United States v. Hewitt*, No. 3:08-cv-167-B-BH (Aug. 19, 2021) (granting section 2255 motion)
- *United States v. Hewitt*, No. 3:08-cv-167-B-BH (Nov. 8, 2022) (judgment on resentencing)

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OPINIONS BELOW

The Fifth Circuit’s opinion (Pet. App. 1a-16a) is published at 92 F.4th 304.

JURISDICTION

The Fifth Circuit entered judgment on February 2, 2024. Petitioner filed a petition for a writ of certiorari on March 8, 2024, which the Court granted on July 2, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, are reproduced in the petition appendix at pages 17a-21a.

INTRODUCTION

Section 924(c) of title 18 of the U.S. Code authorizes drastic mandatory minimum sentences for those who commit certain federal crimes while carrying, brandishing, or discharging a firearm. For first offenses, it calls for a mandatory minimum sentence between five and ten years’ imprisonment. For second or subsequent offenses, that number jumps to 25 years. The statute requires that the sentence for each section 924(c) count run consecutively with any other sentence.

In *Deal v. United States*, 508 U.S. 129 (1993), the Court held that section 924(c), as originally enacted, required imposition of the 25-year mandatory minimum if a defendant was convicted of multiple section 924(c) counts in a single criminal proceeding. Thus, even a first-time offender, if charged with multiple section 924(c) counts, could face multiple 25-year sentences, running consecutively. This effect, which often resulted in *de facto* life sentences for first-time offenders, came to be known as “stacking.”

Stacking was widely regarded as unjust and irrational. As one district court noted, a first-time, nonviolent offender who carried a firearm during a string of simple

drug sales would face more prison time than a murderer. Congress finally answered the calls for corrective action with the First Step Act of 2018 (FSA). A principal aim of the law was to end stacking. To that end, section 403(a) of the FSA amended section 924(c) to abrogate *Deal*, so that the statute now permits enhanced sentences only “[i]n the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final.” 18 U.S.C. § 924(c). As a result, now only true recidivists may be sentenced to section 924(c)’s enhanced 25-year mandatory minimum.

But under 1 U.S.C. § 109, the default rule for such sentencing reforms is that they apply only to crimes committed after enactment. Appreciating the grave injustice that would result if stacking were allowed to continue in post-enactment sentencings for pre-enactment conduct, Congress overrode the default rule, making section 403(a)’s sentencing reform retroactive. It thus adopted section 403(b), which specifies that section 403(a) “shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.”

All agree that this language makes section 403(a) relief available to a defendant who committed an offense pre-enactment but is sentenced post-enactment. All also agree that it does *not* make relief available to anyone who committed an offense pre-enactment and whose sentence and judgment of conviction were final on the date of enactment and remain so today. The only question here is whether it makes section 403(a) relief available to a defendant who was sentenced pre-enactment, but whose initial sentence was thereafter vacated, rendering the initial sentence void *ab initio* and necessitating post-enactment plenary resentencing.

The plain text of section 403(b) supplies the answer: It does. As a starting point, “a sentence for the offense”

does not—cannot—include a sentence that has been vacated. A vacated sentence is a nullity, one treated by operation of law as never having been imposed. The point of vacatur is to ensure that the object has no legal effect and works no ongoing prejudice. Congress is presumed to understand and incorporate background legal principles like this and thus could not have intended “a sentence” to include a *vacated* sentence.

This is confirmed by the statutory context, including the verb tense and preposition that Congress used. The present-perfect tense, used together with the preposition “as of,” indicates that Congress sought to deny section 403(a)’s reforms only to those defendants whose judgments of conviction were final on the date of enactment *and* remain so today. As the government now agrees, no ordinary English speaker would say that a sentence “has been imposed as of December 21, 2018” if the sentence was vacated and no longer has any force or effect.

Reading section 403(b) as drawing a line between pending and past cases reflects Congress’s evident desire to respect the finality of judgments. But finality is not an issue when a judgment is vacated for reasons independent of the FSA; such a case is “pending” like any other. That is confirmed by post-vacatur practice, which calls for an entirely new, *de novo* proceeding at which Congress could not have intended stacking to remain available.

None of the contrary rationales supplied by the court below or by the Sixth and Eleventh Circuits is persuasive. Those courts’ rationales would revise the statute’s language and blinder the Court to the statute’s context, structure, and manifest purpose, reading section 403(b) to defeat Congress’s design rather than to conform to it. This Court’s cases require no such result. If there were any doubt about that, the rule of lenity would require resolving it in petitioner’s favor and thus reversing the decision below.

STATEMENT

A. Legal background

1. Section 924(c) of title 18 of the U.S. Code criminalizes the use, carrying, or possession of a firearm in connection with a “crime of violence or drug trafficking crime.” 18 U.S.C. § 924(c)(1)(A).

Conviction for a first section 924(c) violation carries a mandatory minimum sentence of five years for offenders who carry or possess a firearm during a crime of violence or a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A)(i). As originally enacted and through December 21, 2018, a conviction for a “second or subsequent” 924(c) violation carried a mandatory minimum sentence of 25 years. *Id.* § 924(c)(1)(C). Moreover, when a defendant is convicted of violating section 924(c), the statute’s mandatory minimum sentence must run consecutively rather than concurrently “with any other term of imprisonment.” *Id.* § 924(c)(1)(D)(ii).

In *Deal v. United States*, 508 U.S. 129 (1993), the Court interpreted section 924(c)’s “second or subsequent” language to apply to multiple 924(c) convictions obtained in a single criminal proceeding. See 508 U.S. at 134 (rejecting the contention that that section “924(c)(1) must be read to impose the enhanced sentence only for an offense committed after a previous sentence has become final”). In other words, according to the Court, a defendant could commit an initial *and* “subsequent” offense as part of a single criminal transaction prosecuted in a single case. The Court thus rejected the notion that section 924(c) was intended to punish only recidivists and held that a defendant with no prior criminal history could receive enhanced, consecutive sentences for each section 924(c) count charged. *Ibid.*

Given its lengthy minimum consecutive penalties, section 924(c) threatened exceptionally “long prison sen-

tences for anyone who uses a firearm in connection with certain other federal crimes.” *United States v. Davis*, 588 U.S. 445, 448 (2019). The practice of “charging multiple violations of section 924(c) within the same indictment” became known as “stacking.” See U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 271 (Oct. 2011) (hereinafter *USSC Report*). Because each count beyond the first was subject to the enhanced 25-year minimum penalty, stacking often resulted in *de facto* life sentences for first-time section 924(c) offenders—often several hundred years’ imprisonment imposed all at once. As one court noted, a first-time offender frequently would receive a lighter sentence “if he had committed murder” rather than a series of nonviolent drug sales while carrying a firearm. *United States v. Holloway*, 68 F. Supp. 3d 310, 313 (E.D.N.Y. 2014).

Stacking was widely criticized as unjust. District judges—those on the front lines of the federal criminal justice system—objected to having to impose what they viewed as drastic and disproportionate sentences for first-time (and often nonviolent) offenders. See, e.g., *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230-33 (D. Utah 2004) (having to sentence the defendant, a “twenty-four-year-old first offender who is a successful music executive with two young children,” to “prison for the rest of his life is unjust, cruel, and even irrational”).

Circuit judges likewise expressed great discomfort having to affirm “irrational, inhumane, and absurd” sentences that were “a predictable by-product of the cruel and unjust mandatory minimum sentencing scheme adopted by Congress.” *United States v. Hungerford*, 465 F.3d 1113, 1118 (9th Cir. 2006) (Reinhardt, J., concurring); see also, e.g., *United States v. Hunter*, 770 F.3d 740, 746-747 (8th Cir. 2014) (Bright, J., concurring) (decrying the sentence imposed as “out of this world” and

“join[ing] in the litany of criticisms directed towards” the “overly harsh” practice of sentence stacking).

Judges and commentators observed that, beyond the undue harshness of mandatory minimum sentences, the law also produced wildly divergent sentencing outcomes based on mere geography—prosecutors in some jurisdictions used stacking as a matter of course, while others more often avoided it. See *In re Hernandez*, 857 F.3d 1162, 1169 (11th Cir. 2017) (Martin, J., concurring) (explaining that the defendant “might never have received this sentence if he had been sentenced in another part of the country”). And prosecutors frequently used the threat of stacked sentences to induce defendants to accept plea deals, thus forfeiting their Sixth Amendment right to a jury trial, adding constitutional insult to statutory injury. See Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013).

Among those calling for reform was the Sentencing Commission itself. *USSC Report* 359-362. In a report to Congress, the Commission explained that “[t]he ‘stacking’ of mandatory minimum penalties for multiple violations of section 924(c) results in excessively severe and unjust sentences in some cases.” *Id.* at 359. In many of those cases, “the offense did not involve any physical harm or threat of physical harm to a person.” *Ibid.* The Commission noted that the Judicial Conference had, on multiple occasions, urged Congress “to amend the ‘draconian’ penalties established at section 924(c).” *Id.* at 360-361 (quoting *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 111th Cong. 35 (2009)); see also *Hearing Before the Over-Criminalization Task Force of 2014 of the House Committee on the Judiciary*, 113th

Cong. 23 (2014) (testimony of Hon. Irene M. Keeley, Judicial Conference of the United States).

2. Although it took several attempts over nearly a decade, Congress finally heeded the Sentencing Commission’s call to action in 2018. Late that year, it enacted and President Trump signed the First Step Act, which was the “product of a remarkable bipartisan effort.” *United States v. Henry*, 983 F.3d 214, 218 (6th Cir. 2020). The culmination of work by an “extraordinary political coalition” (164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin)), the FSA made “once-in-a-generation reforms to America’s prison and sentencing system” (*Senate Passes Landmark Criminal Justice Reform*, U.S. Senate Committee on the Judiciary (Dec. 18, 2018)).

Section 403 of the FSA addresses sentence stacking. Its well-recognized purpose is “to remedy past overzealous use of mandatory-minimum sentences” under section 924(c). *Henry*, 983 F.3d at 218. To that end, section 403(a) amends section 924(c) to clarify that the 25-year mandatory minimum sentence applies only for violations “occur[ing] after a prior” section 924(c) conviction “has become final,” effectively overruling *Deal*. See *Oversight Hearing on the Federal Bureau of Prisons and Implementation of the First Step Act: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 116th Cong. 2 (2019) (statement of Rep. Karen Bass) (describing section 403 as “eliminat[ing] the ability to stack firearm enhancements within the same indictment, which has historically resulted in excessive sentences”).

Without stacked 25-year sentences, first-time offenders convicted of multiple violations of section 924(c) at once will receive consecutive five-year minimum sentences, rather than one five-year sentence and one or more 25-year sentences.

3. By default, a change in sentencing law is prospective only. That is so by statute—1 U.S.C. § 109 specifies that a “new criminal statute [that amends or repeals] an older criminal statute shall not change the penalties ‘incurred’ under that older statute ‘unless the repealing Act shall so expressly provide.’” *Dorsey v. United States*, 567 U.S. 260, 272 (2012) (quoting 1 U.S.C. § 109). For this purpose, “penalties are ‘incurred’ under the older statute when an offender * * * commits the underlying conduct that makes the offender liable.” *Ibid.*

But by late 2018, Congress knew well how widespread and problematic sentence stacking had become. Lawmakers thus added section 403(b) to the FSA. It specifies that section 403(a)’s amendment of section 924(c) shall apply not only to future offenders, but also to past offenders whose criminal cases remain pending:

APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Congress thus extended section 403(a) relief to all criminal defendants whose sentence “has not been imposed as of” December 21, 2018.¹

In contrast, Congress did not make section 403(a) a basis for reducing the sentence of a defendant whose case was and remains subject to a final criminal judgment. Instead, it provided limited alternative relief through

¹ Section 401, which reduces mandatory minimum sentences for various federal drug offenses, uses identical language. Because sections 403(b) and 401(c) use the same language, the lower courts “have construed them to have the same meaning.” *United States v. Bethea*, 841 F. App’x 544, 548 n.5 (4th Cir. 2021); accord *United States v. Mitchell*, 38 F.4th 382, 389 (3d Cir. 2022).

section 404 to “defendants previously sentenced” in a final judgment, which this Court addressed three Terms ago in *Concepcion v. United States*, 597 U.S. 481 (2022). Under certain circumstances, section 404 authorizes sentence-reduction motions, which are a more limited form of sentencing relief than plenary resentencing following a vacatur. See *Dillon v. United States*, 560 U.S. 817, 830 (2010).

B. Factual and procedural background

1. Petitioner Tony Hewitt and his co-defendants were convicted on various charges relating to a series of bank robberies in 2008. The district court originally sentenced Hewitt to 355 years of imprisonment, the bulk of which corresponded to a number of stacked section 924(c) counts. *United States v. Duffey*, 456 F. App’x 434, 438-439 (5th Cir. 2012); Judgment, No. 3:08-cv-167, Dkt. 374 (N.D. Tex. May 7, 2010). The Fifth Circuit reversed the convictions in part and vacated Hewitt’s sentence due to an error not relevant here. *Duffey*, 456 F. App’x at 444. On remand, the district court resentenced Hewitt to 305 years—275 years of which corresponded to mandatory 25-year consecutive sentences for second or subsequent 924(c) convictions. The Fifth Circuit affirmed. *United States v. Ross*, 582 F. App’x 528, 530 (5th Cir. 2014); Amended Judgment, No. 3:08-cv-167, Dkt. 524 (N.D. Tex. Dec. 6, 2012).

In 2019—after the FSA’s enactment—this Court held that section 924(c)’s “residual clause” is unconstitutionally vague. *Davis*, 588 U.S. at 448. Following *Davis*, conspiracy-based charges no longer support convictions under section 924(c). Given that several of Hewitt’s convictions were predicated on conspiracy to commit bank robbery, Hewitt moved the Fifth Circuit for authorization to file a successive section 2255 habeas petition. Pet. App. 3a. The Fifth Circuit granted leave.

Ibid. The district court, in turn, vacated the conspiracy-based section 924(c) convictions, vacated the sentence on the remaining convictions, and ordered plenary resentencing. *Ibid.*

2. The case returned to the district court for *de novo* resentencing, but the new presentence report prepared in Hewitt’s case did not account for section 403(a)’s intervening amendment of section 924(c). Pet. App. 3a-4a. Hewitt thus objected to the report, arguing that section 403(a) should apply. *Ibid.* The difference, he observed, was substantial: Under the law in place at the time of his original sentencing, his minimum sentence for the remaining section 924(c) counts would be 105 years, still effectively a life sentence. Under section 403(a) of the FSA, the combined mandatory minimum is 25 years.

Hewitt’s co-defendants raised the same objections. As to them, the government took the position that section 403 was inapplicable on resentencing because the initial sentence for each had been imposed before the FSA’s date of enactment. But by the time of Hewitt’s resentencing, the government had reversed its course and requested application of section 403(a) at Hewitt’s resentencing. See Sentencing Tr., No. 3:08-cv-167, Dkt. 785 at 19:8-16 (N.D. Tex. Jan. 17, 2023).

The district court rejected Hewitt’s and the government’s position. *Id.* at 22:18-23:5. The court reasoned that even when a sentence has been vacated, “it’s not vacated for purposes of the statute.” *Id.* at 22:25-23:1. It thus held that section 403(a) does not apply and sentenced Hewitt to a 165-year term of imprisonment, 105 of which corresponded to stacked section 924(c) sentences. Pet. App. 5a; see Judgment on Resentencing, No. 3:08-cv-167, Dkt. 780 (N.D. Tex. Nov. 8, 2022).

3. The Fifth Circuit affirmed. See Pet. App. 1a-16a. Before the court of appeals, Hewitt and the government again both argued that section 403(a) should apply at resentencing following the judicial vacatur of a pre-FSA sentence. Pet. App. 7a. The Fifth Circuit nonetheless concluded that section 403(b) bars relief for Hewitt and his codefendants. Pet. App. 6a.

While the Fifth Circuit acknowledged that the phrase “has not been imposed” is an example of “present-perfect tense,” the court focused predominantly on the word “imposed.” Pet. App. 7a. It reasoned that whether a sentence has been imposed “appears to hinge on a district court’s action or inaction” as a singular point in time, and “not on a defendant’s status.” Pet. App. 8a. It thus held that section 403(b)’s focus is on the one-time historical fact of a sentence’s imposition. *Ibid.* Because Hewitt had been sentenced before the FSA’s enactment as a matter of historical fact, it held relief under section 403(a) was unavailable. *Ibid.*

The court reasoned that “[i]f Congress meant for the First Step Act’s retroactivity bar to apply only to valid sentences, it could easily have said so.” Pet. App. 8a. And it rejected Hewitt’s arguments to the contrary, explaining that “[t]he mere observation that the statutory language could be made clearer does not make it unclear in the first place.” *Id.* at 9a (quoting *United States v. Jackson*, 995 F.3d 522, 526 (6th Cir. 2021)).

The Fifth Circuit held further that “vacatur has no effect” on the outcome of the case. Pet. App. 9a. That conclusion was justified, the court explained, because “otherwise, one who, as here, has been in prison for over a decade serving later-vacated sentences would nonetheless qualify” for a more lenient sentence at resentencing under the FSA. Pet. App. 9a-10a. The court referred to 18 U.S.C. § 3742(g), which requires use of the guidelines “that were in effect on the date of the previous sentencing

of the defendant prior to the appeal” for resentencing, which it characterized as giving continuing effect to initial sentences that have been vacated. *Id.* at 10a. On those grounds, the court affirmed.

SUMMARY OF ARGUMENT

Pursuant to section 403(b) of the FSA, section 403(a) applies to a defendant who committed an offense and was convicted and sentenced pre-enactment, but whose initial conviction and sentence have been vacated, necessitating a post-enactment *de novo* resentencing.

A.1. The question here is whether Congress meant “a sentence for the offense” to include a sentence that was pronounced before that date but later vacated. It could not have done so. Congress drafts and enacts statutes against background legal principles, the content of which is presumptively incorporated into the meaning of the words it uses. As relevant here, the law treats a sentence that has been vacated as a nullity *ab initio*, as if it never existed. Cases from before the Founding and consistently through today confirm that when an order or judgment is vacated, the *status quo ante* is restored, and it is as though the order or judgment had never been made.

Congress is presumed to have known that settled legal principle and, absent a contrary indication, to have incorporated it in the FSA. A sentence that has been vacated therefore cannot be “a sentence for the offense,” because a sentence that has been vacated does not exist. It therefore cannot be ground to deny substantive relief at resentencing.

2. Some lower courts have reasoned that to focus on the invalidation *ab initio* of a vacated judgment is to add words to section 403(b), effectively inserting the word “valid” in front of the word “sentence.” That reading has matters backward. Again, the Court must presume that Congress incorporates settled legal principles into the

statutes it enacts. It therefore does not add words to the statute to presume the word “sentence” means a sentence that has not been vacated. On the contrary, to read “a sentence” in section 403(b) to *include* a vacated sentence would be to read it as “an initial sentence” or “an original sentence.” Such modifiers would be necessary to displace the background rule that the law treats a sentence that has been vacated as though it never existed. But Congress did not include those words.

3. Other courts have held that section 403(b) refers only to the historical fact of a past pronouncement and that a vacatur does not change the past. That is wrong twice over. First, vacatur does change the past by operation of law—cases from time immemorial stand for the proposition that when an order is vacated, it as though the proceeding that produced the order never happened. That is why the Double Jeopardy Clause does not bar retrial after a conviction is vacated on appeal.

Second, section 403(b) refers to the ongoing enforcement of a sentence, not the fact of a past pronouncement. Congress’s use of the present-perfect tense and the preposition “as of” confirm so. Use of the present-perfect tense implies concern with a time-span beginning in the past *and extending up to now*. And the preposition “as of” is used to indicate a time or date from which something continues. Together, they indicate that Congress was concerned only with sentences that were pronounced pre-enactment and remain in force and effect today.

Common English usage confirms the point. No one would say that Hewitt’s initial, since-vacated sentence “has been imposed as of December 21, 2018,” because it has no continuing force or effect. If one wanted to refer to the fact of a vacated sentence having been pronounced, one would use the simple past tense and a preposition indicating a singular point in time: Hewitt’s initial, since-vacated sentence *was* imposed *before* December 21, 2018.

Indeed, Congress used just that formulation in section 404, concerning sentencing modifications. That it did so there but not in section 403(b) must be taken as intentional.

4. Statutory interpretation turns on ordinary, contemporary, and common use of the English language. Thus, while rules of grammar and dictionary definitions are centrally important, the outcome cannot be determined by a single phrase scrutinized in the abstract. The Court must look to the relevant language in its full context, with an eye to the statute's overall objective.

Only our interpretation is consistent with the FSA's broader context, design, and purpose. Section 403(b) reflects a clear purpose: to make section 403(a)'s ameliorative sentencing reform available retroactively in pending cases while preserving the finality of valid criminal judgments. That line is sensible. Allowing application in pending cases ensures that no court ever again engages in sentencing stacking, while at the same time respecting the importance of the principle of finality to criminal justice and sound judicial administration.

Plenary resentencings following full vacatur are "pending" cases like any other; there is no sentence for the defendant to serve, and a new one must be imposed by exercise of *de novo* judicial discretion. In that context, application of section 403(a) would do nothing to disturb the finality of an already-vacated judgment. Applying section 403(a) to such cases is thus consistent with Congress's objective to foreclose stacking in pending cases while preserving the finality of past cases.

The opposite is true of the decision below. It draws an arbitrary line between plenary sentencings and plenary resentencings, without any account for why Congress would have intended such an irrational distinction. And in doing so, it ensures that prosecutors still may seek, and

courts still will be required to impose, stacked sentences in plenary sentencing proceedings into the future. That cannot be what Congress intended.

B. The rule of lenity arises only if the Court concludes that the statutory text is ambiguous, which the provision here is not. But if the Court disagrees, it must resolve the ambiguity in favor of Hewitt and the lesser sentence required under section 403(a).

The Court has repeatedly confirmed that the rule of lenity applies not only to statutes that define criminal liability, but also those that set the penalties for violations. Under our interpretation of section 403(a), Hewitt would face a mandatory minimum of 25 years. Under the Fifth, Sixth, and Eleventh Circuit’s mistaken construction, he would face a mandatory minimum of longer than one century at his resentencing on the section 924(c) counts alone. If there is any reasonable doubt about the construction of section 403(a), it must be resolved in his favor.

ARGUMENT

“The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.” *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (quoting *Estate of Coward v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)). When the statute’s text is “unambiguous,” that “first step of the interpretive inquiry” is also the “last.” *Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019).

To interpret Congress’s words, the Court must focus on “ordinary, contemporary, [and] common” use of the English language. *Star Athletica*, 580 U.S. at 414. That means among other things the Court must give the text a reading that is consistent with and incorporates settled background legal principles, with which the public would expect any words to comport. *E.g., Cannon v. University*

of *Chicago*, 441 U.S. 677, 696-697 (1979) (explaining that “[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law”).

And while background principles, rules of grammar, and dictionary definitions are centrally important to the task of statutory interpretation, the Court must “‘consider not only the bare meaning’ of the critical word or phrase ‘but also its placement and purpose in the statutory scheme.’” *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). The only permissible meaning of a word or phrase is the one that fits with the statutory context and purpose, rather than conflicts with them. See, e.g., *Dubin v. United States*, 599 U.S. 110, 118-120 (2023).

First, Congress did not intend the phrase “a sentence for the offense” to include a vacated sentence. According to settled background principles, the law treats a vacated sentence as never having been pronounced. For a statute to override that principle requires a clear statement. There is no such statement here.

Second, the contrary rationales offered among the lower courts are unpersuasive. The rules of grammar, relevant dictionary definitions, and statutory context all confirm that Congress intended section 403(b) to authorize section 403(a) relief in *all* pending cases, including cases that are pending *de novo* resentencing following a vacatur. No other conclusion is consistent with Congress’s purpose or settled practice. And even if there were doubt on that front (there should be none), it would be resolved by the rule of lenity.

No matter whether the Court finds the words clear or ambiguous, a resentencing with the benefit of section 403(a) is necessary.

**A. Section 403(a) applies to post-enactment
de novo resentencings**

All relevant considerations—the text, context, and purpose of the FSA, the statute’s design, and the background principles against which it was enacted—confirm that section 403(a) applies to plenary resentencings that take place after the Act’s enactment.

1. *A sentence that has been vacated is not “a sentence for the offense”*

The central issue is whether Congress meant “a sentence for the offense” imposed “as of” December 21, 2018, to include a sentence that was pronounced before that date but later vacated. It did not.

a. One rule for reading “statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions.” *Bond v. United States*, 572 U.S. 844, 857 (2014). Among those presumptions is that “Congress is aware of existing law” and, absent express indication otherwise, intends for the statutes it enacts to comport with settled background legal principles and precedents. See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014); accord *Cannon*, 441 U.S. at 696-697.

Put another way, the background principles against which Congress acts operate as default rules to which it presumptively intends for its enactments to conform. Because the accepted legal backdrop will generally accord with “widely held intuitions about how statutes ordinarily operate,” a presumption that Congress means to incorporate background legal principles “will generally coincide with legislative and public expectations.” *Landgraf v. USI Film Productions*, 511 U.S. 244, 272 (1994). Cf. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 102 (2013) (in a case concerning ERISA plan documents, relying on the “default rules [that] govern in the absence

of a clear expression of [a] contrary intent”); *Staub v. Proctor Hospital*, 562 U.S. 411, 418 (2011) (in a federal tort case, observing that the Court must “consult general principles of law” that “form the background against which federal tort laws are enacted”).

b. Here, the settled legal background against which section 403(b) was adopted demonstrates beyond debate that Congress did not mean for “a sentence” to include a vacated sentence. Absent contrary intent, a vacated order is and always has been treated as though it was never entered in the first place—it is a nullity, as though it never existed. See *United States v. Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring) (historical principles “reveal that vacatur makes a sentence void from the start”). Nothing in section 403(b)’s text overrides that default understanding.

Take first historical sources. At common law before the Founding, vacatur on appeal made it “as if no [judgment] had been” entered, meaning in effect that there was no “record of it.” *Ognell’s Case* (1592) 78 Eng. Rep. 526, 526; 34 Cro. Eliz. 270, 271 (Q.B.); accord *Eyre v. Woodfine* (1592) 78 Eng. Rep. 533, 533; 34 Cro. Eliz. 278, 278-279 (Q.B.). Countless other historical sources confirm that when an order is vacated, it is “in all respects as though the [order] had never been made.” *Norman v. Norman*, 207 P. 970, 972 (Okla. 1922). Since time out of mind, courts have understood that vacatur “puts the parties in the state, in which they were, immediately before the judgment was rendered,” fully restoring the *status quo ante*. *Lockwood v. Jones*, 7 Conn. 431, 436 (1829). This Court summarized this principle more than 150 years ago: “vacating the former judgment * * * render[s] it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause.” *United States v. Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869).

A vacated order is not merely “suspended” on a forward-looking basis, while “retain[ing] its vitality” retrospectively. *Stewart v. Oneal*, 237 F. 897, 906 (6th Cir. 1916). Rather, “where an irregular order has been vacated *it is held to be the same as though it never existed*, and for that reason” courts may not afford any “protection to the acts which may have been performed under it.” *Farnsworth v. Western Union Telephone Co.*, 6 N.Y.S. 735, 747 (Gen. Term 1889) (emphasis added). When orders are vacated, it is “as though they had never been made or had” in the first place. *United States v. Mayse*, 5 F.2d 885, 886 (9th Cir. 1925).²

This ancient principle has been carried forward to modern times without meaningful alteration. Like their forebears, cases since the midcentury onward confirm that after a conviction is vacated, the defendant “stand[s]

² Other historical examples expressing this principle are too many to list. For a limited sample, see *Williams v. Floyd*, 27 N.C. 649, 656 (1845) (a void or “stricken” order is “the same as if the [order] had never been made”); *Lawson v. Bissell*, 7 Ohio St. 129, 132 (1857) (when a verdict and judgment are “vacated” it is “as if there had been no trial”); *In re Lacey*, 14 F. Cas. 906, 908 (C.C.D. Conn. 1874) (vacating an order allows the parties to act “in the same way and manner, and to the like effect” as they could have had the order “never been made”); *Strickland v. Flagstaff Silver Mining Co.*, 1 Utah 199, 204 (1875) (for purposes of post-judgment motions, a judgment that is vacated “was as though it had never existed”); *Aultman v. Seiberling*, 31 Ohio St. 201, 204 (1877) (when a decision is vacated, the law and the facts are treated “the same as if no decision had been made”); *Bondholders & Purchasers of the Iron Railroad v. Toledo*, 62 F. 166, 168 (7th Cir. 1894) (after a court order vacating and annulling a decree disallowing a claim, the claim was “re-established in all respects as fully as if [the vacated decree] had never been made”); *Green v. McCarter*, 42 S.E. 157, 158 (S.C. 1902) (when a judge “revoke[s] his * * * order, the case [stands] just as if no order had been made”); *In re Rochester Sanitarium & Baths Co.*, 222 F. 22, 26 (2d Cir. 1915) (recognizing “[t]he general rule” that when a court vacates an order, “it is the same as if such order had never existed”).

in the position of any man who was accused of a crime but has not yet shown to have committed it.” *Fiswick v. United States*, 329 U.S. 211, 223 (1946). “The general rule,” according to these cases, “is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made.” *Wrang v. Spencer*, 235 A.2d 861, 863 (Conn. App. Ct. 1967). Nearly verbatim restatements of this universal principle appear in *Mitchell v. Joseph*, 117 F.2d 253, 255 (7th Cir. 1941); *Miller v. Schlereth*, 36 N.W.2d 497, 506 (Neb. 1949); *Tims v. Holland Furnace Co.*, 90 N.E.2d 376, 380 (Ohio 1950); and *Buchanan v. Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951) (en banc).

The notion that a vacated order is treated as though it had never been entered in the first place reflects the same principle behind the Court’s own *Munsingwear* doctrine: An order vacating a judgment “eliminates [the] judgment” so that “none is prejudiced” by it, “clear[ing] the path for future relitigation of the issues between the parties.” *United States v. Munsingwear*, 340 U.S. 36, 40 (1950). “The point of vacatur is to prevent” its object “from spawning any legal consequences, so that no party is harmed by” it. *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (citing *Munsingwear*).

And the law not only treats the vacated judgment as a nullity in its own right, but also regards the proceedings producing it effectively as never having happened. Thus, for example, the vacatur of a criminal judgment of conviction on appeal effectively erases from history the fact of the jury’s empanelment in the original trial, and thus in most circumstances “there is no double jeopardy upon a new trial.” *Burks v. United States*, 437 U.S. 1, 12 (1978) (quoting *Bryan v. United States*, 338 U.S. 552, 560 (1950)). That rule “rests ultimately upon the premise that the original conviction has, at the defendant’s behest,

been wholly nullified and the slate wiped clean.” *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969) (citing *United States v. Ball*, 163 U.S. 662 (1896)).

