Federal Courts:

Cases and Materials on Judicial Federalism and the Lawyering Process

FOURTH EDITION

2021 Supplement

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Preface

The authors completed work on the Fourth Edition of this casebook in early 2017. Since then, although Congress has not amended any of the important jurisdictional statutes, the Supreme Court has continued to play an active role in shaping (or reshaping) Federal Courts law. This Supplement contains five cases that we think are of particular interest from a Federal Courts perspective. It also includes new note material and a new topic reflecting recent developments in removal practice.

We recognize that some Supreme Court decisions that loom large on first reading may fade in importance as time goes by. Still, there is pedagogical value in studying recent cases that highlight current issues and reveal philosophical divisions among the Justices now on the Court. We have therefore opted to err on the side of inclusion.

Although the decisions range over four distinct areas of Federal Courts law (standing, the political question doctrine, removal, and *Bivens*), they have one striking feature in common: all five rulings close the doors of the federal courts (in one instance, the federal appellate courts) to a particular class of litigants.

- In *Gill v. Whitford* (Chapter 3), the Court unanimously held that the plaintiff voters lacked standing to challenge a statewide redistricting map as the product of partisan gerrymandering. The injury they asserted, the dilution of the influence of their votes, was insufficient because the plaintiffs did not allege that they lived in a legislative district that was "packed" or "cracked" for partisan reasons. But the Court took the unusual step of remanding the case to allow the plaintiffs to refine their standing theory, and perhaps to allege alternative forms of injury that flow from partisan gerrymandering. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote separately to show how the plaintiffs could satisfy the standing requirement — and also to discuss the possibility of an alternative argument for standing based on infringement of the First Amendment right of association.
- In *Virginia House of Delegates v. Bethune-Hill* (Chapter 3), a divided three-judge district court held that the state's legislative map was the product of unconstitutional racial gerrymandering, but the state's attorney general declined to appeal from that ruling. The Supreme Court held that a house of the state legislature lacked standing to appeal because state law authorizes only the attorney general to represent the state, and the legislature could identify no independent injury flowing from the district court judgment. Justice Alito, joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, dissented.
- In *Rucho v. Common Cause* (Chapter 3), the Court resolved decades of uncertainty by unequivocally holding that partisan gerrymandering claims present nonjusticiable political questions. Noting the long history of gerrymandering in the United States, the Court concluded that there are no judicially manageable standards for identifying when partisan gerrymandering has gone "too far." Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented.
- In *Hernandez v. Mesa* (Chapter 8), the Court significantly curtailed the availability of implied causes of under *Bivens v. Unknown Named*

Federal Agents. Under *Bivens*, courts could readily recognize new implied cause of action to enforce constitutional rights unless Congress had provided an alternate remedy or there were special factors counseling against the recognition of the action. *Hernandez* rejected this presumption in favor of new actions. In a 5-4 decision, the Court stated that courts should not extend *Bivens* to new contexts unless there are special circumstances suggesting that the judiciary, as opposed to Congress, is the appropriate body to create the action.

- In *Home Depot U.S.A., Inc. v. Jackson* (Chapter 12), the question was whether a third-party counterclaim defendant can remove a case to federal court, either under § 1441(a), or (if the case otherwise qualifies) under the Class Action Fairness Act of 2005 (CAFA) (see Chapter 2). Most observers expected the Court to uphold removal under CAFA and perhaps under § 1441(a) as well. However, a 5-4 majority, with Justice Thomas writing for the Court, rejected all of the arguments for removal. Justice Alito, joined by Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh, dissented.

The Supplement also includes new Note material on, among other topics, the Supreme Court decisions in *TransUnion LLC v. Ramirez* on standing (Chapter 3) and *PennEast Pipeline Co. v. New Jersey* on state sovereign immunity (Chapter 13) and calls for reform in the law of qualified immunity (Chapter 14).