The same rationale applies with respect to sentencing. As the Court made clear in *Pepper v. United States*, 562 U.S. 476 (2011), when a court of appeals “set[s] aside [a defendant’s] entire sentence and remand[s] for a *de novo* resentencing,” all legal effect from the original sentencing proceeding is nullified, “effectively wip[ing] the slate clean.” *Id.* at 507. Rulings made at the original sentencing therefore have no continuing vitality under the law-of-the-case doctrine. *Ibid.*

c. The legal backdrop against which Congress enacted the FSA is thus clear: When a criminal sentence is vacated, the *status quo ante* is restored as if the sentence had never been pronounced. A sentence that has been vacated is a nullity; it is nothing; it never existed. See *Fiswick*, 329 U.S. at 223.

That resolves this case. Congress specified that section 403(a)’s sentencing reform shall apply “if *a sentence* for the offense has not been imposed as of” December 21, 2018. FSA § 403(b) (emphasis added). Because a sentence that has been vacated is treated by operation of law as though it never was imposed—so that it “spawn[s no] legal consequences” and “no party is harmed by” it (*Camreta*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 40-41))—Congress could not have intended for “a sentence” to include a vacated sentence. As a matter of law, an offender whose sentence has been vacated is one for whom “a sentence for the offense has not been imposed” *ever*, including as of December 21, 2018.

**2. Contrary opinions among the lower courts
are not persuasive**

a. In holding otherwise, the Fifth Circuit focused on the indefinite article, “a” appearing before the word “sentence.” See Pet. App. 8a-9a. The same argument was spelled out by then-Judge Barrett in her dissent in *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc): “[T]he indefinite article ‘a’ is broad enough,” she argued, “to refer to any sentence that has been imposed for the offense, even one that was subsequently vacated.” *Id.* at 608. In her and the Fifth Circuit’s view, a pre-enactment sentence, even if later vacated, remains “a sentence” imposed “as of” December 21, 2018. *Ibid.*; Pet. App. 8a-9a; see also *United States v. Hernandez*, 107 F.4th 965, 969 (11th Cir. 2024).

Respectfully, that position disregards the nature of a vacatur and the default rule that it establishes. When Congress says “a sentence” without more, it cannot mean a sentence that is treated by operation of law as never having been imposed. Otherwise, what would it mean for something to be treated as never having been imposed?

That conclusion does not add words to the statute, as the Fifth Circuit implied. In the lower court’s view, “[i]f Congress meant for the First Step Act’s retroactivity bar to apply only to valid sentences, it could easily have said so” by specifying “a *valid* sentence.” Pet. App. 8a-9a. But that misses the point, which is that an adjective like “valid” would have been redundant given the background legal principles against which Congress adopted the FSA. Again, Congress is presumed to be aware of and incorporate those principles in the statutes it enacts. And here, the long-settled rule is that when an unlawful “order has been vacated it is held to be the same as though it never existed” and the law will “afford no protection to

the acts which may have been performed under it.” *Farnsworth*, 6 N.Y.S. at 747.

Accordingly, it is the Fifth Circuit’s reading, not petitioner’s, that would add words to the statute. To read “a sentence” as including a vacated sentence would be to read the statute as saying “an *initial* sentence” or “an *original* sentence.” Use of such adjectives would have readily displaced the default rule that a vacated sentence is treated as a matter of law as never having existed. But Congress did not use those modifiers, and thus the assumption “that our elected representatives, like other citizens, know the law” when they draft and enact statutes (*Cannon*, 441 U.S. at 696-697) carries the day for Hewitt.

b. Some lower courts have instead simply denied the premise of the argument, asserting that an order fully vacating a sentence “does not require the district court to proceed as if the initial sentencing never happened.” Pet. App. 9a (quoting *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting)). For support, they have pointed to 18 U.S.C. § 3742(g)(1), which specifies that “a district court imposing a sentence on remand” following a vacatur on appeal “must apply the Sentencing Guidelines ‘that were *in effect on the date of the previous sentencing* of the defendant prior to the appeal.’” *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting) (quoting section 3742(g)(1)). That, we are told, is evidence that the effects of a vacated sentence are not wholly eliminated, and a court need not “proceed as if the earlier sentencing never happened.” *United States v. Carpenter*, 80 F.4th 790, 792 (6th Cir. 2023) (Kethledge, J., concurring in the denial of rehearing en banc).

That misunderstands what section 3742(g)(1) does. As a starting point, the very relevance of the provision is doubtful. It provides only that when a court of appeals remands a case for resentencing (plenary or otherwise),

the district court must utilize the sentencing guidelines “that were in effect on the date of the previous sentencing.” 18 U.S.C. § 3742(g)(1). That shows only that Congress did not want changes to the guidelines to apply retroactively at resentencing. The statute’s reference to the state of the law on “the date of” a prior proceeding does not suggest in any way that a vacated sentence itself continues to have legal force or effect.

Moreover, to the extent section 3742(g) has any relevance, it is only to confirm that Congress knows how to use express language to override the default rule when it wishes to. Our point is not that a vacated sentence can *never* have ongoing consequences—it is only that, given that Congress is assumed to understand that a vacated sentence is treated as if it were never entered, Congress would have to use express language to accomplish that objective. That is at most what section 3742(g) confirms: When Congress wants a vacated sentence to continue to have some effect, it says so using a clear statement. Such language is missing from section 403(b).

3. *Section 403(b) refers to the ongoing enforcement of a sentence, not the fact of a past pronouncement*

a. Other lower court opinions have rejected the relevance of vacatur by characterizing the imposition of a sentence as a historical fact that, if it occurred, cannot be erased from the documented past by a later vacatur of the sentence. According to this rationale, when Congress said that section 403(a) shall apply to a pre-enactment offense “if a sentence for the offense has not been imposed as of” December 21, 2018 (FSA § 403(b)), it actually meant “if a sentence was not pronounced before” that date.

The Eleventh Circuit took this view in *Hernandez*. There, it reasoned that section 403(b) “is best read to refer to a completed act” because it conjugates the verb

“imposed,” which “refers to the historical fact of *pronouncement*” taking place at “a specific point in time.” *Hernandez*, 107 F.4th at 969-970; accord *Pet. App. 7a-8a*. Viewing the imposition of a sentence this way renders effect of vacatur irrelevant, according to these sources, because “vacatur does not erase * * * from history” the recorded fact that a sentence was pronounced on a date preceding enactment. *United States v. Jackson*, 995 F.3d 522, 525 (6th Cir. 2021).

b. The problem with that approach is two-fold.

First, that is indeed precisely what an order of vacatur does—by operation of law, it erases from history both the vacated order or judgment and the proceeding that produced it. Thus, when a verdict and judgment are “vacate[d],” it is “as if no trial had ever taken place in the cause.” *Ayres*, 76 U.S. (9 Wall.) at 610; accord *Lawson*, 7 Ohio St. at 132 (following a vacatur, the case must proceed “as if there had been no trial”).

Again, that is the premise underlying the rule that “there is no double jeopardy upon a new trial” following a vacatur on appeal of the final judgment. *Burks*, 437 U.S. at 12. “There are few if any rules of criminal procedure clearer than the rule that ‘jeopardy attaches when the jury is empaneled and sworn.’” *Martinez v. Illinois*, 572 U.S. 833, 839 (2014) (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978)). But when a conviction is later vacated, the law treats the jury’s empanelment at the first trial effectively as if it had never happened. *Burks*, 437 U.S. at 12.

Applied here, that means that no legal disability may follow from Hewitt’s sentence ever having existed, including any disability following from the historical fact of the pronouncement having taken place.

Second, the historical-fact approach to section 403(b) is inconsistent with the verb tense and preposition that Congress used there. If Congress had meant the applic-

ability of section 403(a) to turn on whether a district judge had pronounced a sentence on a date preceding December 21, 2018, as a simple matter of historical fact, it would not have used the present-perfect tense or the preposition “as of.” Instead, it would have used the simple past tense, together with a preposition such as *before* or *prior to*—it would have said section 403(a) shall apply to a pre-enactment offense “if a sentence for the offense *was* imposed *before* such date of enactment.” That word choice would have been consistent with the House Legislative Drafting Manual, which directs drafters of legislation to use the past tense to refer to “facts that must precede” the statute’s “operation.” *House Legislative Counsel’s Manual on Drafting Style*, HLC No. 104-1, § 351(f)(2), at 60 (1995).

But that is not the formulation that Congress chose. Instead, it used the present-perfect tense, together with the preposition “as of.” Each alone—and undeniably both together—connote an ongoing condition rather than the occurrence of a singular past event.

The relevant grammar rules make this clear. The present-perfect tense uses the words “has been” (or in this case “has not been”). Whereas the past tense “is a simple tense, just past,” the present perfect “is a compound tense combining past and present.” Rodney Huddleston & Geoffrey K. Pullum, *The Cambridge Grammar of the English Language* 142 (2002) (hereinafter *Cambridge Grammar*). That is to say, the present perfect “involves reference to both past and present time” and “is concerned with a time-span beginning in the past *and extending up to now*.” *Id.* at 143 (emphasis added). Thus, in contrast with the past tense, which focuses on a singular past occurrence, “the primary focus” of the present-perfect “is on the present.” *Ibid.* It accordingly “is not used in contexts where the ‘now’ component of [the time span] is explicitly or implicitly excluded,” such

as when one is speaking about a discrete past event that has concluded. *Ibid.*

That alone forecloses *Hernandez*'s past-historical-fact rationale. If one says that a sentence "has been imposed as of" some past date, it indicates that the sentence was in effect on that date and is still being enforced today, "extending up to now." *Cambridge Grammar* 143. It indicates, in other words, that the sentence remains final and in force at the time of speaking, and that it has not been vacated by a court.³

That conclusion follows not only from the use of the present-perfect tense, but also from the preposition "as of," which indicates a time or date "from" which something begins or continues. See *Collins English Dictionary* 113 (14th ed. 2023) (hereinafter *Collins*). One would say, for example, that a contract is effective "as of" the date it comes into force. In doing so, one would indicate the commencement of a continuous period of enforcement—the effective date *and onward*. And if one were to combine "as of" with the present-perfect tense (stating that a contract "*has been* effective *as of* December 21, 2018"), the plain meaning would be that the contract was enforceable on that date and remains so now. In contrast, it would be incoherent to say that a contract "*has been* effective *as of* December 21, 2018," if, at the time of speaking, the contract was terminated by the parties or voided by a court.³

³ It bears noting "the widely accepted modern legislative drafting convention that a law should not be read to speak as of the date of enactment," but "'as of any date on which it is read.'" *Carr v. United States*, 560 U.S. 438, 463 (2010) (Alito, J., dissenting) (quoting Senate Office of the Legislative Counsel, Legislative Drafting Manual § 103(a), at 4 (1997)). This convention recognizes that most laws "have a continuing effect in that they apply over time," and they thus "speak at the time of reading, not merely at the time of their adoption." *Id.* at 464.

The same goes for section 403(b). Congress specified that section 403(a) shall apply to a pre-enactment offense “if a sentence for the offense has not been imposed as of” December 21, 2018. The inverse is that section 403(a) shall *not* apply to a pre-enactment offense “if a sentence for the offense *has* been imposed as of” that date. But it would be ungrammatical to say that Hewitt is a defendant on whom “a sentence has been imposed as of” December 21, 2018, because that formulation mistakenly implies that at the time of speaking, there is a present, ongoing enforcement of his sentence.

One might say that Hewitt’s initial sentence *was* imposed *before* that date. But, again, those are not the words Congress used. And “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

c. Use of the word “imposed” does not change matters. To be sure, “imposed,” viewed in isolation, can be taken to mean “to establish as something to be obeyed or complied with.” *Collins* 984; see also *Webster’s Third New International Dictionary* 1136 (2002) (hereinafter *Webster’s*) (defining impose as, among other things, “bestow”). On that meaning, a judge who *imposes* a sentence establishes it or bestows it on the defendant as a matter of fact at a singular point in time.

But the word can also mean to “enforce” (*Collins* 984) or to “apply,” as in a “penalty” (*Webster’s* 1136). Understood in that way, the word means an ongoing condition of enforcement: A sentence is *imposed* on (it is applied to or enforced against) an offender during the entire duration of his or her incarceration. This meaning suggests not a singular past occurrence that took place at a particular point in time, but rather an ongoing condition: A “sentence remains ‘imposed’” until it is “vacate[d].”

United States v. Henry, 983 F.3d 214, 223 (6th Cir. 2020).

The academic possibility of these two meanings does not render section 403(b) ambiguous. The proper interpretation of “words that can have more than one meaning” are generally resolved “by their surroundings.” *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 10 (2013) (quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 466 (2001)). That is, the “susceptibility” of a singular word to multiple meanings does not necessarily render the word ambiguous, because “all but one of the meanings is ordinarily eliminated by context.” *Deal v. United States*, 508 U.S. 129, 131-132 (1993).

Just so here. By using the present-perfect tense (rather than the past tense) and the preposition “as of” (rather than “before” or “prior to”) Congress signaled its focus on a “time-span beginning in the past and extending up to now.” *Cambridge Grammar* 143. Any contention that the word “imposed” in section 403(b) “refers to the historical fact of *pronouncement*” at “a specific point in time” (*Hernandez*, 107 F.4th at 970) rather than a condition of ongoing enforcement would require reforming the tense and replacing the preposition that Congress used. The law permits no such revisions.

d. Moreover, section 404 of the FSA demonstrates that Congress was aware of and intended the difference. There, Congress provided for motions to reduce valid, final sentences in limited circumstances. See generally *Concepcion v. United States*, 597 U.S. 481 (2022). In doing so, Congress limited relief in two notable ways. First, it specified in section 404(c) that “[n]o court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced” under certain circumstances. FSA § 404(c), Pet. App. 21a. If the lower court were correct that Congress intended in section 403(b) to refer to a

singular past event (the pronouncement of a sentence before enactment), it presumably would have used the same formulation—section 403(a) shall apply to pre-enactment offenses “if no sentence for the offense was previously imposed.” It did not do so.

Second, also in section 404(c), Congress foreclosed relief if a motion “to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.” Again, if the lower court’s reading were correct, Congress could have used that alternative formulation in section 403(b)—section 403(a) shall apply to pre-enactment offenses “if no sentence for the offense was imposed before said date of enactment.” Again, it did not do so.

Both examples demonstrate that Congress knows how to use the simple past tense to denote discrete events taking place at fixed times in the past when it wishes to. It did so in section 404(c), but it did not do so in section 403(b). And the Court “generally presum[es] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. 178, 186 (2020) (quoting *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994)).

All of this leads to a straightforward conclusion: When Congress said that section 403(a) shall apply to a pre-enactment offense “if a sentence for the offense has not been imposed as of” December 21, 2018 (FSA § 403(b), Pet. App. 20a), it meant a sentence that was being enforced “as of” that date and is still being enforced at the relevant time of reading. And needless to say, that does not describe a sentence vacated before the reading.

4. Purpose and practice confirm that section 403(a) applies to plenary resentencings

a. Purpose and practice confirm the Fifth Circuit’s error in this case. Statutory interpretation turns on the way that ordinary English speakers use language. The Court thus has a long history of reading statutory words and phrases “not in a vacuum, but with reference to the statutory context, ‘structure, history, and purpose,’” “not to mention common sense.” *Abramski v. United States*, 573 U.S. 169, 179 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)). While rules of grammar, dictionary definitions, and background legal principles are of course matters of central importance, the Court “must not be guided by a single sentence or member of a sentence” studied in the academic abstract; it must instead “look to the provisions of the whole law, and to its object and policy.” *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986)).

Although broader in total effect, the FSA’s “most important reforms” were the “changes to mandatory minimums” at issue here. 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar). Moved by heartless examples of excessive imprisonment, Congress set out to “eliminate[] the so-called stacking provision in the U.S. Code” and to “ensure that sentencing enhancements for repeat offenses apply only to true repeat offenders.” *Id.* at S7774 (statement of Sen. Cardin); accord 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Nadler). Courts on both sides of the issue have thus concluded that the FSA’s purpose “is obvious: to reduce the harsh length of sentences for * * * certain firearms offenses.” *Mitchell*, 38 F.4th at 387. It was, in other words, “to ensure that the lengthy mandatory-minimum sentences for stacked

§ 924(c) convictions ended, whether at initial sentences or resentencings.” *Henry*, 983 F.3d at 224.

To that end, Congress made section 403(a) applicable not only to post-enactment crimes, but also pre-enactment ones. In doing so, it had two options: *First*, it could make section 403(a) retroactively applicable to *all* defendants serving stacked sentences, including those subject to valid final judgments. *Second*, it could make section 403(a) retroactively applicable to crimes committed pre-enactment, but only in pending, non-final cases.

The choice required a balance of competing values of the highest order. On the one hand, Congress was deeply concerned that defendants were serving unduly harsh and overlong sentences. Few government interventions have the same impact and gravity as deprivation of liberty by imprisonment. On the other hand, there is a “strong interest in preserving the finality of judgments.” *Harris v. Rivera*, 454 U.S. 339, 348 n.21 (1981) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977)). Legislators understand that “[f]inality is essential to both the retributive and the deterrent functions of criminal law.” *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). And finality serves the public’s interest in efficient judicial administration, increases confidence in the justice system, and fosters the public interest in repose.

Evidently with these latter principles in mind, Congress selected the second option: It made section 403(a) relief available to defendants whose criminal conduct predated enactment of the statute, but whose cases were “pending” (that is, those whose sentence “has not been

imposed as of” the FSA’s enactment). See FSA § 403(b) (titled “Applicability to Pending Cases”).⁴

In taking this approach, “Congress stanch[ed], to the degree that it could,” the problem of sentence stacking, but “without overturning valid and settled sentences.” *Uriarte*, 975 F.3d at 601. “In choosing not to write § 403(b) to allow reductions to valid sentences that already had been imposed, Congress expressed a policy preference in favor of settled expectations and ease of administration.” *Id.* at 605; see also *United States v. Merrell*, 37 F.4th 571, 576 (9th Cir. 2022) (“[W]e find it clear that § 403(b) was intended to ensure that the adoption of the First Step Act by itself would not affect any sentence previously imposed.”); *Henry*, 983 F.3d at 225 (“Congress chose not to disrupt the finality of past sentences * * * for defendants serving stacked sentences.”).

What is more, Congress “naturally wanted to reach all cases where there was not already a sentence in place.” *Uriarte*, 975 F.3d at 605. It intended to give defendants the benefit of section 403(a) at all *future* plenary sentencing proceedings, without disturbing the sentences validly imposed in *past* proceedings.

b. Applying section 403(a) to defendants like Hewitt is consistent with Congress’s policy choice. The lower court’s contrary decision is not.

Once a court vacates a criminal sentence and orders a *de novo* resentencing, there can no longer be any interest

⁴ “This Court has long considered that the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of” a statutory provision. *Dubin*, 599 U.S. at 120–121 (cleaned up). A section title cannot “override” the words that follow, but Congress’s words “must be construed in light of the terms surrounding them, and the title Congress chose is among those terms.” *Id.* at 121 (cleaned up).

in finality. See *Pepper*, 562 U.S. at 507. Because the district court must resentence the defendant “as if no initial sentencing ever occurred” (*United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017)), finality is already out the window by the time the district court undertakes a *de novo* resentencing following a vacatur. The initial sentence is gone, and a brand new sentence must be determined and pronounced.

Practice bears this out. A plenary resentencing is a *de novo* proceeding, and the district court must exercise its discretion anew in setting an appropriate sentence. “[A]t any subsequent resentencing after a sentence has been set aside,” the court must determine a sentence “based on appropriate consideration of all of the factors listed in § 3553(a),” without regard for prior rulings from the initial sentencing. *Pepper*, 562 U.S. at 490. Among other things, the probation officer must prepare a new presentence report (see Pet. App. 3a-4a; Dkt. 785, at 15), the parties must submit new objections and responses (Dkts. 694, 699), and the court must hold a new hearing and consider and resolve the disagreements. See *Conception*, 597 U.S. at 484.

There is no conceivable reason that Congress would have wanted district courts to continue imposing “irrational, inhumane, and absurd” sentences pursuant to a “cruel and unjust” sentencing rule (*Hungerford*, 465 F.3d at 1118 (Reinhardt, J., concurring)) that it had just repealed retroactively for all pending cases. On the contrary, lawmakers “wanted the unfair practice” of stacking “stopped upon enactment” (*Uriarte*, 975 F.3d at 603) because they “recognized that such lengthy sentences * * * were draconian and sought to end the practice” (*Henry*, 983 F.3d at 225).

No court and no party in any case presenting this issue has identified any reason why Congress would have intended for courts to continue to impose since-repu-

diated stacking rules in plenary resentencings. Simply put, there is none. Given “that Congress had determined that the earlier sentencing structure resulted in sentences that were too long and unfair,” its goal was to “ensur[e] that those sentences would not be imposed on defendants yet to be sentenced,” *for whatever reason*. *Uriarte*, 975 F.3d at 603. The Court is not required to turn a blind eye to that purpose, adopting an interpretation that does violence to it rather than respecting it.

B. Any ambiguity must be resolved in favor of applying section 403(a) to Hewitt

If, after all, there were any doubt about section 403(b)’s proper interpretation, the rule of lenity would require the Court to resolve it in Hewitt’s favor. A penal statute cannot be construed to impose a 105-year mandatory minimum sentence when another plausible reading would produce a 25-year mandatory minimum. No matter the Court’s view of the interpretations adopted by the Fifth, Sixth, and Eleventh Circuits, Hewitt’s interpretation is at the very least a plausible one. The rule of lenity thus requires the Court to adopt it.

1. The rule of lenity is an interpretive canon “not much less old than [statutory] construction itself.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). It demands that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). It “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Simply stated, “[i]n the construction of a penal statute, it is well settled * * * that all reasonable doubts concerning

its meaning ought to operate in favor of [the defendant].” *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850).

The rule is grounded in the Constitution. It ensures “that the power of punishment is vested in the legislative, not in the judicial department,” for it is “the legislature, not the Court, which is to define a crime, and ordain its punishment.” *Wiltberger*, 18 U.S. (5 Wheat.) at 95; see also *Wooden v. United States*, 595 U.S. 360, 388-392 (2022) (Gorsuch, J., concurring) (describing the due-process and separation-of-powers underpinnings).

The rule of lenity applies when the ordinary tools of construction (“text, structure, and history”) “fail to establish that” the harsher reading is “unambiguously correct.” *United States v. Granderson*, 511 U.S. 39, 54 (1994). Lenity applies “when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute.” *Shular v. United States*, 589 U.S. 154, 165 (2020) (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)); see also *Wooden*, 595 U.S. at 392-393 (Gorsuch, J., concurring).

2. As we demonstrated in the preceding parts of this brief, section 403(b) states plainly that Hewitt’s plenary resentencing shall be subject to section 403(a). That is the only reading consistent with the background rules against which Congress enacted the FSA, as well as the relevant rules of grammar, the definitions of the terms used, the structure and scheme of the statute, and Congress’s manifest purpose.

If for any reason the Court concludes that the lower court’s alternative interpretation is a possible one, the rule of lenity would dictate that the ambiguity be resolved in Hewitt’s favor. Indeed, this is a textbook case for application of lenity. Defendants like Hewitt who are resentenced will receive drastically lower sentences under our interpretation than they would under the Fifth,

Sixth, and Eleventh Circuits’ construction. “[L]enity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.” *Bifulco*, 447 U.S. at 387 (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)). To adopt the Fifth, Sixth, and Eleventh Circuit’s reading would mean making just such a guess.

If, after applying all the textual rules of construction, the Court sees no one clear answer, then lenity requires reversal. *Granderson* proves the point. There, as here, the Court addressed a question of statutory interpretation concerning sentencing. 511 U.S. at 41. The practical difference between the principal options was a mandatory 20-month sentence (if the government was correct) or a mandatory two-month sentence (if the defendant was correct). *Id.* at 41-42. After evaluating the “text, structure, and history” and finding no clear answer, the Court “appl[ied] the rule of lenity and resolve[d] the ambiguity in [the defendant’s] favor.” *Id.* at 54.

The same process is required here. There is no question that Hewitt must be resentenced. Under our interpretation of section 403(a), he would face a mandatory minimum of 25 years. Under the Fifth, Sixth, and Eleventh Circuits’ construction, he would face a mandatory minimum of longer than 100 years at his resentencing. Were there any “reasonable doubt” about the construction of section 403(a), that doubt “should be resolved in favor of” Hewitt. *Wooden*, 595 U.S. at 397 (Gorsuch, J., concurring).

CONCLUSION

The Court should reverse and remand with instructions to resentence Hewitt under section 403(a).

Respectfully submitted.

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No. 23-909

In The
Supreme Court of the United States

STAMATIOS KOUSISIS AND ALPHA PAINTING &
CONSTRUCTION CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under the federal wire fraud statute, 18 U.S.C. § 1343.

PARTIES TO THE PROCEEDING

Petitioners are Stamatios Kousisis and Alpha Painting & Construction Co., Inc., defendant-appellants below. Additional defendants in the district court who were not parties in the court of appeals and are not parties here were Emanouel Frangos and Liberty Maintenance, Inc.

Respondent is the United States of America, appellee below.

CORPORATE DISCLOSURE STATEMENT

Alpha Painting & Construction Co., Inc. does not have a parent company and no stock is publicly owned.

RELATED PROCEEDINGS

United States v. Kousisis, No. 19 2679 and *United States v. Alpha Painting & Construction Co., Inc.*, No. 19-3774 (consolidated), U.S. Court of Appeals for the Third Circuit; judgment entered September 22, 2023.

United States v. Kousisis, Alpha Painting & Construction Co., Inc., et al., No. 18-cr-130, U.S. District Court for the Eastern District of Pennsylvania; judgments entered November 8, 2019 and November 15, 2019.

United States v. Emanouel Frangos, Liberty Maintenance, Inc., No. 19-2482, U.S. Court of Appeals for the Third Circuit; judgment entered July 20, 2020, unrelated appeal from same district court proceeding (No. 18-cr-130).

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<i>Dura Pharms., Inc. v. Broudo</i> , 544 U.S. 336 (2005)	20
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<i>Genger v. Genger</i> , 43 N.Y.S.3d 264 (N.Y. App. Div. 2016)	40

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Other Authorities:	
Addison, C.G., <i>Wrongs and Their Remedies: A Treatise on the Law of Torts</i> (4th Eng. ed. 1876)	21
Bigelow, Melville M., <i>The Law of Fraud and the Procedure Pertaining to the Redress Thereof</i> (1877)	21, 22
Bishop, Joel Prentiss, <i>Bishop on Criminal Law</i> (9th ed. 1923).....	23
Bispham, George Tucker, <i>The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery</i> (1874)	22
Blackstone, William, <i>Commentaries on the Laws of England</i> (1766).....	35
Brill, Hascal R., <i>Cyclopedia of Criminal Law</i> (1923)	23

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(continued)

	Page(s)
Byrne, Francis J., <i>False Pretenses and Cheats</i> , in 12 <i>The American and English Encyclopaedia of Law</i> (David S. Garland & Lucius P. McGehee eds., 2d ed. 1899).....	23
Hanbury, Harold Greville, <i>Modern Equity</i> (8th ed. 1962)	20
Holmes, Jr., Oliver Wendell, <i>The Common Law</i> (1881)	21
Keeton et al., W. Page, <i>Prosser and Keeton on the Law of Torts</i> (5th ed. 1984).....	20
Kerr, William Williamson, <i>A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity</i> (1868)	23
McClain, Emlin, <i>A Treatise on the Criminal Law as Now Administered in the United States</i> (1897)	23
PennDOT Publication 408/2007-4, https://www.dot.state.pa.us /public/PubsForms/Publications/Pub_408/408_ 2007/408_2007_4/408_2007_4.pdf	5
PennDOT Publication 408/2007-5, https://www.dot.state.pa.us/ public/PubsForms/Publications/Pub_408/408_ 2007/408_2007_5/408_2007_5.pdf	5
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Pomeroy, John Norton, <i>A Treatise on Equity Jurisprudence, as Administered in the United States of America</i> (2d ed. 1892)	22

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	Page(s)
Sand et al., Leonard B., <i>Modern Federal Jury Instructions—Criminal</i> (2024).....	17
Story, Joseph, <i>Commentaries on Equity Jurisprudence, as Administered in England and America</i> (10th ed. 1870).....	21, 22
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BRIEF FOR PETITIONER

Petitioners Stamatios Kousisis and Alpha Painting & Construction Co., Inc. respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's relevant opinion is reported at 82 F.4th 230, and is reprinted in the Appendix to the Petition (Pet. App.) at 1-41. An earlier version of the Third Circuit's opinion, superseded on rehearing, is reported at 66 F.4th 406. The district court's relevant order is unpublished but reprinted at Pet. App. 76-129.

JURISDICTION

The court of appeals issued its opinion on September 22, 2023. Pet. App. 1-41. By orders dated December 12, 2023 and January 18, 2024, Justice Alito extended the time for filing a petition for a writ of certiorari until February 19, 2024. *See* 23A538. The Court granted the petition on June 17, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1343 provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

INTRODUCTION

In the past few decades, this Court has twice rejected the government’s extravagant interpretations of the federal statutes criminalizing mail and wire fraud. Each time, the government has responded with, if anything, an even more audacious theory. In *McNally v. United States*, 483 U.S. 350 (1987), the Court held that those statutes do not protect intangible rights; they protect property rights only. In response, the government invented the right-to-control theory, which held that scheming to obtain money or property while depriving the victim of potentially valuable economic information was mail or wire fraud. The Court rejected that theory in *Ciminelli v. United States*, 598 U.S. 306 (2023). But before the ink was dry, the government pivoted to a still broader theory: “fraudulent inducement,” under which “us[ing] falsehoods to induce a victim to enter into a transaction,” even when no harm to any property right is intended or occurs, constitutes wire fraud. BIO 9.

It is past time for this game of whack-a-mole to end. This Court’s decisions are not invitations for creative prosecutors to reimagine criminal fraud. They reflect fundamental limitations on the fraud statutes’ reach. In particular, a scheme “to defraud” contemplates harm to a traditional property interest. The mail and wire fraud statutes do not criminalize garden-variety disputes that have typically been the province of “state contract and tort law.” *Ciminelli*, 598 U.S. at 315.

McNally and *Ciminelli* are not the only cases the government’s new fraudulent inducement theory would relegate to historical footnotes. The Court held in *Cleveland v. United States*, 531 U.S. 12 (2000), and

Kelly v. United States, 590 U.S. 391 (2020), that the property fraud statutes do not protect regulatory interests. Yet under the inducement theory, federal prosecutors may charge regulatory harm as property fraud whenever a federal, state, or local government writes a regulatory interest into a contract—as here.

The government’s new theory is breathtakingly expansive in other ways as well. Under the theory, *any* material deception with the goal of obtaining money or property violates the wire fraud statute. BIO 7-8, 10. For instance, a college student seeking a babysitting gig who texts that she’ll spend her earnings on books—when she really plans to spend them on beer—could face up to two decades in federal prison, even if she performs her services flawlessly. So too a sales clerk who fibs about an aspect of a product having nothing to do with its value (say, how many are currently in stock) to persuade someone to buy one at the going rate. It is not clear such disputes should land in court at all. For the few that do, state contract and tort law—backed by far less punitive criminal statutes—are more than up to the task. Congress did not provide for a 20-year federal sentence for deceptions that threaten no harm to property in statutes “limited in scope to the protection of property rights.” *Ciminelli*, 598 U.S. at 314 (internal quotation marks and citation omitted).

In short, deceptively inducing someone to enter into a transaction that does not contemplate harm to their property rights is not mail or wire fraud. The statutes bar deceptive schemes to harm a pecuniary or other property interest. Petitioners’ scheme was not one, so the judgment below should be reversed.

STATEMENT OF THE CASE

The government charged Petitioners Stamatios Kousisis and Alpha Painting & Construction Co., Inc. with wire fraud for fraudulently inducing the Pennsylvania Department of Transportation (“PennDOT”) to award, and pay money under, two contracts funded by the United States Department of Transportation (“DOT”). The jury found petitioners guilty under this theory, the district court declined to throw out the verdict, and the Third Circuit affirmed petitioners’ convictions.

1. DOT makes funds available to state counterpart agencies to finance transportation projects. Pet. App. 4. In 2009 and 2010, PennDOT received federal grants for two major bridge-repair projects in Philadelphia, and put the projects out for bidding. Petitioners and their business partners submitted a lump-sum bid for each project, together totaling approximately \$120 million. JA106-16, 167-77. Those bids were the lowest PennDOT received by far—\$5 million lower than the next lowest bidder on one project and \$7 million lower on the other. JA44-47.

The PennDOT contracts for these jobs totaled more than 1,100-pages, and imposed countless statutory, regulatory, technical, and ethical obligations. JA106-116, 167-77.¹ PennDOT also reserved the right to

¹ The contracts incorporated most of these obligations by reference to PennDOT Publication 408, a lengthy “set of standard specifications” included in “just about every PennDOT contract.” JA38-39; see JA108, 169. The contracts incorporate successive versions of Publication 408. The provisions cited herein are identical (and numbered identically) in both versions. *Compare*

declare a default for nonperformance of any contract provision. JA136-38 § 108.08.

Among other things, the contracts required petitioners “[a]t all times, [to] observe and comply” with “all Federal, State, and local laws, ordinances, and regulations,” and with all “orders or decrees” then-existing or enacted in the future. JA119 § 107.01. The contracts incorporated federal and state regulations designed to advance the government’s policy priorities—for instance, a “Buy America” provision requiring petitioners to use U.S.-manufactured materials for certain aspects of the projects. JA117-18 § 106.10(a). They also required contractors to: pay minimum wage and carry workers’ compensation insurance, JA126-29 §§ 107.21, 107.22; “discipline[]” employees who commit sexual harassment, JA160-62; and comply with federal, state, and local “provisions[] and policies governing safety and health,” JA121-23 § 107.08. In addition, they required contractors to maintain “the highest standards of integrity,” by, for example, disclosing any conflicting financial interests and maintaining confidentiality. JA162-66.

The contracts also required petitioners to make good-faith efforts to spend a target percentage of their earnings with disadvantaged business enterprise (“DBE”) subcontractors. JA108-09, 114, 138-60, 168-69, 175. Like other contract provisions, this one was

PennDOT Publication 408/2007-4, https://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/408_2007/408_2007_4/408_2007_4.pdf (reproduced digitally at C.A.3 App. 3,879-4,975), to PennDOT Publication 408/2007-5, https://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/408_2007/408_2007_5/408_2007_5.pdf. Relevant pages are reproduced only once in the joint appendix for brevity.

designed to further policy interests captured in regulations. Specifically, to promote diversity in contracting, DOT has set an “aspirational goal” that ten percent of its infrastructure project funds will go to DBEs. 49 C.F.R. § 26.41(b).² State entities set their own “good faith” participation goals based on local conditions, and may incorporate project-specific goals into contracts. 49 C.F.R. §§ 26.47, 26.51. Non-DBE prime contractors may satisfy such contract goals by subcontracting with one or more DBEs. *See* Pet. App. 4-5. But payments to a DBE count toward a participation goal only if the DBE performs a “commercially useful function” and is not merely a “pass-through.” 49 C.F.R. § 26.55(c).

PennDOT incorporated DBE goals into both contracts at issue here, requiring the successful bidder to commit to good-faith efforts to spend the equivalent of six percent of its contracted earnings on one project, and seven percent on the other, with DBEs. JA18-23; Pet. App. 6. And PennDOT’s standard contract specifications provided that “failure to comply with DBE regulations would be a material breach.” Pet. App. 6-7; JA140 § I(d).

Once PennDOT accepted petitioners’ lump-sum bids, they became the fixed price of the contracts, with no allowance for costs. At the same time, petitioners had to show they could fulfill the contract before PennDOT would award it. That required them to set

² Federal regulations define a DBE as a business that is majority owned and controlled by “one or more individuals who are both socially and economically disadvantaged.” 49 C.F.R. § 26.5. Regulations also identify groups that are “presumed to be socially and economically disadvantaged.” *Id.*

out their plan for DBE participation (and many other things). JA39-42. Petitioners' DBE plan included obtaining paint supplies from Markias, Inc., "a company that had prequalified as a DBE in Pennsylvania." Pet. App. 6. PennDOT deemed petitioners qualified and the parties executed a contract on each project.

2. PennDOT made periodic payments to petitioners toward the contracts' fixed price, based on its inspectors' reports of completed work. JA21-23; C.A.3 App. 1368-1369. Separately, the prime contractor on each project reported to PennDOT qualifying payments to DBEs. JA7-8, 22-23. As part of this process, petitioners caused the prime contractor to report that Markias earned payments as a supplier. Pet. App. 7; *see* 49 C.F.R. § 26.55(e)(2). In truth, however, Markias was a mere "pass-through." Petitioners purchased supplies from non-DBE suppliers and paid Markias a 2.25% markup on each invoice. Pet. App. 7-8.

This scheme never threatened economic harm to PennDOT. To the contrary, the agency got exactly "the repairs it paid for": the lowest bidders "delivered the requested work, and the quality of the workmanship and materials is uncontested." Pet. App. 18, 29. As the government has recognized, "it may be that PennDOT would have been willing to pay more" if it had known petitioners would fall short of DBE participation goals. C.A.3 U.S. Br. 90. But maybe not: it may be "that PennDOT would have accepted a project with reduced DBE participation at the stated price; or that PennDOT would have re-bid the project." *Id.*

3. The government nonetheless charged petitioners with wire fraud and wire-fraud conspiracy, 18 U.S.C. §§ 1343 & 1349, and causing the submission of false statements, *id.* § 1001. The indictment identified DOT and PennDOT as victims. As to the wire fraud counts, the government’s trial theory was that petitioners won the contracts through deceptive “non-financial” inducements, causing PennDOT harm that “had nothing to do with dollars and cents” but “had to do with its own program, its own desires.” JA95-96. Petitioners maintained that this theory was illegitimate because the wire fraud statute requires a showing not just that money changed hands, but of a scheme to harm the victim’s property rights—for example, to get paid for work not done. But over petitioners’ objection, the district court instructed the jury in part that it could convict based simply on PennDOT’s wish that “a DBE provide services” and petitioners’ breach of their “promise[] that a DBE [would] provide those services.” Pet. App. 24-25. Proof of a scheme to harm economic interests was not required.

The jury returned a mixed verdict, finding petitioners guilty of some counts of wire fraud and false statements, as well as the conspiracy charge. Pet. App. 8. Petitioners moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing as relevant here that the government “failed to establish a scheme to defraud the government of ‘money or property’ within the meaning of the wire fraud statute.” Pet. App. 106. The district court rejected that argument. Pet. App. 106-10.

At sentencing, the district court recognized that petitioners’ completed scheme caused PennDOT no

financial harm. JA100-05. Accordingly, “what the government lost” here was not money but rather PennDOT’s regulatory interest in fostering economic opportunities for DBEs. JA102-03. For this, the district court sentenced Kousisis to 70 months’ imprisonment, ordered Alpha to forfeit 100% of its profits on the projects, and imposed a \$500,000 fine, Pet. App. 58, 61, 64.

4. While petitioners’ appeal was pending in the Third Circuit, this Court decided *Ciminelli v. United States*, 598 U.S. 306 (2023). In *Ciminelli*, as here, the defendant procured and collected on multi-million-dollar government contracts after making certain “misrepresentation[s]”—there, “lying about the manipulation of the process through which his company was selected as the best-qualified developer.” U.S. *Ciminelli* Br. 11; *see also Ciminelli*, 598 U.S. at 310. Rejecting the “right to control” theory under which the government had secured those convictions, the Court held unanimously that a person who “schemes to deprive the victim of potentially valuable economic information necessary to make economic decisions” does not commit wire fraud. *Ciminelli*, 598 U.S. at 309 (internal quotation marks and citation omitted). Otherwise, the Court reasoned, the federal wire fraud statute would cover “an almost limitless variety of deceptive actions traditionally left to state contract and tort law.” *Id.* at 315.

Petitioners then argued to the court of appeals that *Ciminelli* confirmed their convictions were invalid (both because insufficient evidence supported them and because the trial court’s instructions were faulty). The court of appeals nevertheless affirmed. Pet. App 1-41. It reasoned that petitioners committed wire

fraud because they obtained \$120 million in contract funds from PennDOT in part through misrepresentations regarding DBE participation. Pet. App. 18-24. According to the Third Circuit, “DBE participation was an essential component of the contract” without which “the nature of the Parties’ bargain would have been different.” Pet. App. 22. And in the Third Circuit’s view, petitioners’ misrepresentation about DBE participation was “sufficient evidence to support a federal fraud conviction given all of the circumstances surrounding that misrepresentation and the millions of dollars it fraudulently caused PennDOT to pay to [petitioners].” *Id.*

The court of appeals dismissed *Ciminelli* in a footnote. “[T]he basis of the wire fraud conviction here,” the court asserted, “is not PennDOT’s frustrated interest in DBE participation. Rather, it is the actual money paid as a result of Appellants’ fraudulent scheme.” Pet. App. 20 n.63. Put another way, the Third Circuit reasoned that so long as money or property changes hands, a “misrepresentation” or “fail[ure] to disclose information that a reasonable jury could find affected the nature of the bargain may provide a basis for a wire fraud conviction.” *Id.* at 21-22 (quoting *United States v. Wheeler*, 16 F.4th 805, 820 (11th Cir. 2021)).³

³ The Third Circuit also stated that Markias’s 2.25% fee alone was “economic harm sufficient to sustain wire fraud convictions.” Pet. App. 21. This statement merely reinforces the court of appeals’ theory that breaching a promise to spend contractual earnings on legitimate DBE participation (regardless of any

The Third Circuit did not dispute that this deceptive inducement theory would turn “every purposeful breach of contract” involving the payment of money or conveyance of property “into a potential violation of the federal criminal property fraud statutes.” Pet. App. 22 (internal quotation marks omitted). If anything, the court of appeals openly acknowledged that. *Id.* at 23. But it asserted that if such sweeping coverage is “a valid concern, the concern is with the text of the statute and the Supreme Court’s interpretation of it.” *Id.* at 22-23.

5. Petitioner sought certiorari, noting a circuit split over the validity of the fraudulent inducement theory. *See United States v. Guertin*, 67 F.4th 445, 451-52 (D.C. Cir. 2023) (reversing conviction secured under the theory); *United States v. Sadler*, 750 F.3d 585, 589-92 (6th Cir. 2014) (same); *United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016) (same); *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992) (same). This Court granted the petition. 144 S. Ct. ____ (2024).

SUMMARY OF ARGUMENT

The “fraudulent inducement” theory is not a valid theory of wire fraud.

I. The text of the wire fraud statute, its design and structure, and this Court’s precedent foreclose the “fraudulent inducement” theory.

financial implications) is sufficient to convict. *Id.*; *see also id.* at 24-27 (upholding jury instruction allowing same). PennDOT did not pay petitioners extra to cover the pass-through fee. *See* Cert. Reply at 12-13.

A. The wire fraud statute prohibits devising a “scheme or artifice to defraud.” 18 U.S.C. § 1343. In a consistent line of cases stretching back a century, this Court has held that the ordinary legal meaning of “defraud” consists of wronging one in his property rights, and that the mail and wire fraud statutes use the term in exactly this sense. This understanding of fraud as requiring harm to property is well grounded in the common law. In civil law, equity, and criminal law when Congress enacted the mail fraud statute, injury was an indispensable element of fraud. It is therefore an indispensable aspect of mail and wire fraud.

This does not mean the government must prove a realized injury in every case. Mail and wire fraud are inchoate offenses; Congress criminalized devising a scheme to defraud, not the completed fraud. But to prove such a scheme, the government must show that the scheme, *if completed*, would have constituted fraud. And fraud itself, as embodied in the wire fraud statute, requires injury as an essential element.

B. The inducement theory likewise conflicts with the fraud statutes’ design and structure. The wire fraud statute protects property rights only; it does not protect the government’s regulatory interests. Yet the inducement theory would allow the government to procure convictions for frustrating regulatory interests whenever they are memorialized in a contract.

Lest there be any doubt, other specific statutes protect the government from regulatory harm, including 18 U.S.C. §§ 371 and 1001. In those statutes, Congress carefully calibrated the punishments to no

more than five years in prison. But under the inducement theory, prosecutors and administrative bureaucrats writing contracts—not Congress—would decide whether deception that harms a regulatory interest is punishable by five years in prison or twenty.

The inducement theory is also incompatible with Congress’s decision to bring one—and only one—intangible interest under the protection of the mail and wire fraud statutes: the right to honest services. Congress’s reverberating silence about other intangible interests signals that a scheme to harm property is otherwise required to convict someone of wire fraud.

C. Endorsing the inducement theory would also unwind nearly all of this Court’s fraud decisions, converting them into non-substantive cases identifying nothing more than pleading errors. The holdings in *Kelly* and *Cleveland* that a scheme to harm regulatory interests is not property fraud would be rendered meaningless in any case where a regulatory interest is memorialized in a contract. *McNally*’s holding that the mail and wire fraud statutes do not protect intangible rights would be easy for prosecutors to elide. And *Ciminelli*’s unanimous rejection of the right-to-control theory would be for naught. As the government itself made clear in *Ciminelli*, the fraudulent inducement theory is the right-to-control theory rebranded.

II. Adopting the fraudulent inducement theory would lead to untenable consequences.

A. To begin, the theory is egregiously overbroad. It applies to any deceptive statement or omission designed to induce someone to part with property,

even if they get what they paid for or don't go through with the deal at all. A babysitter who lies about how she will spend the money? A fraudster, even if she is fully qualified and performs the job admirably. An employee who lies about a violation of workplace policy to keep her job? A fraudster, just as well.

B. The government seems to know it has an overbreadth problem here. In *Ciminelli*, it proposed several *ad hoc* patches in an attempt to make the inducement theory appear palatable. But those patches themselves are dubious and, at best, would render the outer boundaries of the mail and wire fraud statutes vague. Only one thing can be certain: If this Court follows the government's course, yet another array of suspect prosecutions—accompanied by an avalanche of legal challenges—will ensue. There is no good reason to go down that path.

ARGUMENT

The Third Circuit affirmed petitioners' convictions on the ground that using deception to induce someone to enter into a transaction—even if the scheme contemplates no harm to any traditional property interest—is a scheme to defraud under the federal wire fraud statute. The Third Circuit thereby adopted the “fraudulent inducement” theory of wire fraud. The government defends that theory, consistent with its merits brief two Terms ago in *Ciminelli v. United States*, 598 U.S. 306 (2023), in which it proposed the theory as an alternate ground to affirm. It argues that “where the defendant uses falsehoods to induce a victim to enter into a transaction,” “the government need not prove . . . that the victim suffered loss or harm as a result of such reliance.” BIO 7, 9; *see also* U.S.

Ciminelli Br. 11 (arguing that where the defendant obtains “contract funds” by means of material misrepresentations, the wire fraud statute “does not require proof that the defendant caused or intended to cause [financial] harm”); *id.* at 12 (actual or intended economic harm is “not a necessary element”); *id.* at 15 (listing elements and omitting any mention of property harm); *id.* at 21-23. The government, under this theory, need only prove (as relevant here on facts like these) that the transaction involved the payment of money and that the misrepresentation was “material.” *Id.* at 16-20.⁴

The fraudulent inducement theory is wrong. A scheme “to defraud” under 18 U.S.C. § 1343 is a scheme to commit fraud as that term was commonly understood when the mail fraud statute was enacted. And, as this Court has already recognized on multiple occasions, the common understanding of fraud required harm to a traditional property interest as an indispensable requirement.

⁴ The Third Circuit also suggested that any interest (or at least any sovereign’s regulatory or policy interest) written into a contract is “property,” such that any material breach harms a property right. Pet. App. 26, 28. Petitioners noted those suggestions in their petition for certiorari and explained why they are plainly misguided. *See* Pet. i (second and third questions presented), 25-27, 30-31. The government did not disagree in the brief in opposition, resting its defense of the decision below instead on the Third Circuit’s assertions that “tens of millions of dollars constitutes property,” and petitioners’ deceptions “caused PennDOT to pay” them that money. Pet. App. 22-23; *see* BIO 7-8. At this point, therefore, no theory besides fraudulent inducement can support petitioners’ wire fraud convictions. *See, e.g., Smith v. Arizona*, 144 S. Ct. 1785, 1796 n.3 (2024). Petitioners accordingly focus on that theory alone.

I. The fraudulent inducement theory flouts text, structure, and precedent.

A. The text of the wire fraud statute requires proof of a scheme to harm a traditional property interest.

1. Originally enacted in 1872 and amended in 1909, the mail fraud statute prohibits “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1341. Congress used “the same language” when it enacted the wire fraud statute in 1952, so the “same analysis” applies to that statute. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); see Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (now codified at 18 U.S.C. § 1343).

This statutory language, the Court has made clear, protects only “traditional property interests.” *Ciminelli v. United States*, 598 U.S. 306, 309 (2023). And it protects them from a particular thing: schemes or artifices to “defraud.” Although the word “or” links this “defraud” clause to the subsequent “obtaining money or property” clause, the latter clause simply confirms that the statute “reache[s] false promises and misrepresentations as to the *future* as well as other frauds involving money or property.” *McNally v. United States*, 483 U.S. 350, 359 (1987) (emphasis added). Either way, the government must prove that the defendant devised a scheme to “defraud” the victim of money or property. *Id.*⁵

⁵ Of course that is not all the government must prove. The government must also prove the requisite *intent* to defraud. See

2. This Court has recognized for a century that the word “defraud,” as used in in the mail and wire fraud statutes, requires property harm. In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Court explained that the ordinary meaning of “defraud” is “*wronging* one in his property rights by dishonest methods or schemes,” *id.* at 188 (emphasis added). The Court held there that the precursor to a different statute, 18 U.S.C. § 371, *departed* from this definition, 265 U.S. at 188, consistent with previous cases condoning prosecutions under that statute for “fraudulently obtaining” property from the government without inflicting economic harm, *see United States v. Keitel*, 211 U.S. 370 (1908); *Hyde v. Shine*, 199 U.S. 62 (1905). But the *Hammerschmidt* Court made clear that the mail fraud statute is different; it is “confined” “to pecuniary or property injury inflicted by a scheme to use the mails for th[at] purpose.” 265 U.S. at 188-89.

United States v. Cohn, 270 U.S. 339 (1926), reinforced this analysis. There, the Court held that the term “defrauding,” when used in its “usual and primary sense,” means “the fraudulent causing of pecuniary or property loss.” *Id.* at 346-47. The Court consequently held that the defendant’s false statements designed to “induc[e]” a customs collector to deliver non-dutiable cigars, *id.* at 344, could not support a prosecution under a statute criminalizing making false statements for the purpose of

Carpenter, 484 U.S. at 28; 2 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶ 44.01, Instr. 44-3 (2024). As this case comes to the Court, however, the Court need not address that particular *mens rea* issue; the question presented in this case involves only the nature of the defendants’ scheme.

“defrauding” the federal government, *id.* at 347. (In the New Deal era, Congress amended that statute, now codified at 18 U.S.C. § 1001, to remove the “restriction to cases involving pecuniary or property loss to the government.” *United States v. Gilliland*, 312 U.S. 86, 93 (1941).)

The Court has never wavered from this common understanding of what “defraud” means when construing the mail and wire fraud statutes. In *Durland v. United States*, 161 U.S. 306 (1896), the Court explained that misrepresentations about future performance come within the mail fraud statute when the defendant knows he will be unable to pay but states otherwise “with an intent to cheat the vendor,” *id.* at 313 (internal quotation marks and citation omitted). More recently, in *McNally*, the Court reiterated *Hammerschmidt*’s explanation that “the words ‘to defraud’ commonly refer ‘to wronging one in his property rights by dishonest methods or schemes.’” 483 U.S. at 358-59 (quoting *Hammerschmidt*, 265 U.S. at 188). On that basis, the Court rejected a reading of the mail fraud statute that extended beyond “protecting property rights.” *Id.*; see also *id.* at 356 (recognizing that mail fraud statute targeted schemes “for the purpose of deceiving *and* fleecing” (internal quotation marks and citation omitted; emphasis added)); *id.* at 369-70 (Stevens, J., dissenting) (recognizing that majority opinion requires proof of “property or pecuniary loss”).

In *Pasquantino v. United States*, 544 U.S. 349 (2005), the Court likewise upheld a wire fraud conviction only after identifying the “economic injury” inflicted by the defendants’ conduct, *id.* at 356. In *Skilling v. United States*, 561 U.S. 358 (2010), the

Court reiterated that the hallmark of property fraud (as distinct from honest services fraud) is that “the victim’s loss of money or property supplied the defendant’s gain, with one the mirror image of the other,” *id.* at 400; *see also Kelly v. United States*, 590 U.S. 391, 401-02 (2020) (property fraud contemplates “taking of property”—that is, a scheme to “convert[]” it to defendant’s benefit—causing “economic loss”). And in *Ciminelli*, the Court emphasized yet again that the wire fraud statute uses the word “defraud” as commonly understood—to refer to “wronging one in his property rights.” 598 U.S. at 312 (quoting *Cleveland v. United States*, 531 U.S. 12, 19 (2000)).

3. Historical sources confirm this Court’s understanding that the term “defraud,” as used in the wire fraud statute, requires harm to property.

“Where Congress employs a term of art ‘obviously transplanted from another legal source,’ it ‘brings the old soil with it.’” *George v. McDonough*, 596 U.S. 740, 746 (2022) (quoting *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019)). To “defraud,” this Court has held, is a “paradigmatic example” of such a statutory term. *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 187 (2016) (citing *Neder v. United States*, 527 U.S. 1, 22-24 & n.7 (1999)). “[A]t the time of the mail fraud statute’s original enactment in 1872, ... actionable ‘fraud’ had a well-settled meaning at common law.” *Neder*, 527 U.S. at 22. And in 1872, injury or harm to property was an indispensable element of “fraud.”

a. At early common law “[f]raud between two private individuals” was “left for civil actions.” Ellen S. Pogdor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 736 (1999). That is, the law at that time regarded fraud

between private individuals “as primarily a tort” called deceit. *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 193 (1963) (quoting Harold Greville Hanbury, *Modern Equity* 643 (8th ed. 1962)).

In 1872, the “action of deceit” included “the requirement that the plaintiff must have suffered substantial damage before the cause of action can arise.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 110, at 765 (5th ed. 1984); Restatement (Second) of Torts § 525 (1977) (describing “liability ... in deceit for pecuniary loss”). Indeed, the pivotal case widely regarded as having inaugurated the modern action for deceit, *Pasley v. Freeman* (1789) 100 Eng. Rep. 450 (KB), made the injury requirement unmistakable. In their opinions, the justices in the majority repeatedly affirmed the principle that “[f]raud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies.” *Id.* at 453 (Buller, J.); *see id.* at 456 (Ashhurst, J.); *id.* at 457 (Kenyon, C.J.); *see also, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005) (citing *Pasley* for the proposition that “the common law has long insisted” that a fraud plaintiff prove “actual economic loss”).

Pasley’s rule had become a fixture of the American common law of fraud by the time of the mail fraud statute’s enactment. In *Smith v. Richards*, 38 U.S. (13 Pet.) 26 (1839), which *Neder* cited as reflective of common-law fraud, *see* 527 U.S. at 22, the Court observed that “a misrepresentation must be of something material, constituting an inducement” to the victim “by which he has been actually misled *to his injury*,” 38 U.S. at 39 (emphasis added). “[T]o maintain an action for fraud,” the Court explained the year

before the mail fraud statute was enacted, a plaintiff was required to show that “loss or damage has resulted from the deceit.” *Butler v. Watkins*, 80 U.S. (13 Wall.) 456, 464 (1871); *see also, e.g., Randall v. Hazelton*, 94 Mass. (12 Allen) 412, 414 (1866) (“[A]n ancient and well established legal principle” of the common law is “that fraud without damage or damage without fraud gives no cause of action.”).

Leading treatises of the era likewise reflect the harm-to-property requirement. Joseph Story’s *Commentaries*—predating the mail fraud statute by just two years—made clear that “to support an action at law for a misrepresentation, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff.” 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 203, at 205 (10th ed. 1870). Oliver Wendell Holmes similarly observed that to be “liable to an action for deceit,” the person to whom a false representation was addressed must have been “persuaded to act to his own harm.” Oliver Wendell Holmes, Jr., *The Common Law* 132 (1881); *see also, e.g.,* 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th Eng. ed. 1876) (deceit action cannot be supported unless a person “suffers damage,” such that there is “a conjunction of wrong and loss”); Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* Ch. I § 1, at 3 (1877) (same).

This common-law harm-to-property requirement served a distinct purpose: It guarded the boundary between abstract moral grievances and suits properly within the judicial sphere. As Story explained, courts

should not use the cudgel of fraud “for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage.” Story § 203, at 205; *see also* 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America* § 898, at 1264-65 (2d ed. 1892) (injury requirement ensured “courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral”). The mail and wire fraud statutes reflect this same limitation. *See Ciminelli*, 598 U.S. at 316; *Kelly*, 590 U.S. at 403; *McNally*, 483 U.S. at 360.

b. The injury requirement for fraud was no less a feature of equity in 1872. “In equity, as at law, fraud and injury” were required to “concur to furnish ground for judicial action.” *Clarke v. White*, 37 U.S. (12 Pet.) 178, 196 (1838). “[A] mere fraudulent intent,” this Court repeatedly explained, “unaccompanied by any injurious act,” was “not the subject of judicial cognizance.” *Id.*; *see also, e.g., S. Dev. Co. of Nev. v. Silva*, 125 U.S. 247, 250 (1888); *Atl. Delaine Co. v. James*, 94 U.S. 207, 214 (1876); *Slaughter’s Adm’r v. Gerson*, 80 U.S. (13 Wall.) 379, 383 (1871).

Again, the leading treatises understood the law the same way. *See* Pomeroy § 898, at 1264 (“Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal.”); Bigelow, Ch. XI § 2, at 400 (“A contract cannot generally be rescinded for fraud unaccompanied with damage.”); George Tucker Bispham, *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery* § 217, at 215 (1874) (“Fraud without damage is no ground for relief at law or in equity.”); Story § 203, at 205 (same);

William Williamson Kerr, *A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity* 12, 51 (1868) (same).

c. Criminal law at the time—typically found in statutes prohibiting false pretenses—likewise required actual or intended harm to property. One state high court put it this way: “Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished.” *State v. Palmer*, 32 P. 29, 30 (Kan. 1893); *see also, e.g., State v. Casperson*, 262 P. 294, 296 (Utah 1927) (same). Treatises confirmed the “rule” of that era “that the person from whom the money or property is obtained shall be defrauded, and if he sustains no injury the offense [was] not committed.” 2 Hascal R. Brill, *Cyclopedia of Criminal Law* § 1271, at 1931 (1923); *see also* 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 417(4), at 340 (9th ed. 1923) (“A loss must have resulted.”); *id.* § 432(1), at 353-54 (“A morally reprehensible falsehood, the effect whereof has not been a legal injury, is not an indictable false pretence.”); Francis J. Byrne, *False Pretenses and Cheats* § II(6), at 828-29, in 12 *The American and English Encyclopaedia of Law* (David S. Garland & Lucius P. McGehee eds., 2d ed. 1899) (“[N]o crime is committed if the party from whom the property was obtained is not injured or prejudiced thereby.”); 1 Emlin McClain, *A Treatise on the Criminal Law as Now Administered in the United States* § 680, at 686 (1897) (“It must appear that there has been a fraud accomplished, that is, somebody has been injured.”).

4. Relying on *Neder*, the government has noted that the wire fraud statute does not require proof “that the victim suffered loss or harm.” BIO 7 (citing *Neder*, 527 U.S. at 24-25). That is true as far as it goes. Congress

did not criminalize fraud itself; it criminalized devising a “scheme” to defraud. *See Neder*, 527 U.S. at 25. Put another way, wire fraud is an inchoate crime, so a scheme need not be completed to support a conviction, and an actual injury need not occur. But by prohibiting “schemes to defraud,” Congress still criminalized schemes that, *if completed*, would have constituted fraud. After all, a “fundamental characteristic” of inchoate criminal liability is an “endeavor which, if completed, would satisfy all of the elements of the underlying substantive ... offense.” *Ocasio v. United States*, 578 U.S. 282, 287 (2016) (internal quotation marks, citation, and alterations omitted).

Here, the underlying substantive offense is scheming “to defraud.” And a scheme that, if completed as devised, would not cause property harm cannot be described as a scheme to *defraud*. Only schemes to harm property rights can qualify as wire fraud.

B. The statutory structure and design of the property fraud statutes require a scheme to harm a traditional property interest.

The structure and design of the mail and wire fraud statutes reinforce the conclusion that a scheme to induce a transaction in property through deception, without harm to a property interest, is not property fraud.

1. The inducement theory is at war with the fact that the property fraud statutes do not protect the “sovereign power to regulate.” *Kelly*, 590 U.S. at 401 (quoting *Cleveland*, 531 U.S. at 23). Nor do the statutes safeguard any intangible interest a sovereign

has in “administering itself in the interests of the public,” *McNally*, 483 U.S. at 358 n.8 (internal quotation marks and citation omitted), including exercising its “prerogatives over who should get [its property] and who should not,” *Kelly*, 590 U.S. at 400.