Decisions that affect federal practice are not limited to decisions of the Supreme Court. Indeed, in some areas of federal practice, the Supreme Court rarely intervenes, and the relevant precedents are those of the court of appeals, or even the district court. Removal is a prime example. In Chapter 12, which deals with the special problems of removal jurisdiction, this Supplement adds a new subsection, including a new principal case, on the practice that has been referred to as "snap removal." At the time of the Fourth Edition, the practice was not widely known, and no court of appeals had considered whether the removal statute allows it. In 2018, the Third Circuit upheld the permissibility of the stratagem; two other circuits soon followed suit. The issue is of substantial practical importance, and it also provides a pointed illustration of the conflict between "textual" and "purposive" approaches to statutory interpretation.

Perhaps of greater significance than any of the decisions were the changes in the Court's membership. In February 2016, before most of the 2015 Term's decisions had been issued, Justice Antonin Scalia died suddenly. His seat remained vacant until April 2017, when Justice Neal A. Gorsuch was confirmed by the Senate. At the end of the 2017 Term, Justice Anthony M. Kennedy retired. He was replaced by Justice Brett M. Kavanaugh, who was the subject of an exceptionally acrimonious confirmation process that culminated in a 50-48 Senate vote. And in September 2020, after the completion of the 2019 Term, Justice Ruth Bader Ginsburg died. After another close vote in the Senate, Justice Amy Coney Barrett was confirmed to fill the vacancy. All of these changes are reflected in the updated Appendix B, showing the membership of the Court Term by Term starting in 1946.

This supplement also reflects the initial participation of a new coauthor. The authors of the Fourth Edition welcome Professor Derek T. Muller of the University of Iowa College of Law as a colleague in our joint venture.

As always, the authors express their appreciation to the staff of the University of Pittsburgh School of Law Document Technology Center for their

dedicated efforts that made it possible to produce this Supplement under a pressing deadline. As with the Casebook, we welcome comments and suggestions from users and readers.

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Justiciability and the Case or Controversy Requirement

A. Standing

Page 85: ***insert after the Note:***

Gill v. Whitford

Supreme Court of the United States, 2018.
138 S. Ct. 1916 (2018).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The State of Wisconsin, like most other States, entrusts to its legislature the periodic task of redrawing the boundaries of the State's legislative districts. A group of Wisconsin Democratic voters filed a complaint in the District Court, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature. The plaintiffs asserted that, in so doing, the legislature had infringed their rights under the First and Fourteenth Amendments.

But a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has "a personal stake in the outcome," distinct from a "generally available grievance about government." That threshold requirement "ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives." Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims. We vacate the judgment and remand the case for further proceedings, in the course of which those plaintiffs may attempt to demonstrate standing in accord with the analysis in this opinion.

I

Wisconsin's Legislature consists of a State Assembly and a State Senate. The 99 members of the Assembly are chosen from single districts that must "consist of contiguous territory and be in as compact form as practicable." State senators are likewise chosen from single-member districts, which are laid on top of the State Assembly districts so that three Assembly districts form one Senate district.

The Wisconsin Constitution gives the legislature the responsibility to "apportion and district anew the members of the senate and assembly" at the first session following each census. In recent decades, however, that responsibility has just as often been taken up by federal courts. Following the census in 1980, 1990, and 2000, federal courts drew the State's legislative districts when the Legislature and the Governor — split on party lines — were unable to agree on new districting plans. The Legislature has broken the logjam just twice in the last 40 years. In 1983, a Democratic Legislature passed, and a Democratic Governor signed, a new districting plan that remained in effect until the 1990 census. In 2011, a Republican Legislature passed, and a Republican Governor signed, the districting plan at issue here, known as Act 43. Following the passage of Act 43, Republicans won majorities in the State Assembly in the 2012 and 2014 elections. In 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote.

In July 2015, twelve Wisconsin voters filed a complaint in the Western District of Wisconsin challenging Act 43. The plaintiffs identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." They alleged that Act 43 is a partisan gerrymander that "unfairly favor[s] Republican voters and candidates," and that it does so by "cracking" and "packing" Democratic voters around Wisconsin. As they explained:

> Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins.