Federal, state, and local governments often pursue policies through regulations or other official programs. Implementing those policies may involve anything from allocating licenses, to managing traffic safety, to leveraging their spending authority to incentivize private behavior the sovereign wants to encourage. Certainly those sovereign interests can be important, and schemes to frustrate them may warrant sanction. But this Court has made clear that the interests are not “property,” and a scheme to frustrate them is not a property-fraud scheme. Unless the defendant devises a scheme that would harm a *property* interest, the scheme cannot support a property-fraud prosecution. *Kelly*, 590 U.S. at 400.

Accepting the inducement theory would upend that limitation. So long as a regulatory interest is memorialized in a contract, any regulatory violation would subject a person to federal criminal prosecution and 20 years in prison. This case is a prime example. Petitioners could not have been charged with wire fraud simply for contravening the governmental policies reflected in the DBE program. But they were convicted under the inducement theory because they bid for and signed a contract memorializing those policies. JA114, 175.

Retaining the distinction under the fraud statutes between harm to traditional property interests and frustration of regulatory interests is particularly

critical because another federal statute directly protects regulatory interests. Enacted just a few years before the mail fraud statute, 14 Stat. 471, 484 § 30 (1867), 18 U.S.C. § 371 prohibits conspiracies to defraud the United States. Yet Section 371 protects federal regulatory interests—and thereby diverges from the mail and wire fraud statutes. *See McNally*, 483 U.S. at 358 n.8. That is, Section 371 does *not* “contemplate a financial loss or that one shall result”; it encompasses “any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.” *Haas v. Henkel*, 216 U.S. 462, 479 (1910); *see also Hammerschmidt*, 265 U.S. at 188. It thus serves as a ready option in cases like this. It is, in fact, the most natural option.

Another statute, 18 U.S.C. § 1001, also criminalizes the making of “any materially false, fictitious, or fraudulent statement or representation” in any “matter within the jurisdiction” of the federal government. That provision is regularly used to punish deceptions that interfere with regulatory interests, regardless of whether they also injure a government property interest. *See, e.g., United States v. Bazantes*, 978 F.3d 1227, 1231 (11th Cir. 2020); *United States v. Bros. Constr. Co.*, 219 F.3d 300, 308-09, 321 (4th Cir. 2000). Indeed, prosecutors secured Section 1001 convictions against petitioners for misrepresenting DBE compliance here. Pet. App. 8.⁶

⁶ On top of Sections 371 and 1001, Congress has also enacted tailored criminal statutes to punish violations of selected

Reading the property fraud statutes to punish the same regulatory harms that Sections 371 and 1001 cover, simply because regulatory policies are readily embodied in government contracts, would collapse Congress’s distinction between property fraud and these other statutes.

Worse yet, the inducement theory would upend the property fraud statutes’ particular place in the overall federal criminal code. Last Term, this Court observed that it would be “inexplicable” for one federal criminal statute to allow dramatically harsher punishment than another statute allows, based simply on insignificant factual details. *Snyder v. United States*, 144 S. Ct. 1947, 1956 (2024). So too here. Whereas violations of Sections 371 and 1001 are punishable by a maximum of five years in prison, a mail or wire fraud conviction carries with it the possibility of a 20-year sentence. Impairing regulatory interests is not four times more culpable simply because an administrative agency memorialized them in a contract. Congress did not give “prosecutors broad discretion to seek a 20-year maximum sentence for acts Congress saw fit to punish only with far shorter terms of imprisonment.” *Fischer v. United States*, 144 S. Ct. 2176, 2189-90 (2024).

2. The fraudulent inducement theory is also incompatible with Congress’s treatment of “intangible” interests that relate to economic

regulatory requirements. For example, the Federal Food, Drug, and Cosmetic Act (“FDCA”) criminalizes “[t]he failure to comply with any requirements of the provisions of, *or any regulations or orders of the Secretary [of Health and Human Services]*” under specified sections of the FDCA. 21 U.S.C. § 331(u) (emphasis added). Congress has enacted no such statute for the DBE program, however.

transactions. Congress has brought only one such interest under the mail and wire fraud statutes—that is, only one scenario where the defendant’s scheme is not one to harm a traditional property right. The fraudulent inducement theory does not fit that bill.

In the decades preceding *McNally*, the courts of appeals interpreted the property fraud statutes to protect a wide variety of intangible rights. See *Skilling*, 561 U.S. at 400. The *McNally* indictment, for instance, alleged violations of a “right to be made aware of all relevant facts when selecting” a services provider, as well as a “right to have [one’s] business ... conducted honestly” and “free from ... deceit.” 483 U.S. at 354 nn. 3 & 4. But this Court held that the property fraud statutes do not protect any intangible rights. *Id.* at 358-59. They “protect property rights only.” *Cleveland*, 531 U.S. at 19.

Congress responded to *McNally* by bringing just one intangible-rights theory back into the mail and wire fraud fold: It defined “scheme or artifice to defraud” to include a “scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346. And to save that enactment from vagueness, *Skilling* later construed it to reach only bribery and kickback schemes. 561 U.S. at 407.

There the statutory structure stands. The mail and wire fraud statutes protect property interests and, when charged together with Section 1346, one non-property interest: the right to a fiduciary’s honest services uncorrupted by bribes or kickbacks. *Ciminelli*, 598 U.S. at 315. Congress’s “reverberating silence” about schemes to harm other non-property interests, *id.* (quoting *United States v. Sadler*, 750 F.3d 585, 591

(6th Cir. 2014) (Sutton, J.)), precludes unmooring the statutes from the “common understanding” that “to defraud” means to injure property rights, *id.* at 312 (quoting *Cleveland*, 531 U.S. at 19).

Yet by the government’s lights, the inducement theory makes any dishonesty that induces a transaction in property into wire fraud. BIO 7-9. “Fraudulent inducement”—as alleged here and in general—is simply “us[ing] falsehoods to induce a victim to enter into a transaction.” BIO 9. That is a scheme to deprive the victim of accurate information, but not a scheme to deprive it of property. Nor need it involve bribery or kickbacks, thereby potentially triggering Section 1346. Consequently, the fraudulent inducement theory is “inconsistent” with the structure of the mail and wire fraud statutes. *Ciminelli*, 598 U.S. at 315.

C. The fraudulent inducement theory flouts this Court’s precedents.

1. The fraudulent inducement theory is not only incompatible with the text and design of the wire fraud statute, but blessing the theory would render meaningless virtually every one of this Court’s fraud decisions from the last four decades. The Court previously has rejected the government’s effort to create an “end-run” around its *Cleveland* decision (which, as explained above, the inducement theory would do as well). *See Kelly*, 590 U.S. at 404; *supra* at 24-26. It follows even more emphatically that the Court should reject a theory that would allow the government to circumvent nearly *all* of them.

Ciminelli. In *Ciminelli*, as in this case, the defendant procured multi-million-dollar government

contracts by way of “misrepresentation[s]”—there, “lying about the manipulation of the process through which his company was selected as the best-qualified developer.” U.S. *Ciminelli* Br. 11; *see also Ciminelli*, 598 U.S. at 310. The government secured a conviction on the theory that “a defendant is guilty of wire fraud if he schemes to deprive the victim of potentially valuable economic information necessary to make discretionary economic decisions.” 598 U.S. at 309 (internal quotation marks and citation omitted).

The Court rejected that right-to-control theory, holding that potentially valuable economic information is not a traditional property interest. *Ciminelli*, 598 U.S. at 316. As the Court observed, the theory would make nearly any misrepresentation or nondisclosure of “valuable economic information” in connection with a transaction into wire fraud, “thus mak[ing] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law.” *Id.* at 315-16.

All of this is true of the inducement theory as well. That theory criminalizes misrepresentations that “induce a victim to enter into a transaction,” even if the victim suffers no loss “as a result of such reliance.” BIO 7, 9; *see also* Pet. App. 22. It would thus cover “almost any deceptive act” in connection with a transaction, federalizing “an almost limitless variety of deceptive actions traditionally left to state contract and tort law.” *Ciminelli*, 598 U.S. at 316.

Look no further than Mr. Ciminelli himself. The government maintains that under the inducement theory, he was guilty of wire fraud. *See, e.g.*, U.S. *Ciminelli* Br. 40. In the government’s view, “the

requirements of the right-to-control theory are best understood as identifying those fraudulent inducements” that it may prosecute as fraud (including the purported inducement in *Ciminelli*), so long as money or property has changed hands. *Id.* at 24.

Accepting this reasoning would be startling, to say the least. It would mean that *Ciminelli* was not a substantive decision about the scope of the property fraud statutes at all. The only flaw in that prosecution (and countless others under the right-to-control theory) would be nothing more than the framing of the indictments. That cannot be. *Ciminelli* rejected the right-to-control theory not because it was garbled pleading but because it criminalized a broad array of conduct “without statutory authorization.” 598 U.S. at 315.

Indeed, if there is any difference between the coverage of the right-to-control theory and that of the fraudulent inducement theory, it is that the latter appears *broad*er. Whereas the right-to-control theory swept in misrepresentations about only “economic information,” the inducement theory also sweeps in “[a] range of noneconomic misrepresentations.” U.S. *Ciminelli* Br. 18. This additional coverage of “deceptive actions traditionally left to state contract and tort law,” *Ciminelli*, 598 U.S. at 315, provides still further reason to reject the inducement theory.

McNally. Much the same can be said for this Court’s landmark decision in *McNally*. Mr. McNally was a corrupt insurance agent. He paid kickbacks to Kentucky officials from commissions he earned on Commonwealth insurance contracts the officials (and

eventual co-defendants) steered to him. 483 U.S. at 352. But “[i]t was not charged that in the absence of the alleged scheme the Commonwealth would have paid lower premiums or secured better insurance.” *Id.* at 360. Instead, the government’s theory was that the scheme deprived the citizens and government of Kentucky “of their right to be made aware of all relevant facts when selecting an insurance agent to write the Commonwealth’s workmen’s compensation policy.” *Id.* at 354 n.3. The Court rejected this theory, holding that the defendants’ conduct was “not within the reach” of the mail fraud statute. *Id.* at 361.

Yet under the government’s inducement theory, any self-dealing employee would still be guilty of fraud. To work around *McNally*, the government need only allege that the employee engaged in a deceptive scheme to obtain money from his employer (e.g., his salary), rather than to deprive the employer of honest services.

It is hard to believe that *McNally*, too, reflected only a prosecutorial charging error. Nor is it plausible that the Court’s concerns about the federal government using mail and wire fraud to “set[] standards of disclosure and good government for local and state officials” in cases contemplating no property loss could be so easily circumvented. 483 U.S. at 360.

Skilling. The inducement theory would similarly neuter *Skilling*. In that case, the defendant engaged in self-dealing and misrepresented his company’s financial health. But he did not solicit or accept payments from any third party. The Court held that not even the post-*McNally* honest-services statute reaches this sort of nondisclosure theory, which is too

“amorphous” for criminal prosecution. 561 U.S. at 410. To avoid otherwise insoluble vagueness concerns, the Court limited the reach of Section 1346 to schemes involving bribery or kickbacks.

The inducement theory would revive the very concerns the *Skilling* Court sought to lay to rest in undisclosed conflict-of-interest cases. The broad honest-services theory that *Skilling* rejected could have been used, for example, to prosecute a city official who purchased property at fair market value from the city without disclosing her self-dealing—or a lawyer who obtained reasonable fees from a client without disclosing a conflict of interest. Yet these cases and countless others can be reframed as fraudulent inducements to obtain property from the victim.

PennDOT’s own contracts require contractors to disclose conflicting financial interests. JA162-64. Had petitioners failed to do so, nothing would distinguish a prosecution based on that noncompliance from this prosecution for noncompliance with the DBE provision. Neither is a scheme to deprive PennDOT of property.

* * *

If nothing else, transforming decades of this Court’s precedent limiting the substantive reach of the fraud statutes into nothing more than decisions concerning pleading errors would be incompatible with the bedrock requirement of fair notice. Particularly when it comes to the property fraud statutes, this Court has stressed that the government may prosecute only conduct that is “plainly within the statute[s].” *McNally*, 483 U.S. at 360 (internal quotation marks and citation omitted); *see also Skilling*, 561 U.S. at

412. Yet according to the government and the Third Circuit, untold numbers of prosecutors for decades have misunderstood the proper way to charge cases like this one.

If this country’s foremost law enforcement attorneys—those who read and apply criminal statutes on a daily basis—have not previously thought that whenever money or other property changes hands, any misrepresentation about something the victim considers an important aspect of the bargain constitutes mail or wire fraud, then it is hard to understand how those statutes could possibly put the “common” man on notice of that. *Marinello v. United States*, 584 U.S. 1, 7 (2018). If Congress “desires” to decouple property fraud from fraud’s injury requirement, perhaps it can. *McNally*, 483 U.S. at 360. But at the very least, “it must speak more clearly than it has.” *Id.*

2. Faced with this sea of precedent under the mail and wire fraud statutes, the government has sought support for the inducement theory in two of this Court’s decisions construing the *bank* fraud statute: *Shaw v. United States*, 580 U.S. 63 (2016), and *Loughrin v. United States*, 573 U.S. 351 (2014). BIO 8. But neither decision can perform the work the government needs done here.

In *Shaw*, “due to standard banking practices in place at the time of the fraud” at issue there, “no bank involved in the scheme ultimately suffered any monetary loss.” 580 U.S. at 67. Against that backdrop, the Court explained that a provision of the bank fraud statute did not require “a showing of ultimate financial

loss nor a showing of intent to cause such loss.” *Id.* at 67; *see* 18 U.S.C. § 1344(1).

That statement, in context, was wholly unremarkable. The bank in *Shaw* sustained injury to its “property rights in [the targeted] bank account,” including its “right to use the funds” and its “right in a bailment” as a “bailee.” 580 U.S. at 66-67 (quoting 2 William Blackstone, *Commentaries on the Laws of England* 452-54 (1766)). It was thus immaterial whether the bank *also* suffered *another* form of property harm, namely “financial” loss.

Furthermore, the Court’s observation that criminal fraud statutes do not require “ultimate” loss is consistent with common-law rules—and with petitioners’ position. At common law, coverage of “the amount of the loss from” a third party, such as an “insurer[],” was typically “no bar to an action subsequently commenced against the wrong-doer to recover compensation for the injury.” *The Atlas*, 93 U.S. 302, 310 (1876). The harm occurred when the victim was first injured, even if someone else later remedied the harm to their own detriment.⁷

The government has also made much of *Shaw*’s quotation of Judge Learned Hand’s quip that “[a] man is none the less cheated out of his property, when he is induced to part with it by fraud,’ even if ‘he gets a quid pro quo of equal value.’” 580 U.S. at 67 (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)); *see* BIO 8. But the Court’s quotation of Judge Hand did

⁷ Today, this rule is known as the collateral source rule. *See W. Towboat Co. v. Vigor Marine, LLC*, 85 F.4th 919, 926 (9th Cir. 2023) (citing *The Atlas*, 93 U.S. at 310); *see also* Restatement (Third) of Torts § 10 (Tent. Draft No. 2) (2023).

not expand the reach of the wire and mail fraud statutes beyond their common-law boundaries.

To start, the language in *Shaw* was dicta twice over. It was dicta in *Shaw* because, as just explained, the scheme there indisputably injured the bank's property rights; it got nothing in return that could have been characterized as a "quid pro quo of equal value." And the language was dicta "in *Rowe* itself": The victims there "suffered a definable harm because they were induced to pay large sums of money for worthless property." *United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987). Double dicta, even when attributable to an esteemed jurist, cannot displace a long-recognized common-law rule.

At any rate, *Ciminelli* makes clear that the *Rowe* dicta has no purchase here. In *Rowe*, Judge Hand reasoned that a defendant who gave the victim something of different but equal value could be guilty of fraud because the victim has nonetheless "suffered a wrong; he has lost his chance to bargain with the facts before him." 56 F.2d at 749. That reasoning might hold some force where victims do not get what they paid for—say, they receive a different tract of land than expected, or a work of art by one artist instead of another. *See* BIO 8. But under *Ciminelli*, depriving someone of "[t]he right to valuable economic information needed to make discretionary economic decisions" is not criminal property fraud. 598 U.S. at 316.

Indeed, if Judge Hand's reasoning sounds like the right-to-control theory *Ciminelli* rejected, that is because it *is* the right-to-control theory. As this Court observed, 598 U.S. at 313-14, the right-to-control

theory traces its roots to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), which in turn cited *Rowe* for support, *id.* at 463. Embracing *Rowe*'s statement that a defendant commits fraud merely by impairing someone's ability to "bargain with the facts before him" would resurrect the overbroad and invalid regime that *Ciminelli* interred just two Terms ago.

The government's reliance on *Loughrin* is even further afield. The government quotes a footnote rejecting the argument that the bank fraud statute "requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank." 573 U.S. at 366 n.9; *see* 18 U.S.C. § 1344(2). But that does not mean the property fraud statutes do away with the common-law requirement of *property* harm (even if not necessarily *financial* in nature) to someone. Instead, the next sentence makes clear that the unique language of the bank fraud statute was simply meant to avoid the question whether the bank, as opposed to the depositor, "would suffer the loss from a successful fraud." 573 U.S. at 366 n.9. It is sufficient under subsection (2) of the bank fraud statute that either the bank *or* the depositor suffer a property harm from the completed scheme.

That was certainly true in *Loughrin*. The scheme there, had it succeeded, would have inflicted on the bank the same harms identified in *Shaw*. Consequently, *Loughrin* supplies no support for the inducement theory.

II. Endorsing the fraudulent inducement theory would produce untenable consequences.

The fraudulent inducement theory is breathtakingly broad. Every dispute over a

transaction where one party asserts that the other made material misrepresentations would become grist for a federal prosecution. To curb the damage, the government proposed various *ad hoc* limits in *Ciminelli*. But those purported limits would render the statutes' boundaries intolerably amorphous at best. The Court should avoid the litigation quagmire that would soon follow by adhering to the common-law limitations it has already recognized.

A. The fraudulent inducement theory is egregiously overbroad.

1. In our constitutional system, Congress creates crimes and sets the penalties. *Fischer v. United States*, 144 S. Ct. 2176, 2189 (2024). “Time and again,” therefore, “this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes,” *Dubin v. United States*, 599 U.S. 110, 130 (2023), requiring Congress to speak clearly before effecting “a sweeping expansion of federal criminal jurisdiction,” *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also Fischer*, 144 S. Ct. at 2190; *Snyder v. United States*, 144 S. Ct. 1947, 1957 (2024); *Dubin*, 599 U.S. at 124-25; *Van Buren v. United States*, 593 U.S. 374, 393-94 (2021); *Yates v. United States*, 574 U.S. 528, 545-46 (2015).

Pressing federal criminal statutes to their outer limits also threatens principles of fair notice. *Dubin*, 599 U.S. at 129. In addition, it “places great power in the hands of the prosecutor ... , which could result in the nonuniform execution of that power across time and geographic location.” *Marinello v. United States*, 584 U.S. 1, 11 (2018).

And if all that were not enough, expansive readings of criminal statutes thwart “bedrock federalism principles.” *Snyder*, 144 S. Ct. at 1956. States have primary responsibility for policing contract rights and interactions between citizens and state governments. *See id.* Courts, therefore, should not construe indeterminate federal statutes to “convert an astonishing amount of ‘traditionally local criminal conduct’ into ‘a matter for federal law enforcement.’” *Bond v. United States*, 572 U.S. 844, 862-63 (2014) (quoting *United States v. Bass*, 404 U.S. 336, 349-50 (1971)).

Nowhere are these principles of judicial restraint more vital than in this Court’s precedent construing the property fraud statutes. Nearly one hundred years ago, the Court emphasized that “[t]here are no constructive offenses; and before one can be punished [for mail fraud], it must be shown that his case is plainly within the statute.” *Fasulo v. United States*, 272 U.S. 620, 629 (1926). And in its modern jurisprudence, the Court has refused to construe the statute “in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials.” *McNally v. United States*, 483 U.S. 350, 360 (1987). Doing so, the Court has explained, would tread on principles of federalism and improperly transform the fraud statutes into all-purpose tools for federal prosecutors to police generalized “deception, corruption, [and] abuse of power,” or “to enforce ([their] view of) integrity.” *Kelly v. United States*, 590 U.S. 391, 393, 404 (2020); *accord Ciminelli v. United States*, 598 U.S. 306, 312 (2023).

2. The fraudulent inducement theory transgresses these principles. Under the theory, every intentional misrepresentation designed to induce someone to transact in property would constitute property fraud, regardless of whether the scheme contemplated any harm to a property interest. BIO 9. The federal mail and wire fraud statutes would become an all-purpose hammer for everyday deception.

Indeed, state court reports are replete with “fraudulent inducement” claims made in run-of-the-mill contract and tort cases. *See, e.g., Lewis v. Fid. Nat’l Title Ins. Co.*, 887 S.E.2d 337, 339 (Ga. Ct. App. 2023); *Nestler v. Scarabelli*, 886 S.E.2d 301, 312 (Va. Ct. App. 2023); *GG Inv. Realty, Inc. v. S. Beach Resort Dev., LLC*, 337 So. 3d 431 (Fla. Dist. Ct. App. 2022); *Genger v. Genger*, 43 N.Y.S.3d 264, 265 (N.Y. App. Div. 2016). The inducement theory would transform each of these civil disputes into federal crimes, thus effecting a massive federalization of disputes routinely litigated under state law (if at all).

Government contract cases provide perhaps the clearest illustration of the breadth of the government’s rule. In Fiscal Year 2022, “the federal government committed about \$694 billion on contracts.”⁸ Each of those contracts imposes innumerable conditions the breach of which could, under the inducement theory, be prosecuted as fraud. In this case, for instance, each PennDOT contract ran more than 1,100 pages. Under the government’s theory, a misrepresentation about any one of the contracts’ terms would have been fraud,

⁸ U.S. Gov’t Accountability Off., *A Snapshot of Government-Wide Contracting for FY 2022* (Aug. 15, 2023), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2022>.

punishable by 20 years in prison, so long as the jury concluded that the contract term was “material.” Pet. App. 26. To pick just one example, if petitioners had carried out a plan to pay certain employees less than minimum wage—in violation of the contract’s requirement to the contrary, *see supra* at 5—they would not have been subject merely to a suit for breach of contract or wage-and-hour violations. The inducement theory would have allowed the government to prosecute petitioners for wire fraud.

But government contracting would be only the beginning. The inducement theory applies equally to *all* public and private contracts. A range of examples—some taken from actual prosecutions; others readily conceivable hypotheticals—illustrate the dramatic reach of the theory:

- If any situation “where the defendant uses falsehoods to induce a victim to enter into a transaction” is a scheme to defraud, BIO 9, then any job applicant who submits a resume that embellishes tasks performed in a past position could be charged with mail or wire fraud—even if the applicant is fully qualified and his performance is stellar (or he doesn’t get the job in the first place, since guilt does not depend on the scheme’s success). *Cf. United States v. Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023). Same for an employee who lies about a violation of workplace policy (perhaps checking social media on a work computer) to keep her job and thus continue collecting her salary.
- So too for a recent college graduate who tells a prospective landlord that she will be attending

graduate school (thereby causing the landlord to believe she will be a quiet tenant) but in actuality has no such plans.

- Or imagine someone sells printer toner to various businesses at the regular price, falsely claiming that the price will go up in a week. Such a misrepresentation could induce a buyer to enter into a transaction, *see United States v. Milheiser*, 98 F.4th 935, 938 (9th Cir. 2024), just as would a used car salesman's false assertion that another person is coming to look at a certain car later that day.
- How about a babysitter who persuades a couple to hire her by falsely telling them that she will use the money she earns to pay for college expenses? Or that she will contribute \$5 of every \$20 she earns to her older brother, who was recently laid off? If the couple chooses the babysitter over other applicants for either reason, the situation would fall squarely within the inducement theory. Indeed, this very case essentially boils down to a false promise to give some of petitioners' earnings to a third party.

What's more, no formal contract is required to trigger the inducement theory. After all, a person can be induced to part with money or property for all sorts of reasons that are not (and were never intended to be) reflected in any written agreement. Every day in this country, for instance, people selling their homes choose among multiple offers based on which prospective buyers' stories about their plans for the property are more compelling. Under the inducement theory, any lie (say, falsely claiming to be planning to

raise a family in the home) would be fodder for a wire fraud prosecution, even if the buyer offered the same price—or better—than others.

Or consider misrepresentations ordinarily covered by state consumer protection laws. Companies sometimes market their products with promises that they donate some portion of their profits to charity or other social or political causes (think, for example, of Newman’s Own or Ben & Jerry’s). Other businesses represent that their crops are locally grown, or that their granola is based on a recipe from the owner’s grandma. Still more claim to be the official supplier of the U.S. Olympic Team or that famous actresses have worn their clothes to the Oscars. If any of these claims is false and material to the purchaser, it would be criminal under the inducement theory, regardless of whether the consumers got exactly what they paid for at market price and thus were not financially injured.

One could go on and on. And that is just the point: The inducement theory would be limited only by the extraordinary diversity of the American marketplace for goods and services and the temperance of federal prosecutors. This “staggering breadth” strongly suggests rejecting the theory. *Dubin*, 599 U.S. at 129.

B. The government’s patches do not solve this problem.

Faced in *Ciminelli* with the sweeping implications of the inducement theory, the government suggested some *ad hoc* limiting principles. But those patches would introduce serious vagueness problems of their own. If the inducement theory were adopted, no remotely clear lines would separate criminal fraud from civil deceit, throwing the law into disarray.

1. The government's main suggestion in *Ciminelli* for reining in the fraudulent inducement theory was a turbocharged version of materiality. Materiality normally requires a statement that "has a natural tendency to influence, or is capable of influencing" the person on the other side of the transaction. *Neder v. United States*, 527 U.S. 1, 16 (1999) (internal quotation marks, citation, and alterations omitted). But the government argued that materiality was especially "rigorous" "in the contracting context," requiring a statement that goes "to the very essence of the bargain." U.S. *Ciminelli* Br. 18, 30, 43 (internal quotation marks and citation omitted).

It is unclear whether the government will endorse this version of materiality here. The jury was instructed under the classic materiality standard, *see* C.A.3 App. 3481-82, not the "essence" standard floated in *Ciminelli*. On the other hand, in its brief in opposition, the government quotes the Third Circuit's assertion that DBE participation was "an essential component of the contract' between petitioners and PennDOT," presenting that assertion as part of its defense of the decision below. BIO 7 (quoting Pet. App. 22). It is unclear whether "essential component" means the same thing as "very essence." And the government elsewhere appears to endorse a more general rule that wire fraud occurs "where the defendant uses falsehoods to induce a victim to enter into a transaction." BIO 9. No mention of essentiality at all there.

There are, in any event, strong reasons for this Court not to put stock in any heightened materiality standard. Start with the government's halfhearted "endors[ement]" of the notion in *Ciminelli*. *See Van*

Buren, 593 U.S. at 394. And even after the government suggested in *Ciminelli* that materiality in this setting requires evaluating whether a misrepresentation goes to the essence of the bargain, federal prosecutors have continued to resist. Again look no further than *Ciminelli* itself. On remand, the government appears to have reverted to the traditional formulation of materiality—and the government in other cases has affirmatively resisted defense requests to apply the heightened standard.⁹

There are also doctrinal reasons to be dubious of any “essence” test. The government fashioned that test in *Ciminelli* from a footnote in *Universal Health Services, Inc. v. United States*, 579 U.S. 176, 193 n.5 (2016). See U.S. *Ciminelli* Br. 18, 30, 44. There, the Court cited a 1931 New York decision holding that a particular half-truth was material because it “went to the very essence of the bargain.” *Junius Constr. Corp. v. Cohen*, 257 N.Y. 393, 400 (1931). But *Universal Health* addressed the False Claims Act, not the wire or

⁹ See, e.g., U.S. Br. on Remand at 21, 35-37, *United States v. Percoco*, No. 18-2990 (2d Cir. Nov. 7, 2023), ECF No. 551 (reciting traditional standard and explaining that the “same concept” as right-to-control theory is “rooted in the materiality element”); *Milheiser*, 98 F.4th at 940 (noting government objection to “very nature of the bargain” standard); U.S. Br. at 38-39, *United States v. Miller*, No. 23-3194 (9th Cir. May 17, 2024), ECF No. 19.1 (opposing defendant’s reliance on government’s *Ciminelli* materiality standard); see also Tr. of Nov. 1, 2023 Charge Conf. at 3589-90, *United States v. Miller*, No. 20-cr-232 (D. Minn. Nov. 9, 2023), ECF No. 2040 (opposing deviation from model charge on ground that “essential element” is equivalent to traditional materiality); Gov’t Opp. to Post-Trial Motions at 60-61, *United States v. Miller*, No. 20-cr-232 (D. Minn. Jan. 23, 2024), ECF No. 2182 (defending model charge).

mail fraud statutes—and the Court expressly disclaimed any view regarding whether the materiality tests for those provisions are the same. *See* 579 U.S. at 192-93. Furthermore, *Universal Health* stressed that the False Claims Act is not an “all-purpose antifraud statute ... or a vehicle for punishing garden-variety breaches of contract or regulatory violations.” *Id.* at 194 (internal quotation marks and citation omitted). But here, adopting the fraudulent inducement theory would enable the government to use the mail and wire fraud statutes to punish garden-variety contract disputes and regulatory violations—exactly what *Universal Health* warned against.

Even if these doctrinal deficiencies could be brushed aside, a “very essence” or “essential component” test would lead to nothing but confusion. How to tell what the government means by “essence” of a bargain? *Junius* indicated the essence of a contract for the purchase of goods or services is the agreement to buy goods that have a certain pecuniary “value.” 257 N.Y. at 400. In that sense, the essence of the bargain here was the agreement to repair and paint the bridges for a fixed sum of money—nothing more. There is no evidence that the identities of the people supplying paint for the repairs raised PennDOT’s price or lowered the value of petitioners’ work. But it is unlikely the government thinks this conception of “essentiality” is correct; otherwise, it would lose under its own test.

So one wonders what the “essence” of a bargain is supposed to mean. Maybe the government thinks the essence of the bargain can be defined by the contract’s drafters, such that any term whose breach is deemed material is an “essential component” of the bargain.

That seems to be what the Third Circuit believed, stating that without the DBE provision, “the nature of the parties’ bargain would have been different.” Pet. App. 22; *see also* Pet. App. 23 (suggesting that any breaches of “contracts themselves” are actionable under the criminal fraud statutes). If that is the test, however, it would seem to cover most, if not all, of the provisions in this 1,100-plus-page contract—and of every contract. Perhaps the government’s definition falls somewhere in between. But it is impossible to see where the line would be, or to expect courts to be able to police any potential line with any consistency—much less for ordinary people to guess where that line might be.

Other questions abound. For example, what about inducements expressed only during negotiations and excluded from the parties’ contract? Consider this passage from the court of appeals decision this Court reversed in *Ciminelli*:

We are similarly unpersuaded by defendants’ arguments that rigging the Buffalo and Syracuse RFPs was not wire fraud because it merely induced negotiations, or because Fort Schuyler still received the benefit of its bargain. *The bargain at issue was not the terms of the contracts ultimately negotiated*, but instead Fort Schuyler’s ability to contract in the first instance, armed with the potentially valuable economic information that would have resulted from a legitimate and competitive RFP process. Depriving Fort Schuyler of that information was precisely the object of defendants’ fraudulent scheme, and for Fort Schuyler, it was *an essential element of the bargain*.

United States v. Percoco, 13 F.4th 158, 172 (2d Cir. 2021) (emphasis added). It is hard to imagine a tidier encapsulation not only of the reality that accepting the “fraudulent inducement” theory would in effect revive the right-to-control theory, but also that an “essential component” test would be no meaningful limitation at all.

Finally, what about non-contractual transactions? When does a line on a resume, for example, go to the essence of an employee’s suitability for a job? When does a babysitter’s statement about how she will spend the money she earns go to the essence of a bargain—only when the parents would have stayed home but for the representation, or also when it was a tiebreaker between two neighborhood teenagers equally capable of handling the gig? Once “essence of the bargain” is unmoored from financial or other property interests, the test seems incapable of predictable application.

In fact, the government itself has already realized this. In a recent filing, the government explained that an essence-of-the-bargain test would be hopelessly “confusing” because “[i]t is not obvious that a bargain even has an ‘essence,’ and there is no way to ensure that a jury would know how to identify it.” U.S. Br. at 39, *United States v. Miller*, No. 23-3194 (9th Cir. May 17, 2024), ECF No. 19.1. Exactly right.

2. In *Ciminelli*, the government also adverted to other “common-law doctrines [that] may further constrain” the fraudulent inducement theory. U.S. *Ciminelli* Br. 44. Maybe the government is right. Or maybe it isn’t. The only thing we know for certain from the government’s position in *Ciminelli* is that another avalanche of prosecutions, trials, and appeals would be

needed to sort fraud law out. Meanwhile, likely for decades, prosecutors would have enormous leverage to threaten criminal fraud across a dizzying spectrum of fact patterns. And businesspeople would be left wondering when they might be subjecting themselves not just to tort, contract, or consumer protection liability but to criminal convictions and years behind bars.

At the end of the day, the Court faces a stark choice: Adhere to limitations on the fraud statutes it has enforced for over a century, or allow the statutes' coverage to balloon, giving the federal government sweeping criminal jurisdiction over everyday deceptions. But if the choice is stark, it is also easy. Once again, the Court should turn back the government's attempt to repackage the fraud statutes to reach far beyond their intended purpose.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed insofar as it affirmed petitioners' convictions.

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August 19, 2024

No. 23-1345

In the Supreme Court of the United States

DANNY RICHARD RIVERS, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

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QUESTION PRESENTED

Under federal habeas law, a prisoner “always gets one chance to bring a federal habeas challenge to his conviction,” *Banister v. Davis*, 590 U.S. 504, 509 (2020). After that, prisoners who file a “second or successive habeas corpus application” must satisfy the stringent gatekeeping requirements of 28 U.S.C. §2244(b)(2). Here, petitioner sought to amend his initial habeas application under Federal Rule of Civil Procedure 15 while it was pending on appeal. The Fifth Circuit deemed that filing a second or successive application, subject to §2244(b).

The question presented is whether §2244(b)(2) applies (i) only to habeas filings made after a prisoner has exhausted appellate review of his first petition, (ii) to all habeas filings submitted after a district court enters judgment, or (iii) only to some post-final-judgment habeas filings.

RELATED PROCEEDINGS

Ex parte Rivers, WR-84,550-01 & 84,550-02 (Tex. Ct. Crim. App. Oct. 5, 2016) (remanding for additional findings of fact and conclusions of law)

Rivers v. State, No. 08-12-00145-CR (Tex. Ct. App. Jan. 4, 2017) (findings of fact and conclusions of law following Oct. 5, 2016 remand)

Ex parte Rivers, WR-84,550-01 & 84,550-02 (Tex. Ct. Crim. App. July 7, 2017) (affirming Jan. 4., 2017 Texas Court of Appeals judgment)

Rivers v. Davis, No. 7:17-cv-00124 (N.D. Tex. Sept. 17, 2018) (denying habeas relief)

Rivers v. Lumpkin, No. 7:21-cv-00012 (N.D. Tex. Aug. 11, 2021) (deeming Feb. 2021 filing “second or successive and recommending transfer)

Rivers v. Lumpkin, No. 7:21-cv-00012 (N.D. Tex. Sept. 23, 2021) (adopting recommendation)

Rivers v. Lumpkin, No. 18-11490 (5th Cir. May 13, 2022) (affirming district court’s Sept. 17, 2018 order denying initial habeas petition)

Rivers v. Lumpkin, No. 22-6688 (U.S. Apr. 3, 2023) (denying petition for a writ of certiorari)

Rivers v. Lumpkin, No. 21-11031 (5th Cir. Apr. 15, 2024) (affirming district court’s Sept. 23, 2021, order; decision below here)

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INTRODUCTION

This case is about the hurdles a prisoner must clear to amend his initial habeas application. Petitioner Danny Rivers asked a federal court to review his state conviction, arguing that his counsel had failed to investigate his case and had shown up to trial drunk. The district court denied relief, holding that Rivers had not explained how he was prejudiced. But the answer soon emerged. After fighting for years to obtain his lawyers' records, Rivers finally received them while his case was on appeal. Among the files, Rivers found evidence suggesting he was wrongly convicted: an exculpatory report that his counsel apparently overlooked. New evidence in hand, Rivers raced to court and sought to amend his petition—only to find the doors barred. The courts below reasoned that Rivers's amendment was actually a “second or successive habeas corpus application” under 28 U.S.C. §2244(b), divesting the district court of jurisdiction to consider it.

That was wrong. Congress has already decided what standard applies when a prisoner seeks to amend a habeas application mid-appeal—and it's not §2244(b)(2). Under 28 U.S.C. §2242, an application “may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” Those rules, in turn, provide for just this situation. District courts may not *grant* a motion to amend while an appeal is pending. But Federal Rule of Civil Procedure 62.1(a)(3) authorizes them to *consider* a such motion and state that it “raises a substantial issue.” If the court of appeals agrees, it may vacate and remand, clearing the way for amendment. Fed. R. App. P. 12.1(b); 28 U.S.C. §2106.

None of that happened here because the district court mistakenly thought that §2244(b) barred Rivers’s filing. But §2244(b) cannot be read to implicitly prohibit what §2242 expressly permits. Nor can the decision below be squared with *Banister v. Davis*, 590 U.S. 504 (2020), which looked to historical habeas and statutory aims when deciding whether a filing is second or successive. Both point the same way here. As to history, habeas courts traditionally allowed prisoners to raise newly discovered evidence, and courts routinely addressed filings like Rivers’s on the merits—instead of deeming them successive. (This Court was no exception.) And as to purposes, forcing motions like Rivers’s to run the §2244(b)(2) gauntlet would have baleful implications for habeas practice, making it unlikely that Congress “would have viewed [them] as successive.” 590 U.S. at 513.

The Fifth Circuit was also wrong to hold that §2244(b) kicks in as soon as a district court enters final judgment, making all post-judgment habeas filings second or successive. Section 2244(b) functions as a statute of repose, ensuring that state prosecutors don’t have to defend the same conviction twice. But Congress did not recognize an interest in repose while a prisoner’s initial petition remains pending. Instead, statutory context and historical practice show that the dividing line between first and successive petitions is the end of appellate review. Only then does §2244(b) apply.

This Court should reverse and remand so the district court can consider Rivers’s amendment under the proper Rule 15 standard.

OPINIONS BELOW

The Fifth Circuit’s opinion is reported at 99 F.4th 216 and is reproduced at Pet. App. 1a–11a. The district court’s unpublished opinion is available at 2021 WL 4319670 and is reproduced at Pet. App. 12a–17a.

JURISDICTION

The Fifth Circuit issued judgment on April 15, 2024. Pet. App. 1a. The petition was filed June 24, 2024 and granted December 6, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Sections 2106, 2242, and 2244(b) of Title 28 are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

A. Legal background

1. This case concerns when a habeas filing should be deemed a “second or successive habeas corpus application.” 28 U.S.C. §2244(b).

a. The Antiterrorism and Effective Death Penalty Act of 1996 creates a dual-track system for federal habeas relief. One path is for first-time petitioners. “Under AEDPA, a state prisoner always gets one chance to bring a federal habeas challenge to his conviction.” *Banister*, 590 U.S. at 509. This path begins in the district court. If that court denies relief, the prisoner may request a “certificate of appealability”—initially from the district court, and then from the court of appeals. See *Gonzalez v. Thaler*, 565 U.S. 134, 143–44 & n.5 (2012). The path ends only when the prisoner has exhausted the chance for review.

The second path is “rockier.” *Banister*, 590 U.S. at 509. To file a “second or successive habeas corpus application,” 28 U.S.C. §2244(b), a prisoner must first ask the court of appeals for “an order authorizing the district court to consider the application,” *id.* §2244(b)(3)(A). The appellate court may oblige only if the petition “relies on a new and retroactive rule of constitutional law” or “alleges previously undiscoverable facts that would establish ... innocence,” *Banister*, 590 U.S. at 509 (citing 28 U.S.C. §2244(b)(2)). If so, the petition goes to the district court, which must decide for itself whether the petition “satisfies the requirements” of §2244. 28 U.S.C. §2244(b)(4). Only then may the district court reach the merits.

The upshot is that much rides on whether a given filing is deemed “part of resolving a prisoner’s first habeas application,” *Banister*, 590 U.S. at 507, or instead a “second or successive habeas corpus application.” 28 U.S.C. §2244(b).

b. “[S]econd or successive” is a “term of art” that does not refer simply to “all habeas filings ... following an initial application.” *Banister*, 590 U.S. at 511 (citations omitted). To determine when §2244(b) applies, “this Court has looked for guidance in two main places.” *Id.* at 512. First, history: “whether a type of later-in-time filing would have constituted an abuse of the writ” under the Court’s “pre-AEDPA cases.” *Id.* (cleaned up) (citation omitted). Second, “statutory aims”: conserving judicial resources, reducing piecemeal litigation, and achieving finality “within a reasonable time.” *Id.* at 512–13 (citation omitted).

2. Two recent cases have required this Court to consider whether a motion filed under a Federal Rule of Civil Procedure was actually a second or successive application. The Federal Rules “generally govern ha-

beas proceedings.” *Banister*, 590 U.S. at 511; see Fed. R. Civ. P. 81(a)(4); 28 U.S.C. §2254 Rule 12 (Federal Rules apply “to the extent they are not inconsistent with” a federal statute or Habeas Rule). When motions authorized by a given Federal Rule constitute second or successive applications, however, AEDPA “displaces” the Federal Rule, and “all of §2244(b)’s restrictions kick in.” *Banister*, 590 U.S. at 511.

Gonzalez v. Crosby, 545 U.S. 524 (2005), involved a Rule 60(b) motion for relief from judgment. The prisoner there “abandoned any attempt to seek review” of the order denying his habeas petition, waited a year, and then moved to reopen the case under Rule 60(b). *Id.* at 527, 537. Because his motion challenged “a nonmerits aspect of the first federal habeas proceeding,” the Court found “no basis for contending that [it] should be treated like a habeas corpus application” in the first place. *Id.* at 533–34. Had the prisoner’s motion gone to the merits, however, the Court suggested that it would have counted as a second or successive application (or its functional equivalent). See *id.* at 531–32.

Five Terms ago, in *Banister v. Davis*, the Court faced a similar question involving a Rule 59(e) motion to alter or amend a judgment. Under Rule 59(e), a party may seek reconsideration up to 28 days after the district court enters judgment, including on the basis of “new arguments” and “newly discovered or previously unavailable evidence.” *Banister*, 590 U.S. at 508 n.2 (quoting 11 Wright & Miller, *Federal Practice & Procedure* §2810.1, at 161–62 (3d ed. 2012)). Distinguishing *Gonzalez*, the Court held that a Rule 59(e) motion “does not count as a second or successive habeas application.” *Id.* at 521.

3. While federal habeas law does not expressly address the motions at issue in *Gonzalez* and *Banister*, Congress specifically authorized prisoners to amend or supplement their habeas applications. Under 28 U.S.C. §2242, which predates AEDPA and the Habeas Rules, an “[a]pplication for a writ of habeas corpus ... may be amended or supplemented as provided in the rules of procedure applicable to civil actions.”

B. Factual background

Danny Rivers has spent the last thirteen years fighting to prove his innocence. While his initial habeas petition was pending on appeal, he discovered that exculpatory evidence had been sitting in his trial counsel’s files all the while—evidence that his lawyers could have used to clear his name. If Rivers is right, he not only received ineffective assistance but was also wrongly convicted. This case is about whether §2244(b)(2) bars Rivers from amending his petition and bringing the new evidence to light.

1. Rivers is tried and convicted.

In 2012, a Texas jury convicted Rivers of sexually abusing his children and possessing child pornography. He is currently serving a 38-year sentence.

a. This case began amidst a bitter divorce. In 2008, a Texas judge awarded Rivers temporary custody of his 9-year-old daughter. *Rivers v. Lumpkin*, No. 7:21-cv-00012 (N.D. Tex.), Dkt. 11-14 (“R-1”), at 156, 164. The court also granted Rivers sole use of the family home and denied his ex-wife’s request for alimony. *Id.* Dkt. 11-15 (“R-2”), at 15. In response, Rivers’s ex-wife “punish[ed]” him by “not letting him see” his 12-year-old stepdaughter, whom he had raised as his own. R-2, at 16.

The following year, with custody arrangements unchanged, Rivers's ex-wife drove the children to the police station. Both girls met with officers and accused Rivers of sexually abusing them. R-2, at 18, 129. Police then searched Rivers's home, seized the family laptop, and launched a forensic examination, eventually identifying "two files of interest"—a single image and a single video—that "appeared to be" child pornography. *Id.* at 26–28; *id.* Dkt. 11-10 ("R-3"), at 13, 31, 73; *id.* Dkt. 11-16, at 15, 66–67.

b. A grand jury indicted Rivers for indecency with a child, continuous sexual abuse, and two counts of possessing child pornography. R-3, at 8–15. Rivers, who had no criminal history, R-2, at 161, pleaded not guilty.

Trial looming, Rivers moved to sever the child-pornography counts, arguing they would poison the jury's views on the other charges. R-1, at 15. The State opposed severance. Because Texas had "no DNA or physical evidence," it argued that the alleged child pornography was "necessary" to establish Rivers's "motive" and "attraction to young girls." *Id.* at 14–15. The court refused to sever. *Id.* at 23.

c. At trial, Rivers's daughter and stepdaughter alleged a staggering pattern of sexual abuse. R-1, at 142, 145–46, 167–68. They further claimed that Rivers had shown them child pornography at least seventy times, testifying that he had "downloaded multiple videos" and played different films on different occasions. *Id.* at 153, 172. (Texas charged Rivers with possessing only one such video.) Rivers's daughter also accused her father of secretly recording images in the shower, R-1, at 170, although no hidden cameras were ever found. All told, the girls alleged over 200 instances of shocking abuse, many of which reported-

ly took place in common areas of the home while their mother, uncle, or cousin were present in the house. R-1, at 139, 147, 152–53, 156, 158, 166; R-2, at 12, 90. No other witnesses testified that they had seen the alleged abuse, and no physical evidence corroborated the story. R-2, at 34, 64.

This lack of supporting evidence made the alleged child pornography a key issue at trial. The prosecution called multiple witnesses to testify about the video file and image that Rivers was charged with possessing. R-2, at 19, 28, 44, 74, 84, 100. While the trial judge had granted a continuance so the defense could obtain its own experts, R-3, at 31, 40, counsel did not do so. R-2, at 112. Instead, the defense called only one witness, who testified that he and Rivers were traveling for work when the two files were allegedly downloaded. R-2, at 113–14, 131. That witness later swore that Rivers’s lawyers never “contacted [him] until the day they wanted [him] to testify” or asked for evidence that would have corroborated Rivers’s alibi. *Rivers v. Lumpkin*, No. 7:17-cv-00124 (N.D. Tex.), Dkt. 27-3, at 9.

d. The jury convicted Rivers on all charges, Pet. App. 2a. It rejected the prosecution’s call for a 169-year sentence, however, and recommended that the court sentence Rivers to 42 years. R-3, at 213–14, 221–29. The court further decreased the sentence: 38 years behind bars, all counts considered—three years above the minimum. Pet. App. 13a. The Texas Court of Appeals affirmed.

2. Rivers seeks postconviction relief.

a. In 2013, while his direct appeal was still pending, Rivers began asking his lawyers to send him his client file. He explained: “I don’t know what all it con-

tains, but it looks like I’m going to have to do this thing pro se, so I need everything I can get.” No. 7:21-cv-00012 (N.D. Tex.) Dkt. 15-11, at 67. Counsel “never responded,” and two years later, hindered by his imprisonment, Rivers was still trying. *Id.* at 68–69. He eventually resorted to filing a formal grievance with the Texas state bar.

Meanwhile, Rivers pressed forward with what records he had. In 2016, he sought state postconviction relief based on ineffective assistance, among other grounds. Relevant here, he argued that his trial counsel had failed to “perform an objectively reasonable investigation” or “verify the ages of the persons” in the alleged child pornography. No. 7:21-cv-00012 (N.D. Tex.), Dkt. 12-21, at 9. He added that his lead counsel was “inebriated” at the trial. *Id.* at 11.

The Texas Court of Criminal Appeals found that Rivers had “alleged facts that, if true, might entitle him to relief.” *Ex parte Rivers*, 2016 WL 5800277, at *1 (Tex. Crim. App. Oct. 5, 2016). It remanded for further factfinding, ordering the court to appoint counsel if it “elect[ed] to hold a hearing.” *Id.* Judge Alcala wrote separately to urge the appointment of counsel “regardless of whether the trial court holds a hearing.” *Id.* (Alcala, J., concurring).

On remand, the court neither held a hearing nor appointed counsel. Instead, it chiefly relied on affidavits in which trial counsel defended their performance, denied drunkenness, and claimed that Rivers had “admitted to [them] that he engaged in sexual acts with the victims.” *Rivers v. Davis*, 2018 WL 4443153, at *3 (N.D. Tex. July 27, 2018); see also No. 7:17-cv-00124 (N.D. Tex.), Dkt. 24-1, at 24. Rivers responded with his own affidavit, categorically “deny[ing] making such admissions.” Dkt. 24-1 at 4. He

also submitted a text message from one of the lawyers' spouses, confirming that counsel "showed up intoxicated for court," *id.* at 25, and a news report showing that his lead counsel was arrested six months before the trial "after showing up at a woman[]s house naked and drunk," *id.* at 33 (cleaned up) (quoting Texoma, *Local Attorney Sentenced to Two Years Probation* (Mar. 18, 2015), bit.ly/Barber-Arrest). The trial court nonetheless "concluded that counsel were not ineffective," and the Court of Criminal Appeals affirmed. *Ex parte Rivers*, 2017 WL 3380491, at *1 (Tex. Crim. App. June 7, 2017).

b. Rivers filed a federal habeas petition in 2017, raising the same ineffective-assistance claims, among other grounds. No. 7:17-cv-00124 (N.D. Tex.), Dkt. 1, at 6. When the district court denied relief, Rivers "timely filed a notice of appeal," *Rivers v. Lumpkin*, 2022 WL 1517027, at *4 (5th Cir. May 13, 2022), and sought a certificate of appealability.

3. While his habeas appeal is pending, Rivers discovers new, exculpatory evidence.

While his case was pending on appeal, Rivers finally received the client file that he first requested in 2013. Pet. App. 2a. In it, he found a state investigator's report analyzing the two files underlying his child-pornography conviction. The report called the video merely "of interest," without further comment. Meanwhile, the image was labeled "**NOT CHILD PORN.**" J.A. 91–92. The report also listed a number of other files found on the family laptop. Next to one—entitled "reallyunderagekiddieporn"—the state investigator had written: "although the title indicated it to be child porn," it "is not." *Id.* at 91. Another, whose title included phrases like "pre-teen tiny chil-

dren” and “incest sex porn underage,” was likewise marked “**NOT CHILD PORN.**” *Id.* at 92. The report also showed that these files were *not* saved under Rivers’s name; they were instead recovered from a download folder bearing the name of Rivers’s ex-wife.

After discovering the report, Rivers moved to supplement the appellate record. See *id.* at 41. He also filed an affidavit stating that he had never seen the report and noting that his lawyers had “failed to raise this exculpatory evidence” that had been “in [their] possession” all along. *Id.* at 54–55. The affidavit added that Rivers’s “estranged wife had access to the house and did in fact enter the house ... while [Rivers] was out of town during the time frame the alleged child porn was downloaded,” *id.* at 49. The Fifth Circuit denied Rivers’s motion but granted a certificate of appealability. *Id.* Dkt. 34, at 2.

C. Procedural history

In February 2021—more than a year before the last filings were submitted in his pending appeal—Rivers returned to the district court and tried to amend his initial petition. Using the standard §2254 template provided to pro se litigants, Rivers alleged that his counsel had “fail[ed] to present exculpatory evidence in their possession” that would have shown “factual innocence.” J.A. 68. He added that prosecutors had violated due process by “falsely pursu[ing]” charges based on evidence that “their own investigators” deemed “NOT CHILD PORN.” *Id.* at 75.

Soon thereafter, Rivers asked the Fifth Circuit to stay or remand. *Id.* at 95. Rivers explained that his amended petition contained “substantial [ineffective-assistance] claims that [it] should be aware of before determining if counsel was or was not ineffective.” *Id.*

at 99. Since his “original habeas action [remained] pending,” Rivers reasoned that “judicial economy would best be served by [the Fifth Circuit’s] one time review,” covering “all grounds”—both “those on appeal” and “those currently raised in the district court.” *Id.* (cleaned up). To avoid “piecemeal litigation,” Rivers asked the court to either stay appellate proceedings so he could “exhaust the new claims and then join the causes” or to “remand this case back to the district court for consideration of the new grounds.” *Id.* at 100. The court denied the motion in a one-line order. No. 18-11490 (5th Cir.) Dkt. 78.

Meanwhile, in the district court, the same magistrate judge who reviewed Rivers’s initial habeas petition recommended that the February 2021 filing be deemed a “second or successive” petition and transferred to the Fifth Circuit for lack of jurisdiction. See Pet. App. 3a–4a. Rivers objected, maintaining that the filing was “an amendment to [his] initial petition currently pending on appeal.” 7:21-cv-00012 (N.D. Tex.), Dkt. 27, at 5. He then moved the court to stay or “consider an interlocutory review” to “preserve judicial resources.” J.A. 107. The court adopted the magistrate’s recommendation and denied Rivers’s stay motion. See Pet. App. 18a–19a. Rivers appealed in October 2021, again arguing that his filing was “an amendment/supplement under Fed. R. Civ. P. 15 to [his] initial petition.” 5th Cir. No. 21-11031, Dkt. 20, Feb. 17, 2022.

The Fifth Circuit docketed Rivers’s jurisdictional appeal as a separate case. (Now there were two appeals pending before separate panels.) Seven months later, in May 2022, Panel 1 affirmed the initial habeas denial without addressing Rivers’s amended petition or the newly discovered evidence. See *Rivers*,

2022 WL 1517027, *cert. denied*, 143 S. Ct. 1090 (2023). Then, in April 2024, Panel 2 affirmed the transfer order—the decision below. Pet. App. 1a–2a. It reasoned that §2244(b) applies to “filings introduced after a final judgment that raise habeas claims, no matter how titled.” *Id.* at 10a.

SUMMARY OF ARGUMENT

For two independent reasons, Rivers’s motion to amend was not a second or successive habeas corpus application. The Court should reverse and remand.

I. First, a mid-appeal Rule 15 motion is not a second or successive habeas corpus application.

A. Section 2242 of Title 28 expressly states that an “[a]pplication for a writ of habeas corpus ... may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” The civil rules, in turn, permit motions to amend or supplement a pleading while a case is pending on appeal. Although a district court lacks jurisdiction to *grant* such a motion, Federal Rule of Civil Procedure 62.1(a)(3) permits it to issue an indicative ruling “stat[ing] either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” The court of appeals may then vacate the judgment and “remand for further proceedings.” Fed. R. App. P. 12.1; 28 U.S.C. §2106.

Because §2242 authorizes mid-appeal motions to amend a habeas application, such motions cannot be deemed “second or successive habeas corpus application[s]” under §2244(b). Requiring such motions to satisfy §2244(b)(2) would nullify Congress’s instruction that habeas applications “may be amended” if they satisfy “the rules of procedure applicable to civil actions.” 28 U.S.C. §2242. It would wrongly treat an

amendment as a new, independent “application,” rather than part and parcel of the initial application. And it would override Congress’s decision that only a limited subset of amendments not at issue here must satisfy §2244(b)(2). See *id.* §2266(b)(3)(B).

B. Historical practice confirms that mid-appeal motions to amend are not second or successive habeas applications. Courts historically did not treat habeas petitions presenting newly discovered evidence as successive. Nor did they regard mid-appeal Rule 15 motions as abuses of the writ. Presented with such motions, courts addressed them on the merits, without suggesting they were abusive.

C. Treating mid-appeal Rule 15 motions as part of and parcel of the initial habeas application would also advance AEDPA’s aims. Channeling such filings to the same judge who has just ruled on the initial petition maximizes judicial economy, avoids piecemeal litigation, and hastens the finality of state convictions. By contrast, diverting them to the court of appeals under §2244(b) would burden appellate judges, lead to simultaneous appeals, and leave states and prisoners in limbo. It’s hard to attribute those results to a Congress focused on efficiency and finality.

D. Applying §2244(b)(2) to mid-appeal motions to amend also leads to anomalous results that Congress is unlikely to have intended. On the Fifth Circuit’s view, Rule 15 applies to nearly every motion to amend in a habeas case. Only a tiny sliver—those filed by a prisoner while the case is pending appeal—must run the §2244(b)(2) gauntlet. That approach also creates senseless distinctions between similarly situated prisoners, slamming the door on newly discovered evidence while the case is still pending.

II. Alternatively, §2244(b) does not apply while a prisoner’s initial petition is pending on appeal. In the postconviction context, this Court has always understood finality by reference to the end of appellate review, not final judgment. Pre-AEDPA courts applied abuse-of-the-writ principles in that manner, treating the appellate court’s decision as the dividing line between first and successive petitions. Far from rejecting that view, Congress embraced it throughout AEDPA by pegging finality to the end of appellate review. And treating appellate review as the relevant inflection point here makes sense too. Section 2244(b) functions as a statute of repose, sparing states the burden of defending the same conviction twice. But Congress did not recognize a state’s interest in repose while the initial petition is still pending: that interest vests only once the appeal is over.

III. The Fifth Circuit’s contrary arguments fail.

A. *Gonzalez v. Crosby* doesn’t control this case. *Gonzalez* neither involved nor addressed mid-appeal amendments under Rule 15. Nor did it analyze or decide whether the dividing line between initial petitions and “second or successive” petitions is the district court’s entry of judgment or the end of appellate review. And *Gonzalez*’s logic doesn’t apply here either because §2242 expressly permits amendments as provided in the civil rules, which already contain ample safeguards against abuse.

B. The Fifth Circuit was also wrong to fear a flood of amendments. Given the jurisdictional, procedural, and substantive barriers to amending mid-appeal, prisoners have every incentive to file all of their claims in their initial petition. The Second Circuit, where mid-appeal Rule 15 motions have been allowed for the last 20 years, offers an informative case study.

District courts there have not been flooded with abusive amendments, and the motions they have received have not proven burdensome.

IV. This Court should reverse and remand. The courts below made a threshold jurisdictional error that kept them from reaching the merits of Rivers’s motion to amend. On remand, the district court will have the chance to consider whether Rivers’s newly discovered evidence warrants relief under the proper Rule 15 standard.

ARGUMENT

I. A motion to amend or supplement an initial habeas petition that is pending on appeal is not a “second or successive” application.

A. Section 2242 permits prisoners to seek leave to amend or supplement their applications while an appeal is pending.

Section 2242 tells courts which rules to apply when a prisoner moves to amend or supplement an initial habeas petition: “the rules of procedure applicable to civil actions.” Those rules, in turn, include mechanisms for updating a pleading mid-appeal. Applying §2244(b)(2)’s gatekeeping requirements instead of the civil rules would nullify §2242 and disregard Congress’s drafting choices.

1. Under §2242, a habeas application may be amended or supplemented as provided in the rules of civil procedure.

Congress has told courts that a habeas application “may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” 28 U.S.C. §2242. Beyond Congress’s “general prescrip-

tio[n]” that the Federal Rules apply in habeas cases, §2242 “specifically” requires courts to allow amendment and supplementation per the rules of civil procedure. *Mayle v. Felix*, 545 U.S. 644, 654–55 (2005).

Section 2242 reflects longstanding practice that predates both the Habeas Rules and AEDPA. By its terms, the Habeas Corpus Act of 1867 contemplated amendments only to the jailer’s “return” and “suggestions made against it,” 14 Stat. 385, 386. But by 1948, when Congress added the amendment provision to §2242, courts had long permitted prisoners to amend their petitions “in the interest of justice.” *E.g.*, *Holiday v. Johnston*, 313 U.S. 342, 350 (1941); see also *Price v. Johnston*, 334 U.S. 266, 291–92 (1948) (remanding for amendment). As the Codifier’s Note explains, the provision aimed “to conform to [this] existing practice.” Codifier’s Note, 28 U.S.C. §2242 (1952).

Under §2242, amending a habeas petition works just like amending a pleading “in ordinary civil litigation.” *Mayle*, 545 U.S. at 663. Section 2242 imposes no restrictions beyond those “provided in the rules of procedure.” 28 U.S.C. §2242. Nor did Congress tether §2242 to a specific rule. Instead, it broadly instructed courts to allow amendments in accordance with the “rules” governing “civil actions.” *Id.*

2. The rules of civil procedure provide for motions to amend or supplement a pleading while an appeal is pending.

a. Federal Rule of Civil Procedure 15 lets parties amend and supplement their pleadings. Under Rule 15(a)(2), “a party may amend its pleading” with “the court’s leave,” which should be “freely give[n] when justice so requires.” Fed. R. Civ. P. 15(a)(2); see *Fo-*

man v. Davis, 371 U.S. 178, 182 (1962). And under Rule 15(d), a court “may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after” the initial pleading.