Four of the plaintiffs — Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace — alleged that they lived in State Assembly districts where Democrats have been cracked or packed. All of the plaintiffs also alleged that, regardless of "whether they themselves reside in a district that has been packed or cracked," they have been "harmed by the manipulation of district boundaries" because Democrats statewide "do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly."

The plaintiffs argued that, on a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an "efficiency gap" that compares each party's respective "wasted" votes across all legislative districts. "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win. The plaintiffs alleged that Act 43 resulted in an unusually large efficiency gap that favored Republicans. They also submitted a "Demonstration Plan" that, they asserted, met all of the legal criteria for apportionment, but was at the same time "almost perfectly balanced in its partisan consequences." They argued that because Act 43 generated a large and unnecessary efficiency gap in favor of Republicans, it violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. The plaintiffs named several members of the state election commission as defendants in the action.

The election officials moved to dismiss the complaint. They argued, among other things, that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote. A three-judge panel of the District Court denied the defendants' motion. In the District Court's view, the plaintiffs "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across the state." It therefore followed, in the District Court's opinion, that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, . . . they should be permitted to bring a statewide claim."

The case proceeded to trial, where the plaintiffs presented testimony from four fact witnesses. The first was lead plaintiff William Whitford, a retired law professor at the University of Wisconsin in Madison. Whitford testified that he lives in Madison in the 76th Assembly District, and acknowledged on cross-examination that this is, under any plausible circumstances, a heavily Democratic district. Under Act 43, the Democratic share of the Assembly vote in Whitford's district is 81.9%; under the plaintiffs' ideal map — their Demonstration Plan — the

projected Democratic share of the Assembly vote in Whitford's district would be 82%. Whitford therefore conceded that Act 43 had not "affected [his] ability to vote for and elect a Democrat in [his] district." Whitford testified that he had nevertheless suffered a harm "relate[d] to [his] ability to engage in campaign activity to achieve a majority in the Assembly and the Senate." . . .

At the close of evidence, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." The court turned away the defendants' argument that the plaintiffs' injury was not sufficiently particularized by finding that "[t]he harm that the plaintiffs have experienced . . . is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute." . . .

The District Court enjoined the defendants from using the Act 43 map in future elections and ordered them to have a remedial districting plan in place no later than November 1, 2017. The defendants appealed directly to this Court, as provided under 28 U.S.C. § 1253. We stayed the District Court's judgment and postponed consideration of our jurisdiction.

II

A

Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. Our previous attempts at an answer have left few clear landmarks for addressing the question. What our precedents have to say on the topic is, however, instructive as to the myriad competing considerations that partisan gerrymandering claims involve. Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury. [The Court summarized the Justices' opinions in four cases decided from 1973 through 2006.]

B

At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must*: The Court should exercise its power here because it is the "only institution in the United States" capable of "solv[ing] this problem." Such invitations must be answered with care. "Failure of political will does not justify unconstitutional remedies." Our power as judges to "say what the law is" rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.

Our considerable efforts [on partisan gerrymandering] leave unresolved whether such claims may be brought. . . . In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

To ensure that the Federal Judiciary respects "the proper — and properly limited — role of the courts in a democratic society," a plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy." A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Foremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.*, which "affect[s] the plaintiff in a personal and individual way."

We have long recognized that a person's right to vote is "individual and personal in nature." Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. The plaintiffs in this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking).

To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[]" therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

For similar reasons, we have held that a plaintiff who alleges that he is the object of a racial gerrymander — a drawing of district lines on the basis of race — has standing to assert only that his own district has been so gerrymandered. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed "district-by-district."

The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." But . . . the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals."

The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In

those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature."

Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote — having been packed or cracked — to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district — so that the voter may be unpacked or uncracked, as the case may be. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."

The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public."