Unlike other Federal Rules, *e.g.*, Fed. R. Civ. P. 12(b), (h), these provisions contain no time limit. To the contrary, Rule 15(d) permits supplementation after a court has found “the original pleading ... defective in stating a claim or defense.” Likewise, leave to amend “has been granted under Rule 15(a) at various stages of the litigation,” including “after a judgment has been entered” and “on remand following appeal.” 6 Wright & Miller, *Federal Practice & Procedure* §1488 & n.11 (3d ed. June 2024); see also Fed. R. Civ. P. 15(b)(2) (expressly permitting amendment “after judgment”).

b. Rule 15 motions may be filed while a case is on appeal. Two structural barriers ordinarily prevent district courts from granting such motions: the pending appeal and the final judgment. But those barriers are not insurmountable. Federal courts have long experience with the complexities of litigation—including the problem of newly discovered evidence. The “rules of procedure applicable to civil actions” reflect that experience, 28 U.S.C. §2242, providing ways to update the pleadings even after an appeal has been filed. Relevant here, Federal Rule of Civil Procedure 62.1(a) permits a district court to issue an indicative ruling inviting remand, and Federal Rule of Appellate Procedure 12.1(b) and 28 U.S.C. §2106 allow the court of appeals to vacate and remand in response.

i. An appeal “divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56,

58 (1982). That principle precludes a district court from *granting* a motion to amend a pleading that is pending on appeal. The principle does not, however, preclude the district court from *considering* the motion. Even if a district court lacks jurisdiction to grant a motion, it still “ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand.” *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984) (citing *United States v. Johnson*, 327 U.S. 106, 108–09 (1946)).

Federal Rule of Civil Procedure 62.1(a) is the modern mechanism for this longstanding practice. It gives a district court three options when faced with a “timely motion ... for relief that the court lacks authority to grant because of an appeal.” First, the court may “defer considering the motion.” *Id.* §(a)(1). Second, it may entertain the motion and “deny” it. *Id.* §(a)(2). Finally, the court may issue an “[i]ndicative [r]uling” “stat[ing] either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” *Id.* §(a)(3). When the court of appeals receives such a ruling, Federal Rule of Appellate Procedure 12.1(b) allows it to “remand for further proceedings.”

Although Rule 62.1(a) is often used in conjunction with Rule 60(b) motions, “nothing in [the rule’s] language limits its application” to that context. *Ret. Bd. of Policemen’s Annuity & Benefit Fund v. Bank of N.Y. Mellon*, 297 F.R.D. 218, 221 (S.D.N.Y. 2013). Instead, Rule 62.1(a) covers “all circumstances in which a pending appeal ousts district-court authority to grant relief.” Report of the Civil Rules Advisory Committee, Dec. 12, 2006 at 14. That includes mid-

appeal Rule 15 motions. See, *e.g.*, *Ret. Bd.*, 297 F.R.D. at 220, 223.

Rule 62.1(a) does not require a party to move for an indicative ruling. The rule speaks of just one motion—the “timely motion ... for relief that the court lacks authority to grant because of an appeal.” Fed. R. Civ. P. 62.1(a). A distinct “motion” for a “targeted ‘indicative ruling’” is thus unnecessary: the district court may issue an indicative ruling based solely on the underlying motion for relief. *Mendia v. Garcia*, 874 F.3d 1118, 1120–21 (9th Cir. 2017) (collecting cases); see also, *e.g.*, *Scarborough v. U.S. Sec. Assocs., Inc.*, 836 F. App’x 60, 61 & n.1 (2d Cir. 2020).

ii. When a district court issues an indicative ruling under Rule 62.1(a), “the court of appeals may remand for further proceedings.” Fed. R. App. P. 12.1(b). The court of appeals may also “vacate” or “set aside” any “judgment” or “order” below and “require such further proceedings ... as may be just under the circumstances.” 28 U.S.C. §2106. Remand on those terms makes a separate motion to reopen the judgment unnecessary.

Appellate courts’ authority to grant such relief has a deep pedigree. For as long as there have been federal appellate courts, those courts have had to contend with unforeseen developments on appeal. Sometimes the appellate court was “informed” of new evidence. *E.g.*, *Estho v. Lear*, 32 U.S. (7 Pet.) 130, 131 (1833) (Marshall, C.J.); *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 234–38 (1957); *Levinson v. United States*, 32 F.2d 449, 450 (6th Cir. 1929). Sometimes an intervening event meant that “great injustice” would be done by ruling on “the present ... record.” *E.g.*, *Ballard v. Searls*, 130 U.S. 50, 52 (1889); *Ransom v. City of Pierre*, 101 F. 665, 670–71 (8th Cir. 1900). And sometimes situations “changed

radically” enough to “preclud[e]” further action. See *Watts, Watts & Co. v. Unione Austriaca Di Navigazione*, 248 U.S. 9, 21–22 (1918) (collecting cases). When such things happen, courts are not limited to “correcting error” but may also “dispos[e] of the case as justice may at th[e] time require.” *Id.* at 21.

D.W. Bosley Co. v. Wirfs, 20 F.2d 629 (8th Cir. 1927), is illustrative. The plaintiff in *Bosley* sued the defendant for patent infringement. After losing in the district court, the defendant appealed and “the case was argued and submitted” before the Eighth Circuit. *Id.* at 630. Then, while the appeal was still pending, the defendant discovered that another firm had been selling products “like those patented to the [plaintiff]” years before the plaintiff applied for his patent. *Id.* The Eighth Circuit knew what that meant: if the defendant was right, the evidence “would be likely to lead the court below to a different result from its earlier conclusion.” *Id.* At the defendant’s request, the Eighth Circuit remanded to the district court, where the defendant sought to “amend its answer and present [the] newly discovered” evidence. *Id.*; see also, e.g., *Estho*, 32 U.S. at 131 (granting leave to amend); *Dietz v. Horton Mfg. Co.*, 170 F. 865, 873 (6th Cir. 1909) (same).

A remand order that vacates the judgment “reopen[s] litigation.” *Mendoza v. Lumpkin*, 81 F.4th 461, 470 (5th Cir. 2023). This makes it unnecessary to ask the district court for relief from judgment under Rule 60(b). The remand order “suppl[ies] all that is needed by way of authority below and amount[s] in itself to a vacation of the judgment for further proceedings, including amendments.” *Markert v. Swift & Co.*, 173 F.2d 517, 520 (2d Cir. 1949). Rule 62.1(c) reflects this principle, providing that “[t]he district court may de-

cide the motion if the court of appeals remands for that purpose.” See also Wright & Miller §1489 (calling such an order “comparable to a vacation of the lower court’s judgment”).

* * *

All of that boils down to this: While Rule 15 motions are most common before final judgment, a party may also seek leave to amend or supplement while an appeal is pending. A district court that receives such a motion may consider it and issue an indicative ruling. Then, if the court of appeals vacates and remands, the district court is free to grant the motion.

3. Section 2244(b) does not override §2242.

a. “[I]t is this Court’s duty to interpret Congress’s statutes as a harmonious whole rather than at war with one another.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018). It follows that §2244(b)(2) cannot be read to implicitly prohibit what §2242 expressly permits. Section 2242 expressly allows a prisoner to “amen[d] or supplemen[t]” his “[a]pplication” “as provided in the rules of procedure applicable to civil actions.” Section 2242 thus identifies what conditions must be satisfied to amend a habeas petition: the conditions specified in the civil rules. Those conditions don’t include §2244(b)(2)’s stringent gatekeeping requirements for second or successive petitions. Construing a motion to amend as a second or successive petition, and thereby subjecting it to §2244(b)(2), would thus nullify Congress’s instruction that a habeas petition “may be amended” as provided in the civil rules. 28 U.S.C. §2242.

Treating an *amendment* to an application as a “second or successive” application would also “elid[e] the

difference” Congress recognized between the two. *Artuz v. Bennett*, 531 U.S. 4, 9 (2000). Section 2244(b) refers to a “second or successive” application as a new, distinct “application.” Section 2242, meanwhile, makes clear that an “amendment” is not a new and independent application, but rather something that happens to an existing application. See 28 U.S.C. §2242 (providing that “[i]t”—the “[a]pplication”—may be amended); see also Tr. of Oral Arg., *Banister*, No. 18-6943 (Assistant to the Solicitor General: “Section 2242 ... makes clear that that amendment still goes to the same application.”). And Congress elsewhere in the statute expressly distinguished between “an application,” an “amendment to an application,” and a “second or successive application.” 28 U.S.C. §2266(b)(2), (b)(3)(B).

Congress also showed that it knows how to subject an amendment to §2244(b)(2)’s gatekeeping requirements when it wants to. It did so in §2266, part of AEDPA’s “opt-in” chapter: a set of fast-track procedures for capital habeas cases that apply when a state meets certain conditions. See 28 U.S.C. §§2261–2266; *Calderon v. Ashmus*, 523 U.S. 740 (1998). Under §2266(b)(3)(B), “[n]o amendment ... shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).” Congress thus considered requiring that amendments satisfy the §2244(b)(2) standards—but it did so for only a tiny sliver of amendments: those filed by state prisoners, on death row, whose states have opted in. When “Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest,” this Court should “not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.” *Jama v. ICE*, 543 U.S. 335, 341 (2005).

b. Viewed another way, treating a motion to amend as a second or successive petition would effectively read §2244(b) as impliedly repealing §2242. But “[t]he cardinal rule is that repeals by implication are not favored.” *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). “[P]resented with two statutes, the Court will regard each as effective—unless Congress’ intention to repeal is clear and manifest, or the two laws are irreconcilable.” *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 315 (2020) (cleaned up). Not so here.

There is no evidence—let alone “clear and manifest” evidence—that Congress intended §2244(b) to repeal §2242. *Id.* Courts “strongly presum[e]” that “Congress will specifically address language on the statute books that it wishes to change.” *United States v. Fausto*, 484 U.S. 439, 453 (1988). Congress did just that in AEDPA. Title I of the Act, labeled “Habeas Corpus Reform,” expressly amended §§2243, 2244, 2245, and 2255 of Title 28. Pub. L. No. 104-132, tit. I, §§101–106 (1996). But neither that title nor any other provision of AEDPA mentions §2242. See *id.*

Nor are §§2242 and 2244(b) “irreconcilable.” *Me. Cmty.*, 590 U.S. at 315. Irreconcilability is a high bar. See *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 141–42 (2001). It is “not enough to show” that two statutes “produce differing results when applied to the same factual situation, for that no more than states the problem.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). And a “policy preference” for applying one provision over another won’t do either. *FCC v. NextWave Personal Commc’ns Inc.*, 537 U.S. 293, 304 (2003). Instead, two statutes are “irreconcilable” only when they “cannot mutually coexist” or there is “a positive repugnancy”

between them. *Radzanower*, 426 U.S. at 155. Here, §§2242 and 2244(b) can easily coexist, without “repugnancy,” by confining them each to their own respective spheres. Section 2242 addresses amendments but not second or successive applications. Section 2244(b), for its part, says much about second or successive applications but not a word about amendments. If both provisions stuck to their own jobs, neither would be out of work. *Id.*

B. Historical practice confirms that mid-appeal Rule 15 motions are not second or successive habeas applications.

Even apart from §2242, *Banister*’s logic yields the same result. To decide “what qualifies as second or successive,” this Court looks first to “historical habeas doctrine and practice.” *Banister*, 590 U.S. at 512. If “a type of later-in-time filing would have constituted an abuse of the writ, as that concept is explained” in the Court’s “pre-AEDPA cases,” it is “successive.” *Id.* (citation omitted). “[I]f not, likely not.” *Id.* As shown below, history favors Rivers twice over. For one thing, habeas courts did not historically deem the mere act of raising newly discovered evidence abusive. More telling still, pre-AEDPA courts routinely decided mid-appeal Rule 15 motions on the merits—rather than dismissing them as abusive.

1. The abuse-of-the-writ doctrine did not foreclose petitions presenting newly discovered evidence.

The abuse-of-the-writ doctrine was a nineteenth-century innovation. “[B]y the common law of England, as it stood at the adoption of the constitution,” the denial of habeas relief was “no bar to the issuing of a second or third or more writs.” *Ex parte Kaine*, 14

F. Cas. 78, 80 (C.C.S.D.N.Y. 1853). Courts were instead “accustomed to exercise an independent judgment on each successive application, regardless of the number.” *Salinger v. Loisel*, 265 U.S. 224, 230–31 (1924). “Th[is] rule made sense because at common law an order denying habeas relief could not be reviewed. Successive petitions served as a substitute for appeal.” *McCleskey v. Zant*, 499 U.S. 467, 479 (1991) (internal citation omitted).

Only later, once “a right to an appellate review was given,” did U.S. courts restrict this practice. *Salinger*, 265 U.S. at 231. Abuse-of-the-writ doctrine developed to ban successive petitions that presented claims that were “deliberately with[e]l[d],” *Sanders v. United States*, 373 U.S. 1, 18 (1963), or that the applicant “had [a] full opportunity” to present in his first petition, *Wong Doo v. United States*, 265 U.S. 239, 241 (1924). Courts carefully emphasized, however, that presenting newly discovered evidence was not itself abusive. *E.g.*, *Price*, 334 U.S. at 290–91.

Ex parte Cuddy, one of the earliest abuse-of-the-writ cases, illustrates the point. 40 F. 62, 66 (C.C.S.D. Cal. 1889) (Field, J.). A district court denied Thomas Cuddy’s initial habeas petition, and this Court affirmed. *Id.* at 63. Cuddy then sought habeas relief from Justice Field, riding circuit. Justice Field ordered the writ dismissed, reasoning that “a second application upon the same facts ... should not be heard,” absent “leave to make a new application.” *Id.* at 66. At the same time, he cabined that principle to “cases where a second application is made upon the same facts presented, or which might have been presented” in the first application. *Id.* In his view, things would be “entirely different” if “subsequent occurring events” offered “new” grounds for relief. *Id.*

Other courts agreed. In line with Justice Field's remarks, habeas courts did not treat the presentation of newly discovered evidence as itself abusive. This Court said as much in *Waley v. Johnston*, 316 U.S. 101, 105 (1942), where the subsequent petition did not raise "the same issue" as the prior one. Early twentieth-century district courts applied the same principle, reasoning that a "substantial change in the circumstances" could warrant a further petition. *E.g.*, *Ex parte Moebus*, 148 F. 39, 40 (D.N.H. 1906). So did state courts, which "routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene v. Bush*, 553 U.S. 723, 780–81 (2008) (collecting cases).

To be sure, Congress later restricted prisoners' ability to raise newly discovered evidence in "second or successive" applications. But this "historical habeas doctrine and practice" counsels against construing that phrase more broadly than the statutory text compels. See *Banister*, 590 U.S. at 512 (If a "type of later-in-time filing" would not have "constituted an abuse of the writ," it is "likely not" successive.).

2. Habeas courts did not historically treat mid-appeal Rule 15 motions as successive.

The same rules applied when new grounds for relief emerged while an initial petition was pending on appeal. Had courts viewed mid-appeal Rule 15 motions as successive, "there should be lots of decisions dismissing them on that basis." *Banister*, 590 U.S. at 514. Instead, courts time and again "resolved [such] motions on the merits—and without comment about repetitive litigation." *Id.* at 515.

a. *Harisiades v. Shaughnessy* is a good example. After a district court denied his initial habeas petition, Peter Harisiades appealed to the Second Circuit. See *United States ex rel. Harisiades v. Shaughnessy*, 187 F.2d 137, 138 (2d Cir. 1951). Then, while his appeal was pending, he returned to the district court and “moved for permission to amend.” *Harisiades v. Shaughnessy*, 90 F. Supp. 431, 432 & n.2 (S.D.N.Y. 1950). The United States “opposed the motion” on multiple grounds, see *id.* at 432–33, but it didn’t claim that Harisiades had abused the writ by moving to amend mid-appeal.

The district court in *Harisiades* followed precisely the path that Rivers advocates here. While it recognized that an appeal “deprive[s] the District Court of authority,” the court still deemed it “proper” to “consider the merits of the ... application to amend.” *Id.* at 433–34. In short: exactly what Rule 62.1(a) would later prescribe. See *Munoz v. United States*, 451 F. App’x 818, 819 n.1 (11th Cir. 2011) (Rule 62.1 “codif[ied]” existing practice). After doing so, the court denied the motion “on the merits”—without a hint that moving to amend was itself an abuse of the writ. *Id.* at 820.

The Second Circuit affirmed. When Harisiades challenged the denial of his motion to amend, the court consolidated that appeal with his pending habeas appeal, see 187 F.2d at 139, and decided both cases in the same four-page opinion. As to the amendment issue, Judge Swan (joined by Chief Judge Learned Hand and Judge Augustus Hand) proceeded straight to the merits and deemed the district court’s order “correct.” *Id.* at 139–40, 142. That is telling. After all, dismissing Harisiades’s motion as successive “would have been easier” than ruling on the merits.

Banister, 590 U.S. at 519 n.8. “And even more to the point, that course would usually have been required” if mid-appeal Rule 15 motions “counted as successive.” *Id.* The Second Circuit clearly did not view them that way.

But the story doesn’t end there. After the Second Circuit denied relief, this Court granted certiorari and affirmed. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Although the Court’s opinion focuses chiefly on the habeas denial, the Court also addressed the amendment issue. Like the lower courts, this Court went straight to the merits. Compare *id.* at 583 n.4, with 90 F. Supp. 437, and 187 F.2d at 139–40. And like the lower courts, this Court said not a word about abuse of the writ—an omission all the more striking for the fact that it came only two months after the Court had unanimously decried the “problems raised by ... applications for habeas corpus that are repetitious.” *United States v. Hayman*, 342 U.S. 205, 212 & n.14 (1952).

b. Nor was *Harisiades* the only dog that didn’t bark. Over the next four decades, prisoners regularly tried to amend their petitions after final judgment. But instead of dismissing these motions as successive, courts routinely addressed them on the merits. In fact, our research did not find a single pre-AEDPA case where a court treated mid-appeal efforts to amend or supplement as an abuse of the writ.

Some of these cases resemble *Harisiades*. Take *Strand v. United States*, 780 F.2d 1497 (10th Cir. 1985). The prisoner there filed an “amended petition” while his case was still pending before the district court. *Id.* at 1505 (McKay, J., dissenting). The court later denied relief—apparently without considering the amended petition—and the prisoner appealed. *Id.*

at 1498–99. While the appeal was pending, he filed a “renewed motion to supplement” in the district court. *Id.* After that too was denied, the prisoner appealed, and the Tenth Circuit consolidated the cases. *Id.* at 1499. The court affirmed without a hint that the prisoner had abused the writ. See *id.* at 1500.

In other cases, the prisoner tried to amend in the appellate court itself. *Bennett v. Robbins*, 329 F.2d 146, 147 (1st Cir. 1964), is typical. After the district court denied habeas relief, the prisoner appealed and asked the First Circuit to let him “amend his application.” *Id.* The court declined, without suggesting that the motion was abusive. *Id.* *Petty v. McCotter*, 779 F.2d 299 (5th Cir. 1986), is much the same. The prisoner there introduced a new claim for the first time on appeal. *Id.* at 301. In an opinion joined by Judge Jones, the Fifth Circuit remanded, holding that he “should be given an opportunity to amend.” *Id.* at 302. No member of the panel suggested that the prisoner was abusing the writ. See also *Clarke v. Henderson*, 403 F.2d 687, 688 (6th Cir. 1968); *Thomas v. Virginia*, 357 F.2d 87, 90 (4th Cir. 1966).

In still other cases, prisoners sought leave to amend after final judgment but before appeal. That’s what happened in *Bishop v. Lane*, 478 F. Supp. 865, 866 (E.D. Tenn. 1978). Instead of deeming the motion successive, the court simply walked the prisoner through the rules of civil procedure and then denied leave to amend. *Id.* at 467. See also *Briddle v. Scott*, 63 F.3d 364 (5th Cir. 1995).

What is striking about all these cases is that not a single judge suggested that any of the prisoners had abused the writ. It’s hard to see why “a half century’s worth of habeas courts would have resolved [Rule 15] motions on the merits” if they viewed them as succes-

sive. *Banister*, 590 U.S. at 519 n.8. “The only plausible account of their actions is that they did not.” *Id.*

C. AEDPA’s aims favor treating mid-appeal Rule 15 motions as part and parcel of the initial application.

“Congress passed AEDPA against this legal backdrop, and did nothing to change it.” *Id.* at 515. As *Banister* explained, AEDPA made it harder for second or successive petitions to get past the gate—but it did not “redefine what qualifies as a successive petition” in the first place. *Id.* “Nor do AEDPA’s purposes demand a change” in the practice just described. *Id.* Far from it: forcing mid-appeal Rule 15 motions to run the §2244(b)(2) gauntlet would frustrate—not further—efficiency and finality,” making it unlikely that “Congress would have viewed [them] as successive.” *Id.* at 512–13.

1. Conserving judicial resources. The question is not *whether* prisoners will race to court when exculpatory evidence emerges mid-appeal. They will—no matter what rule the Court adopts. The question instead is *how* the lower courts should review those inevitable filings.

a. Rivers’s rule lets only the most promising claims proceed, efficiently filtering out the rest. Under our approach, a mid-appeal Rule 15 motion would go to the district court judge who just decided the initial petition: the single decisionmaker most familiar with the case. If the motion raised a “substantial issue,” Rule 62.1(a)(3), the court could say so. *E.g.*, *Parry v. Kerestes*, 2013 WL 6002358, at *2 (W.D. Pa. Nov. 12, 2013). If not, the court could deny it. Rule 62.1(a)(2). Either way, a judge “familiar with a habeas appli-

cant’s claims” would likely make “quick work” of such a filing. *Banister*, 590 U.S. at 517.

b. The Fifth Circuit’s contrary rule displaces district courts and burdens the courts of appeals. Because the Fifth Circuit’s approach turns on whether a mid-appeal filing “raise[s] habeas claims,” Pet. App. 10a, the district court must first decide whether the prisoner has asserted “merits-based” or “integrity-based” grounds for relief—a “not-always-easy threshold determination.” *Banister*, 590 U.S. at 518 n.7. If the filing raises merits-based claims, the district court lacks jurisdiction and must either dismiss or transfer it as a second or successive petition. Three appellate judges must then decide—from square zero, without a district-court opinion, and likely without adversarial briefing, see *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., specially concurring)—whether “the factual predicate for the claim” could have been “discovered previously through the exercise of due diligence.” 28 U.S.C. §2244(b)(2)(B)(i). Next they must examine “the evidence as a whole” and determine whether “the facts underlying the claim, if proven,” would be “sufficient to establish by clear and convincing evidence” that “no reasonable factfinder” would have convicted but for constitutional error. *Id.* §2244(b)(2)(B)(ii). That, in turn, means considering the state’s “theory of the case,” the evidence “support[ing]” that theory, and the counterfactual effect of the “newly-discovered evidence,” including how it would have undermined the state’s evidence and influenced the theories—and even “alternative theories”—that both sides could have “offered the jury.” *Munchinski v. Wilson*, 694 F.3d 308, 335–37 (3d Cir. 2012). One recent authorization case features a two-column, sixteen-row chart that spans three pages of the Federal Reporter. See

In re Will, 970 F.3d 536, 544–46 (5th Cir. 2020). And that’s just the first step. If the appellate court authorizes a “second or successive” petition, the case goes back to the district court, which must “conduct its own thorough review” to ensure “the requirements of §2244(b)(2) have been satisfied.” *Id.* at 543 (cleaned up). Still more: because any claim “presented in a prior application” must be dismissed, §2244(b)(1), both courts must compare the “second or successive” petition to every prior petition and determine precisely what “claim[s]” were already brought, *id.* at 541—a task that usually means slogging through “less-than-limpid” pro se filings. *Banister*, 590 U.S. at 516.

All agree that “a three-judge panel of the court of appeals” is the first port of call for petitions filed after a prisoner exhausts appellate review of his initial application. 28 U.S.C. §2244(b)(3)(B). But a Congress concerned about efficiency had little reason to channel filings like Rivers’s down that path—and good reason to treat them as “part and parcel of the first habeas proceeding.” *Banister*, 590 U.S. at 507.

2. Reducing piecemeal litigation. AEDPA’s second aim likewise favors Rivers’s rule. Under our approach, an indicative ruling followed by remand could make further appellate proceedings “altogether unnecessary.” *Banister*, 590 U.S. at 516. Conversely, if a district court denies leave to amend, there is little risk of “piecemeal appellate review.” *Id.* For one thing, prisoners “may not” appeal a “final order in a habeas corpus proceeding” without a “certificate of appealability.” See 28 U.S.C. §2253(c)(1). And even if such an appeal *did* get off the ground, it would be consolidated with the already-pending habeas appeal, see *Harisiades*, 187 F.2d at 139; *Strand*, 780 F.2d 1499, and reviewed for “abuse of discretion.” *E.g.*,

Brown v. United States, 384 F. App'x 815, 817 (10th Cir. 2010) (Gorsuch, J.).

The Fifth Circuit's contrary rule calls for two simultaneous appellate proceedings, demanding the attention of up to six judges. Without an indicative ruling, Panel 1 (the original merits panel) would have to press forward and decide the initial appeal—even if the new evidence was outcome-determinative. Meanwhile, their colleagues on Panel 2 (the authorization panel) would have to learn the case from scratch and evaluate the new evidence without “the benefit of the district court’s plenary findings.” *Banister*, 590 U.S. at 517. That is the epitome of piecemeal litigation.

3. Hastening finality. Finality cuts the same way. If the new evidence here isn’t the bombshell that Rivers reckons, the best way to “lend[] finality” to his conviction “within a reasonable time” would have been for the district court to say so back in 2021. *Banister*, 590 U.S. at 512. District courts are well suited to that task, with tools and experience that appellate courts lack. Instead, the lower courts sent Rivers and Texas down a path that could keep the “cloud of federal review” over Rivers’s conviction for years to come. *Id.* at 523 (Alito, J., dissenting); see, e.g., *In re Will*, 970 F.3d at 536 (authorization proceeding filed September 26, 2017 and closed August 5, 2020).

* * *

Had Congress wanted mid-appeal Rule 15 motions to count as second or successive petitions, “it easily could have written” such a law. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). But it’s hard to squeeze that rule from the text of §2244(b) and its historical backdrop. And it’s even harder to attribute the consequences it would entail to a Congress fo-

cused on judicial resources, efficiency, and finality. For more than two centuries, this Court has declined to “adopt an interpretation that will defeat [a statute’s] own purpose, if it will admit of any other reasonable construction.” *The Emily*, 22 U.S. (9 Wheat.) 381, 388 (1824). It should do the same here.

D. Treating mid-appeal Rule 15 motions as second or successive would produce perverse results.

All agree that §2244(b) kicks in after a prisoner has exhausted the opportunity for review of his initial habeas petition. But applying §2244(b)(2) to mid-appeal Rule 15 motions creates a procedural patchwork and slams the door on viable constitutional claims long before AEDPA demands.

1. Treating mid-appeal Rule 15 motions as second or successive applications creates “procedural anomalies.” *Castro v. United States*, 540 U.S. 375, 380–81 (2003). “[T]he courts of appeals agree ... that an amended petition, filed after the initial one but before judgment, is not second or successive.” *Banister*, 590 U.S. at 512. And if the prisoner won on appeal, Rule 15 would also govern any post-remand motion to amend. See *Boyd v. Sec’y, Dep’t of Corr.*, 114 F.4th 1232, 1240 (11th Cir. 2024) (Pryor, J., concurring); *Mendoza*, 81 F.4th at 468–71. Under the Fifth Circuit’s approach, the very same document would be a successive application if a prisoner filed it in the district court after final judgment, but not if the prisoner filed it before final judgment or waited until after the court of appeals vacated and remanded.

2. The Fifth Circuit’s rule also draws senseless distinctions between similarly situated prisoners.

Many meritorious petitions depend on new evidence. *E.g.*, *Andrus v. Texas*, 590 U.S. 806, 807 (2020); *Kyles v. Whitley*, 514 U.S. 419, 421–22 (1995). In such cases, a prisoner must usually show a “reasonable probability” that, had the new evidence emerged sooner, “the result of the [challenged] proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 681–82 (1985). That’s a burden—but much lighter than the one imposed by AEDPA. Under §2244(b)(2)(B)(ii), a second or successive application must present facts that would “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty.” That raises the bar. No longer is it enough to “undermin[e] confidence in the outcome of the trial.” *Bagley*, 473 U.S. at 678. Instead, the evidence must “establish ... innocence.” *Banister*, 590 U.S. at 509. And AEDPA also ratchets up the burden of proof. A “reasonable probability” is less than a preponderance. See *Kyles*, 514 U.S. at 434. But §2244(b)(2)(B)(ii) demands “clear and convincing evidence”: *more* than a preponderance. *Ca. ex rel. Cooper v. Mitchell Bros.’ Santa Ana Theater*, 454 U.S. 90, 93 n.6 (1981).

The difference between these two standards means that identically situated prisoners will face different outcomes through no fault of their own. Imagine two prisoners whose trial counsel sat on mitigating evidence that would have yielded a lighter sentence. Prisoner 1 requests his counsel’s files, receives them promptly, and discovers the evidence while preparing his initial habeas petition. Prisoner 2 also requests his counsel’s files, but the lawyer stonewalls for years—turning them over only on pain of disbarment, while the prisoner’s initial petition is pending on appeal. Under the Fifth Circuit’s rule, Prisoner 1 faces

the *Strickland* standard and may well get a lesser sentence. But Prisoner 2 is out of luck. While the evidence shows ineffective assistance, it doesn't show innocence, so he fails under §2244(b)(2)(B)(ii).

II. Alternatively, §2244(b) applies only after the initial petition is final on appeal.

The Court may also reverse for the independent reason that §2244(b) does not apply while a prisoner's initial petition is still pending on appeal. *United States v. Santarelli*, 929 F.3d 95, 104–05 (3d Cir. 2019); *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005). The Fifth Circuit held otherwise, declaring that that “filings introduced after a final judgment that raise habeas claims ... are deemed successive.” Pet. App. 10a. Contra *Banister*, 590 U.S. at 510–11. If that rule sounds familiar, it should. In *Banister*, Texas urged this Court to hold that “[e]ntry of final judgment is the dividing line between a first and second application.” Brief for Respondent, *Banister v. Davis*, No. 18-6943 at 18. The Court declined that invitation there, and it should do the same here. In the postconviction context, this Court has long treated the end of appellate review—not the entry of final judgment—as the relevant inflection point. Far from rejecting that view, Congress embraced it throughout AEDPA, under which a state's interest in repose vests only after a prisoner has exhausted the opportunity for review.

A. Before AEDPA, courts treated the end of appellate review as the dividing line between first and successive petitions.

Article III creates “not a batch of unconnected courts, but a judicial *department* composed of ‘inferior courts’ and ‘one supreme Court.’” *Plaut v. Spendthrift*

Farm, Inc., 514 U.S. 211, 227 (1995). From that structure follows “a distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed).” *Id.* Only the former is “the final word of the department.” *Id.* That is why this Court’s “unvarying understanding of finality for collateral review purposes” has always looked to the end of appellate review. *Clay v. United States*, 537 U.S. 522, 527 (2003). In this context, finality attaches only “when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” *Id.* at 528.

No surprise, then, that the earliest abuse-of-the-writ cases recognized that “action ... on [a] second application” should turn on the “character of the court or officer to whom the first application was made, and the fullness of the consideration given to it.” *Cuddy*, 40 F. at 66. What mattered to this Court in *Salinger*, for example, was that the “prior refusal” of habeas relief had been “affirmed in a considered opinion by a *Circuit Court of Appeals*”—not that a district court had entered final judgment. 265 U.S. at 226–27, 232 (emphasis added). Likewise, Justice Field explained in *Cuddy* that habeas relief was unavailable to a prisoner who had already “invok[ed] the judgment of the *appellate* court upon the record presented” and “fail[ed] therein.” 40 F. at 64 (emphasis added). That implies that consequences for later abuses of the writ attached only after a case was final on appeal.

Courts continued applying abuse-of-the-writ principles by reference to appellate review right up until Congress enacted AEDPA. Take *Walker v. Lockhart*,

514 F. Supp. 1347 (E.D. Ark. 1981). The prisoner there sought habeas relief in 1967, lost in the district court (Henley, C.J.), and then lost again on appeal. See *id.* at 1350. When he filed “identical” claims twelve years later, the district court (Woods, J.) declined to “reac[h] the merits” of the successive petition. *Id.* If the dividing line between first and successive petitions was final judgment, one would expect Judge Woods to focus on Chief Judge Henley’s 1967 opinion—not the Eighth Circuit’s affirmance. Instead, Judge Woods reasoned that reconsidering the claims “would put this Court in the position of reviewing a decision of *its Court of Appeals*.” *Id.* at 1352 (emphasis added). Here again, this suggests that appellate review was the dividing line for abuse-of-the-writ purposes. See also, *e.g.*, *Whitney v. United States*, 424 F. Supp. 1236, 1237 (E.D. Mo. 1976); *Andrews v. Deland*, 943 F.2d 1162, 1173 (10th Cir. 1991).

If pre-AEDPA courts thought that final judgment was what mattered for abuse-of-the-writ purposes, “there should be lots of decisions” saying so. *Banister*, 590 U.S. at 514. Instead, courts consistently spoke as though the end of appellate review marked the dividing line between first and successive petitions. Against that backdrop, a rule focused on final judgment is “bad wine of recent vintage.” *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (citation omitted).

B. AEDPA itself pegs finality to the end of appellate review, not final judgment.

Numerous provisions of AEDPA treat the end of appellate review as the relevant inflection point. It would be strange if §2244(b) broke ranks and focused on the district court’s entry of judgment.

AEDPA ties exhaustion to the end of state appellate review. To seek federal habeas relief, a state prisoner must first “exhaust[t] the remedies available in the courts of the State.” 28 U.S.C. §2254(b)(1)(A). That means receiving not just a final judgment from the trial court, but also “invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Section 2244 itself focuses on the end of appellate review for statute-of-limitations and tolling purposes. Under §2244(d)(1)(A), the one-year deadline for seeking federal habeas relief runs from the date “on which the [state] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. §2244(d)(1)(A) (emphasis added); see also *id.* §2263(a). And tolling works the same way. AEDPA’s statute of limitations is tolled while an application for state postconviction relief is “pending.” *Id.* §2244(d)(2). An application does not cease to be pending upon “a lower court’s entry of judgment.” *Carey v. Saffold*, 536 U.S. 214, 219 (2002). Rather, it remains “pending” until it “has achieved final resolution.” *Id.* at 220–21; see also 28 U.S.C. §2263(b)(2).

Postconviction review of federal judgments follows the same pattern. Under §2255(f)(1), a prisoner must seek relief within one year after a federal “judgment of conviction becomes final.” In that context, finality does not attach until this Court has spoken or the chance for review has run. *Clay*, 537 U.S. at 527–28.

C. A state’s interest in repose does not vest until the end of appellate review.

AEDPA functions as a statute of repose. Federal habeas law gives prisoners one chance to drag state

prosecutors into federal court. After that, §2244(b)(2) tells them not to come back unless they have “a new and retroactive rule of constitutional law” or “previously undiscoverable facts” showing “innocence.” *Banister*, 590 U.S. at 509. Beyond those narrow exceptions, AEDPA “effect[s] a legislative judgment” that states “should be free” from the burden of defending the same conviction twice. *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) (cleaned up).

But Congress did not recognize a state’s interest in repose while a prisoner’s first petition remains pending. If that interest vested after a district court enters final judgment, the case should end there. Instead, Congress authorized “appeals from the habeas court’s judgment” and “still later petitions to this Court”—treating them both as “further iterations of the first habeas application.” *Banister*, 590 U.S. at 512. Since the case is “pending until the appeal is disposed of,” *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142–43 (1924), the state’s interest in repose vests only when the case is final on appeal.

III. The Fifth Circuit’s contrary arguments fail.

A. *Gonzalez* does not control this case.

The Fifth Circuit thought that “principles” from *Gonzalez v. Crosby* required it to deem Rivers’s motion successive. See Pet. App. 10a. Not at all. The court squeezed those principles from “a handful of sentences extracted from [a] decisio[n] that had no reason to pass on” the question presented here. *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022). Nor does this case raise the circumvention concerns that motivated *Gonzalez*. Rule 15 and Rule 60(b) have little in common, and allowing mid-appeal Rule 15

motions poses even less circumvention risk than allowing the Rule 59(e) motions approved in *Banister*.

1. *Gonzalez* did not address §2242 or analyze when §2244(b) first kicks in, so it “cannot make [the Court] stop in its tracks.” *Royal Canin U.S.A., Inc. v. Wullschleger*, — S. Ct. — (2025) (slip op. at 17).

The question in *Gonzalez* was “whether a Rule 60(b) motion filed by a habeas petitioner is a ‘habeas corpus application’ as the statute uses that term.” 545 U.S. at 530. To answer that question, the Court explained, the “first step of analysis” is to ask whether the motion contains a habeas “claim”—“an asserted federal basis for relief” from a state conviction. *Id.* at 530. When a Rule 60(b) motion seeks to “add a new ground for relief” or relitigate the “previous resolution of a claim *on the merits*,” it raises a “claim.” *Id.* at 532. But that is not the case when the motion attacks “some defect in the integrity of the federal habeas proceedings.” *Id.* The Rule 60(b) motion in *Gonzalez* attacked a “nonmerits aspect” of the prior habeas proceeding, so there was “no basis” to treat it like a habeas application at all. *Id.* at 533–34.

Gonzalez also reasoned that a merits-based Rule 60(b) motion is a habeas application (or at least its functional equivalent) and “should be treated accordingly” when the filing is second or successive. *Id.* at 531–32. We have no quarrel with that proposition. This case involves a Rule 15 motion, not a Rule 60(b) motion. *Gonzalez* said nothing about Rule 15 or §2242, not a single brief cited those provisions, and they did not come up at argument. Nor did *Gonzalez* implicate or address whether the dividing line between an initial petition and a “second or successive” petition is final judgment or the end of the appeal. The Court had no occasion to consider that issue be-

cause Aurelio Gonzalez filed his Rule 60(b) motion more than a year after “abandon[ing] any attempt to seek review” of the order denying his habeas petition. *Gonzalez*, 545 U.S. at 537. So unlike this case, there was no pending appeal in *Gonzalez*.

2. Nor does *Gonzalez*’s logic control. *Gonzalez* worried about circumvention because the prisoner there was relying on a generally applicable Federal Rule of Civil Procedure—not the federal habeas statute itself. But those concerns are misplaced here. When a prisoner moves to amend or supplement his initial petition, habeas law “itself contains” the pathway he “seeks to exploit.” *Banister*, 590 U.S. at 530 (Alito, J., dissenting). In other words, Congress has already weighed the risks of circumvention and determined that applications “may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” 28 U.S.C. §2242. If §2242 is “bad policy” or “working in unintended ways,” states “can ask Congress to change the law.” But “this Court is not the forum for such arguments.” *Am. Hosp. Ass’n v. Becerra*, 596 U.S. 724, 738 (2022).

In all events, mid-appeal Rule 15 motions differ from the Rule 60(b) motions at issue in *Gonzalez* “in just about every way that matters.” *Banister*, 590 U.S. at 518. They were not historically deemed abusive. See *supra* §1.B.2. They are not “open-ended”: they’re brought within the “fixed ... window” while an appeal is pending—the next phase in the “original proceeding.” 590 U.S. at 519–20; see *supra* §II.A. Any appeal would be consolidated into the pending appeal. See *supra* §I.C.2. And (as we discuss next) numerous “rules suppres[s] abuse.” 590 U.S. at 520. In fact, mid-appeal Rule 15 motions pose far less circumvention risk than the Rule 59(e) motions this

Court approved in *Banister*. Rule 59(e) lets prisoners raise “new arguments” based on “newly discovered or previously unavailable evidence” with the say-so of a single judge. *Banister* 590 U.S. at 508 n.2 (citation omitted). By contrast, amending mid-appeal requires at least three judges to agree that the claim is worth the candle: the district court plus a panel majority—the same lineup needed for a second or successive petition. See 28 U.S.C. §2244(b)(3)–(4).

B. The ordinary civil rules provide ample safeguards against abusive motions.

The Fifth Circuit also worried about opening the floodgates to “an unlimited number of new applications until the appeal is over.” Pet. App. 8a. Even without §2244(b)(2), however, numerous barriers still incentivize prisoners to bring all their claims at once, as 20 years of experience in the Second Circuit shows.

1. Rivers’s rule “maintains a prisoner’s incentives to consolidate all of his claims in his initial application.” *Banister*, 590 U.S. at 516. To see why, just count the hurdles that a prisoner must clear before amending his petition mid-appeal. First he needs an indicative ruling from the same judge who just ruled against him. Next he faces an absolute jurisdictional barrier: without two votes to remand, his motion to amend is going nowhere. Of course, none of that will happen unless he can show that his proposed amendments are not prejudicial, dilatory, or futile. *Foman*, 371 U.S. at 182. Then there are abuse-of-the-writ rules, e.g., *Santarelli*, 929 F.3d at 106, which turn away claims that “w[ere], or could have been, raised ... earlier,” *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002), or whose “whose purpose is to vex, harass or delay,” *Ching v. United States*, 298 F.3d 174, 179 (2d Cir. 2002). And that still leaves AEDPA’s one-year

statute of limitations and Rule 15's relation-back requirements, see *Mayle*, 545 U.S. at 648–50, which together will doom untimely amendments.

All but the most promising claims will falter in that obstacle course—and any self-interested prisoner has good reason to avoid it. (Of course, any prisoners who would be undeterred by all of that are likely the sort of prisoners who would try their luck on §2244(b)(2) as well. Channeling *their* mid-appeal filings through the district court is far more efficient than saddling the court of appeals with them. See *supra* §I.C.1.)

2. The Second Circuit is a perfect case study. For the last two decades, courts there have applied §2244(b) only after a prisoner exhausts appellate review of his initial petition. *Whab*, 408 F.3d at 118. They have not seen a flood of mid-appeal habeas motions. Nor are they struggling to handle the motions they do receive. Courts in the Second Circuit routinely deny such motions in concise orders, *e.g.*, *Cooper v. United States*, 2013 WL 57043 (S.D.N.Y. Jan. 4, 2013) (two pages), issued within a matter of days, *e.g.*, *Steele v. United States*, 2022 WL 4292271 (S.D.N.Y. Sept. 16, 2022) (seven business days). And they often do so on threshold grounds, without requesting a response. *E.g.*, *Lewis v. Brown*, 2013 WL 2181520, at *6 (W.D.N.Y. May 20, 2013) (abuse of the writ). Two decades in, the sky has not fallen in the Second Circuit—and it won't fall anywhere else either.

IV. The Court should reverse and remand.

A. Under the correct standard, this is an easy case. When Rivers moved to amend in February 2021, his pending appeal barred the district court from granting the motion. See *Griggs*, 459 U.S. at 58. But Rule 62.1(a)(3) still permitted the district court to consider

the motion and determine whether it “raise[d] a substantial issue” under the Rule 15 standards. A court that had “already analyzed” Rivers’s initial petition would have no trouble answering that question. *Magwood v. Patterson*, 561 U.S. 320, 340 n.15 (2010).

Amendment is plainly warranted here. When the district court denied relief in Rivers’s initial habeas action, it held that Rivers had not shown his counsel’s performance was “so flawed that it prejudiced his case.” *Davis*, 2018 WL 4443153, at *5, *recommendation adopted* 2018 WL 4409830, at *1 (N.D. Tex. Sept. 17, 2018). But the state investigator’s report tips the balance. It shows that counsel had “exculpatory evidence in their possession” yet failed to use it, J.A. 68—a classic *Strickland* violation. *E.g.*, *Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009). And it also suggests that the state “falsely pursued child pornography charges” based on evidence its “own investigators” had deemed “NOT CHILD PORN.” J.A. 74. That violates due process. See *Giles v. Maryland*, 386 U.S. 66, 74–80 (1967). All of that makes this a straightforward case under Rule 15.

B. The Fifth Circuit deemed it “unclear” what relief Rivers could obtain now that his initial habeas petition has been denied, Pet. App. 3a n.2. The answer is simple. If this Court reverses, the district court can grant Rivers effective relief by reopening the judgment denying his initial habeas petition. While Texas will be free to oppose such relief below, it has waived any objection here. See Sup. Ct. R. 15.2.

The district court’s error skewed the proceedings that followed. Rather than considering Rivers’s motion on the merits as part of his original habeas action, the court opened a new action and ultimately held that §2244(b) left it “without jurisdiction.” Pet.

App. 19a. That was wrong—and the mistake had consequences. Rivers tried to amend his initial petition in February 2021, a full year before the last filings were submitted in his initial habeas appeal. Compare J.A. 5, *with* J.A. 9. But for that error, the district court could have issued an indicative ruling in the original habeas action, inviting the Fifth Circuit to remand well before the panel picked up a single brief. Instead, with no indicative ruling, the panel affirmed the denial of habeas relief without addressing the newly discovered evidence.

On remand, the district court can give Rivers effective relief by setting aside the judgment denying his habeas petition on the ground that its error undermined “the integrity of” his original habeas action. *Gonzalez*, 545 U.S. at 532 (addressing integrity-based Rule 60 motions). The court will then be free to consider Rivers’s motion on the merits for the first time and to let Rivers amend in light of the newly discovered evidence.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

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APPENDIX

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APPENDIX

28 U.S.C. § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. § 2244. Finality of determination

* * *

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * *

Nos. 23-1002 and 23-1150

In the Supreme Court of the United States

TONY R. HEWITT, PETITIONER

v.

UNITED STATES OF AMERICA

COREY DEYON DUFFEY AND JARVIS DUPREE ROSS,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR RESPONDENT
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221-5222, which reduced certain mandatory consecutive sentences under 18 U.S.C. 924(c) for “any offense that was committed before the date of enactment of [the] Act, if a sentence for the offense has not been imposed as of such date of enactment,” applies at a post-Act resentencing following the vacatur of a pre-Act sentence.

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In the Supreme Court of the United States

No. 23-1002

TONY R. HEWITT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 23-1150

COREY DEYON DUFFEY AND JARVIS DUPREE ROSS,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR RESPONDENT
SUPPORTING PETITIONERS**

OPINIONS BELOW

The opinion of the court of appeals (Hewitt Pet. App. 1a-16a; Duffey & Ross Pet. App. 1a-19a) is reported at 92 F.4th 304. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 582 Fed. Appx. 528 and 456 Fed. Appx. 434.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2024. The petitions for writs of certiorari were filed on March 8, 2024 (Hewitt), and April 19, 2024

(Duffey and Ross), and were granted on July 2, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221-5222, provides:

SEC. 403. CLARIFICATION OF SETION 924(c) OF TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking “second or subsequent conviction under this subsection” and inserting “violation of this subsection that occurs after a prior conviction under this subsection has become final”.

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Ibid.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on multiple counts of conspiracy, attempted bank robbery, and bank robbery, as well as corresponding counts of using or carrying a firearm during and in relation to a crime of violence, in violation

of 18 U.S.C. 924(c). Hewitt Judgment 1-4; Duffey Judgment 1-4; Ross Judgment 1-4; see Hewitt Pet. App. 2a.¹ Hewitt was sentenced to 4260 months of imprisonment, to be followed by five years of supervised release; Duffey was sentenced to 4253 months of imprisonment, to be followed by five years of supervised release; and Ross was sentenced to 3960 months of imprisonment, to be followed by five years of supervised release. Hewitt Judgment 2, 5; Duffey Judgment 2, 5; Ross Judgment 2, 5.

The court of appeals vacated four of the counts but affirmed the remainder of petitioners' convictions, 456 Fed. Appx. 434, and this Court denied Hewitt's petition for a writ of certiorari, 566 U.S. 1029. On remand, the district court resentenced Hewitt to 3660 months of imprisonment, Duffey to 3653 months of imprisonment, and Ross to 3425 months of imprisonment, with each petitioner's term to be followed by five years of supervised release. Hewitt Am. Judgment 2, 5; Duffey Am. Judgment 2, 5; Ross Am. Judgment 4-6. The court of appeals affirmed, 582 Fed. Appx. 528, and this Court denied Hewitt's petition for a writ of certiorari, 574 U.S. 1201. Petitioners later filed motions for post-judgment relief under 28 U.S.C. 2255, which were denied by the district court. Pet. App. 3a.

In 2020 and 2021, the court of appeals granted each petitioner authorization to file a second or successive Section 2255 motion. 20-cv-1686 D. Ct. Doc. 10 (Jan. 7, 2021) (Duffey); 20-cv-2245 D. Ct. Doc. 6 (Dec. 14, 2020) (Ross); 21-cv-1397 D. Ct. Doc. 2 (Jan. 28, 2021) (Hewitt). The district court subsequently vacated seven of

¹ Unless otherwise specified, all citations to district court documents are to the record in No. 08-cr-167, and all citations to the petition appendix are to the appendix in *Hewitt*, No. 23-1002.

Hewitt’s and Duffey’s Section 924(c) convictions and six of Ross’s Section 924(c) convictions, and ordered resentencing on petitioners’ remaining counts. D. Ct. Doc. 672 (June 14, 2021) (Duffey); D. Ct. Doc. 683 (Aug. 19, 2021) (Hewitt); D. Ct. Doc. 700 (Nov. 2, 2021) (Ross). Hewitt was resentenced to 1625 months of imprisonment, Duffey was resentenced to 1560 months of imprisonment, and Ross was resentenced to 1625 months of imprisonment, with each petitioner’s term to be followed by five years of supervised release. Hewitt Second Am. Judgment 3-4; Ross Second Am. Judgment 3-4; Duffey Second Am. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-16a.

A. Legal Background

1. Section 924(c)(1)(A) provides that “any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime,” receive a sentence of “not less than 5 years.” 18 U.S.C. 924(c)(1)(A)(i). The statutory minimum increases to seven years if the firearm is brandished, and ten years if the firearm is discharged. 18 U.S.C. 924(c)(1)(A)(ii) and (iii). In addition, the statute provides that “no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person.” 18 U.S.C. 924(c)(1)(D)(ii). Section 924(c) thus displaces the ordinary discretion of a district court to impose concurrent sentences, rather than consecutive sentences, for multiple counts of conviction. See 18 U.S.C. 3584(a); *Lora v. United States*, 599 U.S. 453, 455 (2023).

At the time of petitioners' offenses in 2008, Section 924(c) provided that "in the case of a second or subsequent conviction under this subsection, the person shall * * * be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(C)(i) (2006). In *Deal v. United States*, 508 U.S. 129 (1993), this Court construed the reference to a "second or subsequent conviction" to include circumstances in which the second or subsequent Section 924(c) conviction was obtained in the same proceeding as the defendant's first Section 924(c) conviction. *Id.* at 132-137. As a result, when a defendant was convicted of multiple Section 924(c) offenses in a single proceeding, the district court was required to impose a statutory minimum 25-year sentence for the second and each additional conviction. See *ibid.* And because the district court lacked discretion to have those sentences run concurrently, the 25-year sentences "stacked" on top of each other and any other sentences imposed in the same proceeding. Pet. App. 2a; see *Deal*, 508 U.S. at 137.

As a result, in certain cases, Section 924(c) required district courts to impose a statutory minimum "prison term of many decades" that was "certain to outlast the defendant's life and the lives of every person [then] walking the planet." *United States v. Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014). And Section 924(c)'s mandatory stacked consecutive sentences came under substantial criticism—including by the Sentencing Commission and the Judicial Conference's Criminal Law Committee—as excessive and unjust. See, e.g., U.S. Sentencing Commission, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359 (Oct. 2011) ("The 'stacking' of mandatory minimum penalties for multiple violations of

section 924(c) results in excessively severe and unjust sentences in some cases.”); *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 111th Cong. 1st Sess., 35 (2009) (testimony of Chief Judge Julie E. Carnes on behalf of the Criminal Law Committee of the Judicial Conference of the United States) (explaining that Section 924(c) “is so draconian that the Conference has taken a specific position against it”).

2. On December 21, 2018, Congress enacted the First Step Act of 2018 (Act), Pub. L. No. 115-391, 132 Stat. 5194. The Act is “a significant sentencing reform law,” *Pulsifer v. United States*, 601 U.S. 124, 151 (2024), that included an amendment that eliminated Section 924(c)’s requirement to stack 25-year sentences on a defendant convicted of multiple Section 924(c) offenses in the same proceeding.

Specifically, Section 403(a) of the Act, 132 Stat. 5221-5222, amended the statute to provide that a minimum consecutive 25-year sentence of imprisonment would be required only in the case of a “violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final.” *Ibid.* As a result, Section 924(c) now requires only the default statutory minimums—not automatic 25-year minimums—for additional Section 924(c) convictions entered in a single proceeding. See 18 U.S.C. 924(c)(1)(A), (C); Pet. App. 4a n.1.

Congress provided that the reduced penalties would retrospectively apply to pre-Act offenses in certain circumstances. Specifically, Section 403(b) states that the

amendment “appl[ies] to any offense that was committed before the date of enactment of [the First Step Act] if a sentence for the offense has not been imposed as of such date of enactment.” 132 Stat. 5222.

An identically worded provision appears in Section 401(c) of the Act, see 132 Stat. 5221, which specifies the applicability of amendments that reduce the statutory minimum penalties associated with certain recidivist drug-trafficking offenses and narrow the kinds of predicate convictions that trigger those penalties, see § 401(a) and (b), 132 Stat. 5220-5221.

B. Factual And Procedural Background

1. Between January and June 2008, petitioners and others conspired to commit a series of bank robberies in the Dallas-Fort Worth area of Texas. See Hewitt Presentence Investigation Report (Hewitt PSR) ¶¶ 5-26. The group stole a total of more than \$350,000 from several financial institutions. *Id.* ¶ 26. On June 2, 2008, petitioners and several of their confederates were arrested while preparing to commit an armed robbery of a bank in Garland, Texas. *Id.* ¶¶ 6, 8-10.

A federal grand jury charged each petitioner with multiple counts of conspiracy, attempted bank robbery, and bank robbery; Ross was also charged with kidnapping. Pet. App. 2a; Superseding Indictment 1-55. In addition, the grand jury charged Hewitt and Duffey with 14 counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), and charged Ross with 13 counts of violating Section 924(c). Superseding Indictment 1-55. Petitioners and two other codefendants proceeded to trial, and a jury returned a guilty verdict against each petitioner on all counts. D. Ct. Doc. 238 (Aug. 12, 2009).

2. Under the then-current version of Section 924(c), the district court was required to impose a minimum 25-year sentence for all but one of each petitioner's Section 924(c) offenses. See 18 U.S.C. 924(c)(1)(C)(i) (2006). Applying that requirement, the court sentenced each petitioner to a term of over 300 years of imprisonment. Hewitt Judgment 2 (4260 months); Duffey Judgment 2 (4253 months); Ross Judgment 2 (3960 months). Those sentences included 13 consecutive minimum 25-year terms of imprisonment for Hewitt, 12 consecutive minimum 25-year terms of imprisonment for Duffey, and 12 consecutive minimum 25-year terms of imprisonment for Ross. Hewitt Judgment 2; Duffey Judgment 2; Ross Judgment 2.

Petitioners appealed, and the court of appeals vacated two of each petitioner's convictions for attempted bank robbery as well as the associated Section 924(c) convictions, but otherwise affirmed. 456 Fed. Appx. at 435. This Court denied Hewitt's petition for a writ of certiorari. 566 U.S. 1029. On remand, the district court resentenced petitioners on the remaining counts, with each petitioner receiving a sentence of over 280 years of imprisonment. Hewitt Am. Judgment 2 (3660 months); Duffey Am. Judgment 2 (3653 months); Ross Am. Judgment 4-5 (3425 months). Those sentences again included mandatory consecutive 25-year terms of imprisonment for all but one of each petitioner's Section 924(c) offenses—11 such terms for Hewitt, and ten such terms for Duffey and Ross. Hewitt Am. Judgment 2; Duffey Am. Judgment 2; Ross Am. Judgment 4-5.

Following resentencing, the court of appeals affirmed Hewitt's and Ross's sentences, 582 Fed. Appx. at 529-530, and dismissed Duffey's appeal, No. 12-11021 (Nov. 7, 2013). This Court denied Hewitt's petition for

a writ of certiorari. 574 U.S. 1201. Petitioners later moved to vacate their convictions and sentences under 28 U.S.C. 2255 and the district court denied those motions. 15-cv-500 D. Ct. Doc. 23 (Jan. 17, 2018) (Duffey); 16-cv-603 D. Ct. Doc. 58 (Aug. 13, 2018) (Hewitt); 15-cv-3233 D. Ct. Doc. 9 (Aug. 3, 2017) (Ross).

3. In 2019, this Court held in *United States v. Davis*, 588 U.S. 445 (2019), that the “crime of violence” definition in Section 924(c)(3)(B) is unconstitutionally vague, *id.* at 470. The court of appeals then recognized that conspiracy to commit bank robbery does not qualify as a predicate crime of violence under the remaining “crime of violence” definition in Section 924(c)(3)(A). See *United States v. Reece*, 938 F.3d 630, 635-636 (5th Cir. 2019), cert. denied, 142 S. Ct. 364 (2021). And based on that precedent, the court of appeals granted each petitioner authorization to file a second or successive motion under Section 2255 to request vacatur of Section 924(c) convictions that were predicated on conspiring to commit bank robbery. See 28 U.S.C. 2255(h)(2); 20-cv-1686 D. Ct. Doc. 10 (Duffey); 20-cv-2245 D. Ct. Doc. 6 (Ross); 21-cv-1397 D. Ct. Doc. 2 (Hewitt).

The government agreed that the convictions should be vacated, and the district court granted each petitioner’s motion, vacated the relevant Section 924(c) convictions, and ordered resentencing on the remaining counts. D. Ct. Doc. 672, at 2 (Duffey); D. Ct. Doc. 683, at 2 (Hewitt); D. Ct. Doc. 700, at 2 (Ross).

4. The resentencing hearings occurred after Congress’s enactment of the First Step Act. At the time of the resentencing hearings for petitioners Duffey and Ross, the government took the view that the reduced penalties adopted in Section 403 of the First Step Act

did not apply when a defendant had been sentenced before the Act's enactment, even if the sentence was subsequently vacated and he obtained a resentencing. The government therefore opposed Duffey's and Ross's contentions that they should be resentenced pursuant to Section 403(a)'s amendment to Section 924(c). D. Ct. Doc. 730, at 1-3 (Feb. 7, 2022); D. Ct. Doc. 747, at 1-3 (Mar. 21, 2022).

The district court agreed with the government's position and declined to apply Section 403(a). 3/2/22 Duffey Sent. Tr. 13; 3/24/22 Ross Sent. Tr. 22-23. Applying the pre-First Step Act version of Section 924(c), the court resentenced Duffey and Ross to over 100 years of imprisonment, with each sentence including four consecutive 25-year sentences, as required by the previous—but not the current—version of Section 924(c). Duffey Second Am. Judgment 3 (1560 months); Ross Second Am. Judgment 3 (1625 months); compare 18 U.S.C. 924(c)(1)(C)(i) (2006), with 18 U.S.C. 924(c)(1)(C)(i) (2018).

By the time of Hewitt's resentencing, the government had reexamined its position and determined “that the best reading of Section 403” is that someone receiving a fresh post-Act sentence following the vacatur of a pre-Act sentence “should receive the benefit of the Act's reduced statutory minimum sentences.” D. Ct. Doc. 771, at 2-3 (Oct. 5, 2022). The government therefore joined Hewitt in objecting to the Probation Office's conclusion that stacked 25-year statutory minimum sentences, under the prior version of Section 924(c), applied to all but one of Hewitt's Section 924(c) convictions. *Id.* at 1.

The district court overruled the parties' objections and adhered to its view that it was required to apply the

25-year penalties mandated by the former version of Section 924(c), notwithstanding Section 403's elimination of that mandate. 11/2/22 Hewitt Sent. Tr. 22-23. The court resentenced Hewitt to over 130 years of imprisonment, which included consecutive 25-year terms of imprisonment for four of his five 924(c) offenses. Hewitt Second Am. Judgment 3-4 (1625 months).

5. The court of appeals affirmed, rejecting the position of petitioners and the government that the new sentence should be governed by the current version of Section 924(c). Pet. App. 5a-11a. The court construed Section 403 as “drawing the line for” application of the amended penalties “at the date on which a sentence—whether later-vacated or with ongoing validity—was imposed.” *Id.* at 10a. In the court’s view, “because sentences for [petitioners’] offenses had been imposed * * * prior to the First Step Act’s December 21, 2018 enactment date,” the current version of Section 924(c) “does not apply.” *Id.* at 11a.

SUMMARY OF ARGUMENT

The court of appeals erred in requiring that petitioners, and others similarly situated, be sentenced under an unduly harsh penalty scheme that Congress has discarded. Section 403(b) of the First Step Act, like Section 401(c) of that Act, directs a court to apply the Act’s reduced statutory penalties to any pre-Act offense “if a sentence for the offense has not been imposed as of [the Act’s] date of enactment.” § 403(b), 132 Stat. 5222; § 401(c), 132 Stat. 5221. Where, as here, a sentence has been vacated, no sentence “*has* * * * *been* imposed” within the meaning of the Act. Instead, a sentence *will be* imposed in the future. Accordingly, Sections 401(b) and 403(b) of the Act require application of the amended penalties at the resentencing.

A. The Act’s text indicates that whether “a sentence for the offense has * * * been imposed” turns on the continued existence of a valid sentencing judgment.

Most tellingly, Congress’s use of the present-perfect tense (“has not been imposed”) signifies a condition that “is now completed or continues up to the present.” *The Chicago Manual of Style* ¶ 5.132 (17th ed. 2017). It thus directs the focus to the continuing state of affairs “now” or in “the present.” *Ibid.* For that reason, an ordinary speaker of English would not say that “a sentence *has* been imposed as of 2018, but it has since been vacated.” Instead, the speaker would say, “a sentence *had* been imposed as of 2018, but it has since been vacated.” Here, Congress deliberately chose the former locution, showing that it was concerned with the pronouncement of a *valid* sentence that has continuing effect up to the present, not an invalid sentence that has been vacated.