We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies. Justice Kagan's concurring opinion endeavors to address "other kinds of constitutional harm," perhaps involving different kinds of plaintiffs, and differently alleged burdens. But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others. The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other. And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

C

Four of the plaintiffs in this case — Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace — pleaded a particularized burden along such lines. They alleged that Act 43 had "dilut[ed] the influence" of their votes as a result of packing or cracking in their legislative districts. The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial. As the proceedings in the District Court progressed to trial, the plaintiffs failed to meaningfully pursue their allegations of individual harm. The plaintiffs did not seek to show such requisite harm since, on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. They instead rested their case at trial — and their

arguments before this Court — on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence.

First, the plaintiffs presented the testimony of the lead plaintiff, Professor Whitford. But Whitford's testimony does not support any claim of packing or cracking of himself as a voter. Indeed, Whitford expressly acknowledged that Act 43 did not affect the weight of his vote. His testimony points merely to his hope of achieving a Democratic majority in the legislature — what the plaintiffs describe here as their shared interest in the composition of "the legislature as a whole." Under our cases to date, that is a collective political interest, not an individual legal interest, and the Court must be cautious that it does not become "a forum for generalized grievances."

Second, the plaintiffs provided evidence regarding the mapmakers' deliberations as they drew district lines. As the District Court recounted, the plaintiffs' evidence showed that the mapmakers "test[ed] the partisan makeup and performance of districts as they might be configured in different ways." Each of the mapmakers' alternative configurations came with a table that listed the number of "Safe" and "Lean" seats for each party, as well as "Swing" seats. The mapmakers also labeled certain districts as ones in which "GOP seats [would be] strengthened a lot," or which would result in "Statistical Pick Ups" for Republicans. And they identified still other districts in which "GOP seats [would be] strengthened a little," "weakened a little," or were "likely lost."

The District Court relied upon this evidence in concluding that, "from the outset of the redistricting process, the drafters sought to understand the partisan effect of the maps they were drawing." That evidence may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims against the defendants, assuming such claims present a justiciable controversy. But the question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' "

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies. The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry — the "efficiency gap" of wasted votes. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit.

The plaintiffs asserted in their complaint that the "efficiency gap captures in a single number all of a district plan's cracking and packing." That number is calculated by subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where "wasted votes" are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory. The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats. Though they take no firm position on the matter, the

plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny.

The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts — armed with just "a pencil and paper or a hand calculator" — to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

Consider the situation of Professor Whitford, who lives in District 76, where, defendants contend, Democrats are "naturally" packed due to their geographic concentration, with that of plaintiff Mary Lynne Donohue, who lives in Assembly District 26 in Sheboygan, where Democrats like her have allegedly been deliberately cracked. By all accounts, Act 43 has not affected Whitford's individual vote for his Assembly representative — even plaintiffs' own demonstration map resulted in a virtually identical district for him. Donohue, on the other hand, alleges that Act 43 burdened her individual vote. Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

III

In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence — unlike the bulk of the evidence presented thus far — that would tend to demonstrate a burden on their individual votes. We express no view on the merits of the plaintiffs' case. We caution, however, that "standing is not dispensed in gross": A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.

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

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring.

The Court holds today that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing. The Court also holds that none of the plaintiffs here have yet made that required showing.

I agree with both conclusions, and with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts. I write to address in more detail what kind of evidence the present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing — that is, about how their vote dilution case could then proceed on the merits. The key point is that the case could go forward in much the same way it did below: Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury — an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. But because on remand they may well develop the associational theory, I address the standing requirement that would then apply. As I'll explain, a plaintiff presenting such a theory would not need to show that her particular voting district was packed or cracked for standing purposes because that fact would bear no connection to her substantive claim. Indeed, everything about the litigation of that claim — from standing on down to remedy — would be statewide in nature.

Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic principles." More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

I

As the Court explains, the plaintiffs' theory in this case focuses on vote dilution. That is, the plaintiffs assert that Wisconsin's State Assembly Map has caused their votes "to carry less weight than [they] would carry in another, hypothetical district." And the mechanism used to wreak that harm is "packing" and "cracking." In a relatively few districts, the mapmakers packed supermajorities of Democratic voters — well beyond the number needed for a Democratic candidate to prevail. And in many more districts, dispersed throughout the State, the mapmakers cracked Democratic voters — spreading them

sufficiently thin to prevent them from electing their preferred candidates. The result of both practices is to "waste" Democrats' votes.

The harm of vote dilution, as this Court has long stated, is "individual and personal in nature." It arises when an election practice — most commonly, the drawing of district lines — devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps "contract[ed] the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes. But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered "disadvantage to [herself] as [an] individual[]": Her vote counted for less than the votes of other citizens in her State. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim — in the one-person, one-vote context or any other — always alleges.

To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight — has less consequence — than it would under a neutrally drawn map. So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured."

In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps) — comparably consistent with traditional districting principles — under which her vote would carry more weight. For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50-50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote.

Here, the Court is right that the plaintiffs have so far failed to make such a showing. William Whitford was the only plaintiff to testify at trial about the alleged gerrymander's effects. He expressly acknowledged that his district would be materially identical under any conceivable map, whether or not drawn to achieve partisan advantage. That means Wisconsin's plan could not have diluted Whitford's own vote. So whatever other claims he might have, Whitford is not "among the injured" in a vote dilution challenge. Four other plaintiffs differed from Whitford by alleging in the complaint that they lived in packed or cracked districts. But for whatever reason, they failed to back up those allegations with evidence as the suit proceeded. So they too did not show the injury — a less valuable vote — central to their vote dilution theory.

That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." That means the plaintiffs — both the four who initially made those assertions and any others (current or newly joined) — now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. Recall that the plaintiffs here alleged — and the District Court found — that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies.

When the court addresses those merits questions, it can consider statewide (as well as local) evidence. Of course, the court below and others like it are currently debating, without guidance from this Court, what elements make up a vote dilution claim in the partisan gerrymandering context. But assume that the plaintiffs must prove illicit partisan intent — a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). So, for example, the plaintiffs here introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State — and that they graded draft maps according to the amount of advantage those maps conferred on Republicans. This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. "Voters," we held, "of course[] can present statewide *evidence* in order to prove racial gerrymandering in a particular district." And in particular, "[s]uch evidence is perfectly relevant" to showing that mapmakers had an invidious "motive" in drawing the lines of "multiple districts in the State." The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district — so that the [plaintiff] may be unpacked or uncracked, as the case may be." But with enough plaintiffs joined together — attacking all the packed and cracked districts in a statewide gerrymander — those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." Not necessarily — but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

II

Everything said so far relates only to suits alleging that a partisan gerrymander dilutes individual votes. That is the way the Court sees this litigation. And as I'll discuss, that is the most reasonable view. But partisan gerrymanders inflict other kinds of constitutional harm as well. Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members. The plaintiffs here have sometimes pointed to that kind of harm. To the extent they meant to do so, and choose to do so on remand, their associational claim would occasion a different standing inquiry than the one in the Court's opinion.

Justice Kennedy explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). "Representative democracy," Justice Kennedy pointed out, is today "unimaginable without the ability of citizens to band together" to advance their political beliefs. That means significant "First Amendment concerns arise" when a State purposely "subject[s] a group of voters or their party to disfavored treatment." Such action "burden[s] a group of voters' representational rights." And it does so because of their "political association," "participation in the electoral process," "voting history," or "expression of political views."

As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This is the kind of "burden" to "a group of voters' representational rights" Justice Kennedy spoke of. Members of the "disfavored party" in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies. Standing, we have long held, "turns on the nature and source of the claim asserted." Indeed, that idea lies at the root of today's opinion. It is because the Court views the harm alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said

otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

On occasion, the plaintiffs here have indicated that they have an associational claim in mind. In addition to repeatedly alleging vote dilution, their complaint asserted in general terms that Wisconsin's districting plan infringes their "First Amendment right to freely associate with each other without discrimination by the State based on that association." Similarly, the plaintiffs noted before this Court that "[b]eyond diluting votes, partisan gerrymandering offends First Amendment values by penalizing citizens because of . . . their association with a political party." And finally, the plaintiffs' evidence of partisan asymmetry well fits a suit alleging associational injury (although, as noted below, that was not how it was used). As the Court points out, what those statistical metrics best measure is a gerrymander's effect "on the fortunes of political parties" and those associated with them.