That interpretation is further indicated by Congress’s reference to “a sentence,” not “*any* sentence,” in describing the triggering condition. That usage contrasts with the broader reference to “any offense” in describing the universe of offenses that are potentially subject to the Act’s reduced penalties. And that contrast illustrates Congress’s intent to establish a comparatively narrow carveout of pre-Act offenses that do not receive the benefit of the Act’s sentencing reforms.

B. Statutory context confirms that understanding of Section 403(b). When a defendant’s prior sentence has been vacated because it was invalid, the resentencing constitutes a proceeding where the “[i]mposition of a sentence” will occur. 18 U.S.C. 3553. That indicates that a sentence “has not” already “been imposed” for purposes of the Act. A defendant cannot have two sentences at once. Accordingly, as both courts of appeals to have

considered the issue have recognized, a defendant whose original sentence was vacated before the Act, and who was awaiting resentencing when the Act was enacted, should be sentenced under the Act's revised penalty structure. And the same result is warranted when, as in petitioners' cases, the original sentence was vacated after the Act's enactment. Nothing in the Act's text, which looks to whether a sentence "has * * * been *imposed* as of" the enactment date, turns on the timing of when the sentence was *vacated*.

Interpreting the reference to whether "a sentence * * * has * * * been imposed" as a reference to a valid sentence is consistent with the provision of the U.S. Code that most directly addresses the finality of imposed sentences. That provision states that a district court "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). But as indicated by this Court's decision in *Pepper v. United States*, 562 U.S. 476 (2011), Section 3582(c)'s reference to "a" sentence that "has been imposed" refers only to valid sentences, not ones that have been vacated. The similar language in Section 403(b) should be understood in a similar way.

C. Declining to apply the Act's new sentencing provisions to pre-Act offenses only when a valid sentence has already been imposed and remains in effect is also the interpretation of the Act that best comports with its objectives. The Act made future sentencings fairer, but did not disrupt finality by requiring courts to reopen and revise existing sentences. When the original sentence is invalidated, however, only the fairness interest remains. If a post-Act resentencing is going to occur anyway, "imposing upon the pre-Act offender a pre-Act sentence" that "Congress ha[s] specifically found * * *

[i]s unfairly long,” *Dorsey v. United States*, 567 U.S. 260, 277 (2012), does not further any finality interest. On the contrary, it resurrects a sentencing regime that Congress rejected and subjects defendants to new decades-long sentences—like the century-plus sentences imposed on petitioners here—that present law makes clear are excessive and unjust.

D. The court of appeals identified no sound basis for construing the Act to nevertheless require the imposition of a congressionally disapproved, excessively severe, pre-Act sentence. The court interpreted Section 403(b)’s application to turn exclusively on the historical fact that a district court once pronounced any sentence—even an invalid one. But the court ignored Congress’s choice of verb tense and overall focus on the status of the sentence rather than the act of the sentencing court. The court of appeals also drew an unwarranted comparison between the advisory Sentencing Guidelines and statutory minimum sentences. And the court placed undue emphasis on the notion that Congress could have used even clearer language—a possibility that cuts both ways and provides no reason to misinterpret the language that Congress did adopt.

ARGUMENT

SECTION 403 OF THE FIRST STEP ACT APPLIES AT A POST-ACT RESENTENCING FOLLOWING THE VACATUR OF A PRE-ACT SENTENCE

Recognizing “unfairness in how” certain “mandatory minimum sentences are sometimes applied,” Congress—with overwhelming support in both chambers—passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (Sen. Grassley); see 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (Sen. Leahy). “The First Step Act

takes modest but important steps to remedy some of the most troubling injustices within our sentencing laws and our prison system,” including by “recogni[zing] that one-size-fits-all sentencing is neither just nor effective.” 164 Cong. Rec. at S7749 (Sen. Leahy).

Some of the Act’s “most important reforms” are its “changes to mandatory minimum[s].” 164 Cong. Rec. at S7748 (Sen. Klobuchar); see 164 Cong. Rec. at S7774 (Sen. Feinstein) (“Most importantly, in my view, [the Act] reduces some of the harshest mandatory minimum sentences.”). Sections 401 and 403 of the Act address perceived unfairness in the application of statutory minimums by significantly reducing the “overly harsh and expensive mandatory minimums” for certain drug and gun offenses. 164 Cong. Rec. at S7649 (Sen. Grassley); see § 403, 132 Stat. 5221-5222. Section 403 in particular eliminates the former requirement to stack minimum consecutive 25-year terms of imprisonment on a defendant who was convicted of multiple violations of 18 U.S.C. 924(c) in the same proceeding. See pp. 16-17, *supra*.

Congress’s effort to “ensure that sentencing enhancements for repeat offenses apply only to true repeat offenders,” 164 Cong. Rec. at S7774 (Sen. Cardin), is not limited to future offenders. Ordinarily, a statutory modification to a criminal penalty would apply only to new violations committed after its enactment. See 1 U.S.C. 109. In Section 403(b) of the Act, however, Congress specified that Section 403(a)’s reduced penalties “shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.” § 403(b), 132 Stat. 5222. That language unambiguously shows Congress’s intent that the reduced

penalties apply to pre-Act offenses in at least some circumstances.

Those circumstances include resentencings like petitioners'. A sentence that is not valid, has been vacated, and therefore has no continuing effect is not a sentence that "has * * * been imposed." First Step Act § 403(b), 132 Stat. 5222. Petitioners therefore should have received the benefit of the First Step Act's reduced penalties at their 2021 resentencings.

A. The Text Of The Act Focuses On Whether A Defendant Is Subject To A Valid Pre-Act Sentence, Not Whether A Defendant Once Received A Since-Invalidated Sentence

An invalid pre-Act sentence is not "a sentence" that "has * * * been imposed as of" the date of on which the First Step Act was enacted. The term "sentence" refers to "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty." *Black's Law Dictionary* 1636 (11th ed. 2019). Thus, the term can be employed not only in a context that focuses on the historical fact of the "pronounce[ment]," but also in a context that focuses on the continuing existence of the "judgment." A simple example illustrates the point: if Jones is awaiting resentencing following the vacatur of a previous sentence, and a relative considering whether to travel to his sentencing hearing asks whether "a sentence has been imposed on Jones," the natural answer would be "no." And as two principal features of the Act's text indicate, the answer is likewise "no" when the court imposing a new sentence asks whether a sentence "has * * * been imposed as of" the date on which the First Step Act was enacted.

1. Congress’s use of the present-perfect tense focuses on a sentence’s continuing validity

First and foremost, Congress used the present-perfect tense—“has * * * been imposed.” § 403(b), 132 Stat. 5222. “Congress’ use of a verb tense is significant in construing statutes.” *United States v. Wilson*, 503 U.S. 329, 333 (1992); *Gundy v. United States*, 588 U.S. 128, 142 (2019) (plurality opinion) (observing that this Court “has often ‘looked to Congress’ choice of verb tense to ascertain a statute’s temporal reach’”) (quoting *Carr v. United States*, 560 U.S. 438, 447-448 (2010)).

The present-perfect tense signifies an “act, state, or condition,” that “is *now* completed or *continues up to the present*.” *The Chicago Manual of Style* ¶ 5.132 (emphases added). That is, it focuses on the state of affairs “now” or in “the present” rather than at some earlier point in time. *Ibid.* Congress’s use of the present-perfect tense in Section 403(b) therefore indicates that continuing validity, not historical fact, is the touchstone—*i.e.*, that Congress intended only to capture sentences that both had been pronounced before the Act’s enactment date *and* continued into the present.

If Congress intended a court to focus exclusively on the historic imposition of a sentence, it would have employed the *past*-perfect tense, looking to whether a sentence “*had* not been imposed.” See *The Chicago Manual of Style* ¶ 5.133 (past-perfect tense “is formed by using *had* with the principal verb’s past participle” and “refers to an act, state, or condition that was completed before another specified or implicit past time or past action”) (emphasis omitted). As a matter of ordinary English, it is not coherent to say “a sentence *has* been imposed as of 2018, but it has since been vacated.” Instead, an ordinary speaker would say that “a sentence

had been imposed as of 2018, but it has since been vacated.” Congress would use the same formulation.

Indeed, in a prior applicability provision with a similar structure, Congress did in fact use the past-perfect tense. As part of the Crime Control Act of 1990 (Crime Control Act), Pub. L. No. 101-647, 104 Stat. 4789, Congress amended the statute of limitations in 18 U.S.C. 3293 applicable to certain offenses against financial institutions. See Crime Control Act, Tit. XXV, § 2505(a), 104 Stat. 4862. When doing so, Congress provided that the amendment “shall apply to any offense committed before the date of the enactment of this section, if the statute of limitations applicable to that offense *had* not run as of such date.” § 2505(b), 104 Stat. 4862 (emphasis added). Congress took a different, and contrasting, approach in Section 403(b), using the present-perfect—not the past-perfect—tense.

Congress often employs the present-perfect tense when directing the sentencing court to consider the particular state of affairs that exists at the time of sentencing or resentencing. See, *e.g.*, 18 U.S.C. 1963(m) (when ordering forfeiture, district court must consider whether property, *inter alia*, “has been transferred or sold to * * * a third party,” “has been placed beyond the jurisdiction of the court,” or “has been substantially diminished in value”).² That is what Congress did here. “Congress could have phrased its requirement in language that looked to the past” exclusively, “but it did

² See also 18 U.S.C. 521(b) and (d)(3) (district court must impose an enhanced term of imprisonment where, *inter alia*, the person “has been convicted within the past 5 years” for certain offenses); 18 U.S.C. 3742(g) (district court must “resentence a defendant in accordance with * * * such instructions as may have been given by the court of appeals”).

not choose this readily available option,” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987), instead choosing a phrase with a present-day focus.

2. Congress’s contrasting use of “a” and “any” similarly indicates its focus on a valid sentence rather than an invalid one

Second, in describing the triggering condition for application of the First Step Act, Congress referred to “a sentence,” not “any sentence.” Congress’s choice of the neutral article “a” contrasts with its use of “any” earlier in the provision to identify the “offense[s]” to which Section 403 potentially applies—namely, “*any* offense * * * committed before the date of enactment of this Act.” § 403(b), 132 Stat. 5222 (emphasis added). The “presumption[ption] that Congress acts intentionally and purposely” when it “includes particular language in one section of a statute but omits it in another section of the same Act,” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted), counsels against reading Section 403(b)’s reference to “a sentence” to encompass “any sentence.” Cf. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (observing that the “presumption that a given term is used to mean the same thing throughout a statute” is “surely at its most vigorous when a term is repeated within a given sentence”).

“Congress’ use of the word ‘any’ suggests an intent to use that term ‘expansively.’” *Smith v. Berryhill*, 587 U.S. 471, 479 (2019) (brackets and citation omitted). And the choice to use an expansive term in defining the universe of offenses potentially subject to Section 403, but to describe the limitation on that universe of offenses using a more neutral term, underscores that the

limitation lacks similar breadth. “Had Congress intended the phrase ‘a sentence’ to convey” that “very broad meaning, it could have used the word ‘any,’ as it did earlier in the same sentence.” *United States v. Merrell*, 37 F.4th 571, 575-576 (9th Cir. 2022) (quoting *United States v. Uriarte*, 975 F.3d 596, 604 (7th Cir. 2020) (en banc)).

B. Statutory Context Confirms That The Act’s Revised Penalties Apply Whenever A Court Replaces An Invalid Sentence With A Valid One

Section 403(b)’s focus on whether a sentence has continuing validity, not whether an invalid sentence was previously pronounced, is confirmed by the broader context of the statutory scheme. See *Pulsifer v. United States*, 601 U.S. 124, 133 (2024) (explaining that the “choice between” two possible readings “can sensibly be made only by * * * reviewing text in context”).

1. The “imposition” of a new sentence following vacatur presupposes that a sentence “has not been imposed” at a prior time

In petitioners’ cases, the precise phrasing of the Act’s inquiry into whether “a sentence * * * has * * * been imposed” has particular significance because it arises in the context of a proceeding at which the “[i]mposition of a sentence,” 18 U.S.C. 3553, is *about* to occur. A defendant cannot simultaneously have two sentences for the same crime. Cf. *Whalen v. United States*, 445 U.S. 684, 688 (1980) (“The Fifth Amendment guarantee against double jeopardy protects * * * ‘against multiple punishments for the same offense.’”) (citation omitted). The imposition of a new sentence accordingly presupposes that no sentence has already been imposed.

Consistent with that observation, both courts of appeals that have addressed the issue directly have recognized that where a court previously pronounced a sentence, but that sentence was vacated before the First Step Act was enacted, “a sentence for the offense has not been imposed as of [the] date of enactment.” *United States v. Henry*, 983 F.3d 214, 222-224 (6th Cir. 2020) (Section 403); *Uriarte*, 975 F.3d at 601-605 (Section 403); *United States v. Bethany*, 975 F.3d 642, 649-650 (7th Cir. 2020) (Section 401). But if “has * * * been imposed” included the pronouncement of a sentence known to be invalid, and “a sentence” were to include invalid sentences as well as still-valid ones, then even a pre-Act vacatur would be irrelevant.

If all that mattered was the historical fact of a prior sentencing, then the mere pronouncement of a sentence before the Act’s passage would be wholly dispositive of Section 403’s application—even if the sentence had already been vacated, and resentencing had not yet occurred, when the Act was enacted. On that view, if a sentence was subsequently recognized to rest on, say, an involuntary plea, application of the First Step Act’s ameliorated sentencing scheme nevertheless would forever be precluded. The courts of appeals’ rejection of such a reading comports with common sense and necessarily recognizes—consistent with the text—that the critical event for purposes of Section 403(b) is not simply the pronouncement of a sentence, but the pronouncement of a valid one that has continuing effect up to the present.

That logic applies equally to both pre-Act and post-Act vacatures. The historical pronouncement of an invalid sentence does not control Section 403’s applicability simply because the sentence was not yet *vacated* “as of”

the date of the Act’s enactment. Section 403(b) looks to whether “a sentence * * * has * * * been *imposed* as of” the Act’s enactment date, not whether it has been *vacated* as of that date.

2. This Court’s understanding of 18 U.S.C. 3583(c) illuminates the proper understanding of similar language in the Act

The provision of the U.S. Code that most directly addresses the finality of imposed sentences indicates that Congress intended courts to answer the question whether a “sentence * * * has * * * been imposed,” § 403(b), 132 Stat. 5222, by evaluating whether a defendant is subject to an otherwise valid sentence that remains in effect.

As part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. II, 98 Stat. 1987, Congress provided that—subject to certain limited exceptions—a district court “may not modify a term of imprisonment once it has been imposed.” Title II, ch. II, § 212(a), 98 Stat. 1998. That provision, codified at 18 U.S.C. 3582(c), establishes “the general rule of finality” applicable in federal sentencing law. *Dillon v. United States*, 560 U.S. 817, 824 (2010). But it obviously does not apply to invalid sentences. It makes no sense to speak of “modify[ing]” a sentence that has been recognized to be invalid. Instead, such a sentence must be replaced. See 18 U.S.C. 3551, 3553.

This Court’s decision in *Pepper v. United States*, 562 U.S. 476 (2011), reinforces that Section 3582(c)’s reference to a sentence that “has been imposed” refers solely to a valid sentence. In *Pepper*, the Court declined to apply the finality-protective law-of-the-case doctrine to a sentence that had been vacated (there, on appeal). See *id.* at 481. The Court explained that the vacatur had

“effectively wiped the slate clean,” allowing for a different term of imprisonment at a resentencing that could account for the defendant’s conduct during the interim. *Id.* at 507; see *id.* at 481. And the Court distinguished that circumstance from one in which, under Section 3582(c), a sentence “[o]nce imposed * * * may be modified only in very limited circumstances.” *Id.* at 502 n.14.

The similar language of Section 403 should be understood in a similar way. Indeed, Congress was presumably aware of this Court’s decision in *Pepper* when it adopted the First Step Act in 2018, particularly given that the Act made modest amendments to other aspects of Section 3582(c). See § 603(b), 132 Stat. 5239; see also *Bartenwerfer v. Buckley*, 598 U.S. 69, 80 (2023) (“‘This Court generally assumes that, when Congress enacts statutes, it is aware of this Court’s relevant precedents.’”) (citation omitted).

C. Applying The First Step Act’s Fairer Sentencing Scheme To Post-Act Resentencings Furthers The Act’s Purposes

Application of the First Step Act’s reduced penalty scheme to resentencings like petitioners’ “also best fulfills” the Act’s “statutory objectives,” *Brown v. United States*, 144 S. Ct. 1195, 1205 (2024). Sections 403(b) and 401(c) embody the careful balance Congress struck between competing concerns of fairness and finality. When a sentence has been vacated and a resentencing will take place no matter what, finality interests no longer carry any weight and do not override Congress’s special emphasis on the fairness of broadly applying the First Step Act’s reduced penalties.

a. By default, congressional changes to a sentencing scheme do not apply to already completed offenses. See

1 U.S.C. 109; *Dorsey v. United States*, 567 U.S. 260, 272-273 (2012). Section 403(b), however, unambiguously overrides that default rule by applying the newly ameliorated Section 924(c) sentencing scheme to at least some prior offenders. The extent to which it does so necessarily reflects a balance between the competing considerations of fairness and finality. Cf. *Ramos v. Louisiana*, 590 U.S. 83, 109 (2020) (explaining that this Court’s retroactivity precedents balance interests in “the finality of * * * criminal judgments” alongside interests in “fundamental fairness and accuracy”) (brackets and citation omitted).

On the one hand, Congress’s override of the default rule illustrates the special strength of the fairness considerations underlying Section 403. Having concluded that the prior sentencing regime for Section 924(c) offenses was “overly harsh and expensive,” 164 Cong. Rec. at S7649 (Sen. Grassley), and “neither just nor effective,” 164 Cong. Rec. at S7749 (Sen. Leahy), Congress opted to apply the Act’s reforms retrospectively to offenses committed before the Act was passed. In doing so, Congress recognized that the application of the previous harsher scheme was unfair even for pre-Act offenders who had every reason to expect the penalties in place at the time of their offenses.

On the other hand, Congress did not extend the ameliorated sentencing scheme to sentences that were already final. Under general principles of retroactivity with longstanding roots, new legal developments rarely provide cause to disrupt the system’s “essential” interest in finality, *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). See, e.g., *Teague v. Lane*, 489 U.S. 288, 309 (1989); *United States v. Frady*, 456 U.S. 152, 166 (1982). And here, by limiting the universe of covered offenses

to situations in which “a sentence for the offense has not been imposed,” § 403(b), 132 Stat. 5222, Congress made clear that it was not reopening valid sentences. Thus, as the courts of appeals have uniformly recognized, Section 403 leaves valid sentences untouched—even ones that remained pending on direct appeal at the time the Act was enacted.³

Where a defendant’s sentence is found invalid and vacated on other grounds, however, the finality concerns that counsel against reopening a valid sentence are no longer present. From the perspective of finality, there is no difference between: (1) an offender who was convicted before the First Step Act but who has not had an initial sentencing; (2) an offender who had an initial sentencing but obtained vacatur of the judgment before the enactment of the First Step Act; and (3) an offender who obtained vacatur of the judgment after the enactment of the First Step Act. None of those offenders has an operative judgment; a court will therefore need to undertake a plenary sentencing proceeding for each of them.

³ See *United States v. Cruz-Rivera*, 954 F.3d 410, 412-413 (1st Cir.), cert. denied, 141 S. Ct. 601 (2020); *United States v. Eldridge*, 2 F.4th 27, 40-41 (2d Cir. 2021), cert. granted, vacated, and remanded on other grounds, 142 S. Ct. 2863 (2022); *United States v. Hodge*, 948 F.3d 160, 162-164 (3d Cir.), cert. denied, 141 S. Ct. 347 (2020); *United States v. Jordan*, 952 F.3d 160, 171-174 (4th Cir. 2020), cert. denied, 141 S. Ct. 1051 (2021); *United States v. Gomez*, 960 F.3d 173, 177-178 (5th Cir. 2020); *United States v. Richardson*, 948 F.3d 733, 750-753 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020); *United States v. Sparkman*, 973 F.3d 771, 774-775 (7th Cir. 2020); *United States v. Voris*, 964 F.3d 864, 873-875 (9th Cir. 2020), cert. denied, 141 S. Ct. 2464 (2021); *United States v. Jefferson*, 989 F.3d 1173, 1176-1177 (10th Cir.), cert. denied, 142 S. Ct. 353 (2021); *United States v. Smith*, 967 F.3d 1196, 1210-1213 (11th Cir. 2020), cert. denied, 141 S. Ct. 2538 (2021); see also *Young v. United States*, 943 F.3d 460, 462-464 (D.C. Cir. 2019) (construing Section 401(c)).

When the court does so, no sound reason exists for the court to “impos[e] upon the pre-Act offender a pre-Act sentence” that “Congress ha[s] specifically found * * * [i]s unfairly long,” *Dorsey*, 567 U.S. at 277. To the contrary, subjecting offenders with vacated sentences to “the exact harsh and expensive mandatory minimum sentences that § 403 restricts and reduces”—with no offsetting benefit in terms of finality—“would be fundamentally at odds with the First Step Act’s ameliorative nature.” *Uriarte*, 975 F.3d at 603.

The facts of these cases illustrate the point. In post-Act resentencings, petitioners have each been sentenced to over 100 years of imprisonment, even though Congress determined that stacking 25-year statutory minimum sentences for Section 924(c) offenses arising from a single judgment is excessive and unjust. While Congress gave courts no authority to revisit or revise valid sentences imposed under the pre-Act scheme to protect finality interests, Congress made clear that it considered that scheme too harsh for purposes of future sentencings. Having chosen to override the default rule requiring imposition of the penalties in place at the time of the crime’s commission, Congress did not resurrect those very penalties when no finality interest exists because a pre-Act sentence is invalid for other reasons and has been vacated. The mandatory century-long sentences imposed on petitioners here run roughshod over the balance Congress struck between finality and fairness in the Act.⁴

⁴ In other contexts, especially those regulating substantive conduct rather than seeking to balance finality and fairness in determining the reach of a revised sentencing regime, the historical fact that a sentence was once imposed has legal significance even if that

**D. The Court Of Appeals Identified No Sound Basis For Its
Contrary Conclusion**

The court of appeals nevertheless held that notwithstanding Congress’s elimination of the unduly harsh pre-Act sentencing regime for Section 924(c) offenses, district courts must continue to apply that regime when they resentence offenders who received invalid sentences before the First Step Act’s adoption. See Pet. 5a-11a. None of the considerations identified by the

sentence (or the related conviction) is subsequently vacated. For example, the prohibition of firearm possession by a person “who has been convicted” of a felony, 18 U.S.C. 922(g)(1), turns on the person’s status on the date he possesses a firearm, even if he subsequently succeeds in vacating the predicate conviction. See, e.g., *Burrell v. United States*, 384 F.3d 22, 27-28 (2d Cir.) (“[I]t is the ‘mere fact of a prior conviction’ at the time of the charged possession, not the ‘reliability’ of the conviction, that establishes the § 922(g)(1) predicate.”) (brackets and citation omitted), cert. denied, 543 U.S. 993 (2004); *United States v. Snyder*, 235 F.3d 42, 53 (1st Cir. 2000) (a defendant’s “belated success in vacating his [conviction] bears no relevance to his conviction under § 922(g)(1)”), cert. denied, 532 U.S. 1057 (2001); see also *United States v. Roberson*, 752 F.3d 517, 519-522 (1st Cir. 2014) (reaching similar conclusion with respect to registration requirements for sex offenders under 42 U.S.C. 16911(1) (2012)). And the historical fact that a jury returned a guilty verdict can preclude certain Double Jeopardy Clause claims even if that verdict was subsequently vacated for independent reasons. See *Bravo-Fernandez v. United States*, 580 U.S. 5, 8-9 (2016). It would therefore be incorrect to adopt any general “background legal principle[]” that “vacatur makes a sentence void from the start” for all purposes. *United States v. Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring in the judgment). For the reasons explained in this brief, however, the text, context, and purpose of Section 403 indicate that Congress did not intend to give weight to vacated sentences when determining the retrospective application of the First Step Act’s penalty reductions for Section 924(c) offenses.

court of appeals supports that counterintuitive and unjust result.

1. The court of appeals stated that because “a sentence is ‘imposed’ ‘when the district court pronounces it,’” the question of “whether a sentence has been ‘imposed’ appears to hinge on a district court’s action or inaction—not on a defendant’s status.” Pet. App. 7a-8a (citation omitted). And the court took the view that Section 403(b)’s “use of ‘imposed,’” combined “with § 403(b)’s delineation that the First Step Act applies to defendants for whom ‘a sentence . . . ha[d] not been imposed’ as of the enactment date,” requires that the harsh pre-Act sentencing regime be perpetuated for anyone “who already had a sentence imposed by” the time the Act was passed—even if his sentence has since been vacated. *Id.* at 8a (citation omitted; brackets in original). That set of inferences—which would appear to preclude application of the ameliorated scheme even when a sentence was vacated *before* the Act’s passage, see p. 21, *supra*—is flawed in multiple ways.

For one thing, it fails to respect Congress’s use of the present-perfect tense. As discussed above, pp. 17-19, *supra*, the phrase “*has* not been imposed,” § 403(b), 132 Stat. 5222 (emphasis added), focuses the applicability inquiry on whether the defendant has a sentence that “is *now* completed or *continues up to the present*,” *The Chicago Manual of Style* ¶ 5.132 (emphasis added). The court of appeals, however, rephrased the statutory language to substitute “had” for “has,” stating “that the First Step Act applies to defendants for whom ‘a sentence . . . ha[d] not been imposed’ as of the enactment date.” Pet. App. 8a (emphasis added; brackets in original). But “statutory construction does not work that

way: A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred meaning." *Borden v. United States*, 593 U.S. 420, 436 (2021) (plurality opinion).

In addition, the court of appeals' view that Section 403(b) turns solely "on a district court's action or inaction" in pronouncing a sentence, Pet. App. 8a, disregards Congress's use of the passive voice. If Congress were truly focused "on a district court's action or inaction," as the court of appeals supposed (*ibid.*), it could have used the past-perfect tense and directed that the reduced penalties apply only to offenses for which "a court had not imposed" a sentence "as of" or "before" the date of enactment. "Passive voice," however, "pulls the actor off the stage." *Bartenwerfer*, 598 U.S. at 75. Its use signifies that "the actor is unimportant" or "unknown" and that "the focus * * * is on the thing being acted on," Bryan A. Garner, *Garner's Modern English Usage* 676 (4th ed. 2016). Accordingly, Section 403(b)'s reference to whether "a sentence * * * has not been imposed," § 403(b), 132 Stat. 5222, suggests that what matters is the status of the sentence, not the mere prior act of imposing a sentence that was invalid.

2. The decision below also purported to find support for its approach in 18 U.S.C. 3742(g)(1), which provides that when "a case is remanded" for "resentenc[ing]," the district court "shall apply the guidelines issued by the Sentencing Commission * * * that were in effect on the date of the previous sentencing of the defendant prior to the appeal." *Ibid.* In the court of appeals' view, Section 3742(g)(1) is "a helpful analogue" because it indicates that Congress sometimes "pegs the rules that apply to a resentencing on remand to the historical fact of the prior sentence." Pet. App. 10a.

As a threshold matter, the reasoning of the court of appeals would once again imply that even a sentence vacated *before* the First Step Act's passage could not be replaced by a sentence under the First Step Act's fairer penalty scheme. In any event, the court's reasoning was mistaken. As this Court has previously recognized, application of the Sentencing Guidelines follows a different paradigm than application of statutory penalties. See *Dorsey*, 567 U.S. at 273-275. And Section 3742(g)(1)'s explicit directive to apply an *old* regime is in no way a model for Section 403's directive to apply a *new* regime.

The default rule for the Guidelines is that the court imposing a sentence "shall consider * * * the guidelines * * * issued by the Sentencing Commission * * * that * * * are in effect on the date the defendant is sentenced." 18 U.S.C. 3553(a)(4). Section 3742(g) is an explicit carveout from that focus on the present day, expressly instructing sentencing courts to look to the past. See 18 U.S.C. 3553(a)(4)(i) (explicit carveout for Section 3742(g)); 18 U.S.C. 3742(g)(1); *Dorsey*, 567 U.S. 273-275. In contrast, as noted above, see pp. 15-16, *supra*, the default rule for statutes is to apply the penalties in place when the offense was committed. See 1 U.S.C. 9; *Dorsey*, 567 U.S. at 272-273. And Section 403(b) is an explicit carveout from that focus on the past.

The two statutes thus apply in different (indeed, opposite) contexts, with different (indeed, opposite) purposes, and different (indeed, opposite) text. There is no reason to suppose that the interpretation of one bears on the interpretation of the other. The court of appeals accordingly erred in suggesting (Pet. App. 11a) an incongruity in applying both statutes when a pre-First Step Act sentence is vacated on appeal. Section 3742(g)(1) looks to the Guidelines from "the previous

sentencing of the defendant prior to the appeal”—a purely historical event. Section 403(b), in contrast, looks to whether a valid sentence “has * * * been imposed.” Applying the revised penalty scheme in resentencing an offender who originally received an invalid sentence is not “pretend[ing]” the original “sentence never happened,” Pet. App. 10a (citation omitted); it is instead simply giving effect to the Act’s text, context, and purpose.

3. Finally, the decision below asserted that “[i]f Congress meant for the First Step Act’s retroactivity bar to apply only to valid sentences, it could easily have said so.” Pet. App. 8a. But the same criticism applies equally to the court of appeals’ own reading: If Congress had wanted to exclude offenders like petitioners, it could easily have said that, too, such as by making application of the Act to pre-Act offenders turn on whether “‘*an original* sentence’ or ‘*an initial* sentence,’” had been imposed. *Uriarte*, 975 F.3d at 604; see 10 U.S.C. 863(a) (prohibiting imposition of any “sentence in excess of or more severe than the original sentence” in certain circumstances); 10 U.S.C. 950e (similar); 18 U.S.C. 4214(d)(4) (1982) (providing for a parolee’s referral to a treatment center “for all or part of the remainder of his original sentence” upon a parole violation).

The question presented here therefore cannot be resolved by hypothesizing other language that Congress could have written. See *Pulsifer*, 601 U.S. 138 at (“We have ‘routinely construed statutes to have a particular meaning even as we acknowledged that Congress could have expressed itself more clearly.’”) (citation omitted). The case must instead be resolved through the usual

methods of statutory interpretation, including text, context, and purpose. And for all of the reasons discussed above, the better understanding of Section 403(b) of the First Step Act is that Congress meant to end the imposition of stacked Section 924(c) statutory minimums at resentencings like petitioners', where no finality interest can support the renewed application of a repealed sentencing regime that Congress determined was excessive and unjust.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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