In the end, though, I think the plaintiffs did not sufficiently advance a First Amendment associational theory to avoid the Court's holding on standing. Despite referring to that theory in their complaint, the plaintiffs tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes. Even their proof of partisan asymmetry was used for that purpose — although as noted above, it could easily have supported the alternative theory of associational harm. The plaintiffs joining in this suit do not include the State Democratic Party (or any related statewide organization). They did not emphasize their membership in that party, or their activities supporting it. And they did not speak to any tangible associational burdens — ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes. Even in this Court, when disputing the State's argument that they lacked standing, the plaintiffs reiterated their suit's core theory: that the gerrymander "intentionally, severely, durably, and unjustifiably dilutes Democratic votes." Given that theory, the plaintiffs needed to show that their own votes were indeed diluted in order to establish standing.

But nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim, or from satisfying the different standing requirement that theory would entail. The Court's opinion is about a suit challenging a partisan gerrymander on a particular ground — that it dilutes the votes of individual citizens. That opinion "leave[s] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." And in particular, it leaves for another day the theory of harm advanced by Justice Kennedy in *Vieth*: that a partisan gerrymander interferes with the vital "ability of citizens to band together" to further their political beliefs. Nothing about that injury is "generalized" or "abstract," as the Court says is true of the plaintiffs' dissatisfaction with the "overall composition of the legislature." A suit raising an associational theory complains of concrete "burdens on a disfavored party" and its members as they pursue their political interests and goals. And when the suit alleges that a gerrymander has imposed those burdens on a statewide basis, then its litigation should be statewide too — as to standing, liability, and remedy alike.

III

* * *

Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts — and in particular this Court — will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion because I agree that the plaintiffs have failed to prove Article III standing. I do not join Part III, which gives the plaintiffs another chance to prove their standing on remand. When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. The Court departs from our usual practice because this is supposedly "not the usual case." But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. After a year and a half of litigation in the District Court, including a 4-day trial, the plaintiffs had a more-than-ample opportunity to prove their standing under these principles. They failed to do so. Accordingly, I would have remanded this case with instructions to dismiss.

Note: Standing to Challenge Partisan Gerrymandering

1. Is Justice Kagan correct that partisan gerrymandering inflicts harm on voters, regardless of whether the district in question has been packed or cracked? Which of the two possibilities, packing or cracking, presents a more compelling injury-in-fact under Article III?

2. Does partisan gerrymandering inflict an associational harm sufficient to confer standing under Article III?

3. What do you think about the majority's decision to allow the plaintiffs another chance to prove an injury on remand? Is the majority correct that the plaintiffs deserve another chance because this is an "unusual case"?

4. In *Lujan v. Defenders of Wildlife* (Casebook p. 86) the Court states that the elements of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." What, if anything, can we learn from *Gill* about what plaintiffs must do to satisfy their burden?

Virginia House of Delegates v. Bethune-Hill

Supreme Court of the United States, 2019.
139 S. Ct. 1945 (2019).

JUSTICE GINSBURG delivered the opinion of the Court.

The Court resolves in this opinion a question of standing to appeal. In 2011, after the 2010 census, Virginia redrew legislative districts for the State's Senate and House of Delegates. Voters in 12 of the impacted House districts sued two Virginia state agencies and four election officials (collectively, State Defendants) charging that the redrawn districts were racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. The Virginia House of

Delegates and its Speaker (collectively, the House) intervened as defendants and carried the laboring oar in urging the constitutionality of the challenged districts at a bench trial, on appeal to this Court, and at a second bench trial. In June 2018, after the second bench trial, a three-judge District Court in the Eastern District of Virginia, dividing 2 to 1, held that in 11 of the districts "the [S]tate ha[d] [unconstitutionally] sorted voters . . . based on the color of their skin." *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (2018). The court therefore enjoined Virginia "from conducting any elections . . . for the office of Delegate . . . in the Challenged Districts until a new redistricting plan is adopted." Recognizing the General Assembly's "primary jurisdiction" over redistricting, the District Court gave the General Assembly approximately four months to "adop[t] a new redistricting plan that eliminate[d] the constitutional infirmity."

A few weeks after the three-judge District Court's ruling, Virginia's Attorney General announced, both publicly and in a filing with the District Court, that the State would not pursue an appeal to this Court. Continuing the litigation, the Attorney General concluded, "would not be in the best interest of the Commonwealth or its citizens." The House, however, filed an appeal to this Court, which the State Defendants moved to dismiss for want of standing. We postponed probable jurisdiction, and now grant the State Defendants' motion. The House, we hold, lacks authority to displace Virginia's Attorney General as representative of the State. We further hold that the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part.

I

To reach the merits of a case, an Article III court must have jurisdiction. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693 (2013). The three elements of standing, this Court has reiterated, are (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Although rulings on standing often turn on a plaintiff's stake in initially filing suit, "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013)). The standing requirement therefore "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). As a jurisdictional requirement, standing to litigate cannot be waived or forfeited. And when standing is questioned by a court or an opposing party, the litigant invoking the court's jurisdiction must do more than simply allege a nonobvious harm. To cross the standing threshold, the litigant must explain how the elements essential to standing are met.

Before the District Court, the House participated in both bench trials as an intervenor in support of the State Defendants. And in the prior appeal to this Court, the House participated as an appellee. Because neither role entailed invoking a court's jurisdiction, it was not previously incumbent on the House to demonstrate its standing. That situation changed when the House alone endeavored to appeal from the District Court's order holding 11 districts unconstitutional, thereby seeking to invoke this Court's jurisdiction. As the Court has repeatedly recognized, to appeal a decision that the primary party does not

challenge, an intervenor must independently demonstrate standing. *Diamond v. Charles*, 476 U.S. 54 (1986). We find unconvincing the House's arguments that it has standing, either to represent the State's interests or in its own right.

II

A

The House urges first that it has standing to represent the State's interests. Of course, "a State has standing to defend the constitutionality of its statute." No doubt, then, the State itself could press this appeal. And, as this Court has held, "a State must be able to designate agents to represent it in federal court." *Hollingsworth*. So if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State. Neither precondition, however, is met here.

To begin with, the House has not identified any legal basis for its claimed authority to litigate on the State's behalf. Authority and responsibility for representing the State's interests in civil litigation, Virginia law prescribes, rest exclusively with the State's Attorney General:

> All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge . . . shall be rendered and performed by the Attorney General, except [for certain judicial misconduct proceedings and other circumstances not present here]. VA. CODE ANN. § 2.2-507(A) (2017).

Virginia has thus chosen to speak as a sovereign entity with a single voice. In this regard, the State has adopted an approach resembling that of the Federal Government, which "centraliz[es]" the decision whether to seek certiorari by "reserving litigation in this Court to the Attorney General and the Solicitor General." *United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (dismissing a writ of certiorari sought by a special prosecutor without authorization from the Solicitor General); *see* 28 U.S.C. § 518(a); 28 C.F.R. § 0.20(a) (2018). Virginia, had it so chosen, could have authorized the House to litigate on the State's behalf, either generally or in a defined class of cases. *Hollingsworth*. Some States have done just that. Indiana, for example, empowers "[t]he House of Representatives and Senate of the Indiana General Assembly . . . to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." IND. CODE § 2-3-8-1 (2011). But the choice belongs to Virginia, and the House's argument that it has authority to represent the State's interests is foreclosed by the State's contrary decision.

The House observes that Virginia state courts have permitted it to intervene to defend legislation. But the sole case the House cites on this point — *Vesilind v. Virginia State Bd. of Elections*, 295 Va. 427 (2018) — does not bear the weight the House would place upon it. In *Vesilind*, the House intervened in support of *defendants* in the trial court, and continued to *defend* the trial court's favorable judgment on appeal. The House's participation in *Vesilind* thus occurred in the same defensive posture as did the House's participation in earlier phases of this case, when the House did not need to establish standing. Moreover, the House has pointed to nothing in the Virginia courts' decisions in the *Vesilind* litigation suggesting that the courts understood the House to be representing the interests of the State itself.

Nonetheless, the House insists, this Court's decision in *Karcher v. May*, 484 U.S. 72 (1987), dictates that we treat *Vesilind* as establishing conclusively the House's authority to litigate on the State's behalf. True, in *Karcher*, the Court noted a record, similar to that in *Vesilind*, of litigation by state legislative bodies in state court, and concluded without extensive explanation that "the New Jersey Legislature had authority under state law to represent the State's interests . . . ." Of crucial significance, however, the Court in *Karcher* noted no New Jersey statutory provision akin to Virginia's law vesting the Attorney General with exclusive authority to speak for the Commonwealth in civil litigation. *Karcher* therefore scarcely impels the conclusion that, despite Virginia's clear enactment making the Attorney General the State's sole representative in civil litigation, Virginia has designated the House as its agent to assert the State's interests in this Court.

Moreover, even if, contrary to the governing statute, we indulged the assumption that Virginia had authorized the House to represent the State's interests, as a factual matter the House never indicated in the District Court that it was appearing in that capacity. Throughout this litigation, the House has purported to represent its own interests. Thus, in its motion to intervene, the House observed that it was "the legislative body that actually drew the redistricting plan at issue," and argued that the existing parties — including the State Defendants — could not adequately protect its interests. Nowhere in its motion did the House suggest it was intervening as agent of the State. . . . [*See Karcher*] (parties may not appeal in particular capacities "unless the record shows that they participated in those capacities below").

B

The House also maintains that, even if it lacks standing to pursue this appeal as the State's agent, it has standing in its own right. To support standing, an injury must be "legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811 (1997). This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage. The Court's precedent thus lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment.

Seeking to demonstrate its asserted injury, the House emphasizes its role in enacting redistricting legislation in particular. The House observes that, under Virginia law, "members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly." VA. CONST. art. 2, § 6. The House has standing, it contends, because it is "the legislative body that actually drew the redistricting plan," and because, the House asserts, any remedial order will transfer redistricting authority from it to the District Court. But the Virginia constitutional provision the House cites allocates redistricting authority to the "General Assembly," of which the House constitutes only a part.

That fact distinguishes this case from *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652 (2015), in which the Court recognized the standing of the Arizona House and Senate — *acting together* — to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority

under the Federal Constitution over congressional redistricting. In contrast to this case, in *Arizona State Legislature* there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority. Just as individual members lack standing to assert the institutional interests of a legislature, see *Raines*, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.

Moreover, in *Arizona State Legislature*, the challenged referendum was assailed on the ground that it *permanently* deprived the legislative plaintiffs of their role in the redistricting process. Here, by contrast, the challenged order does not alter the General Assembly's dominant initiating and ongoing role in redistricting. *Compare Arizona State Legislature* (allegation of nullification of "any vote by the Legislature, now or in the future, purporting to adopt a redistricting plan" (internal quotation marks omitted)), with 326 F. Supp. 3d at 227 (recognizing the General Assembly's "primary jurisdiction" over redistricting and giving the General Assembly first crack at enacting a revised redistricting plan).

Nor does *Coleman v. Miller*, 307 U.S. 433 (1939), aid the House. There, the Court recognized the standing of 20 state legislators who voted against a resolution ratifying the proposed Child Labor Amendment to the Federal Constitution. The resolution passed, the opposing legislators stated, only because the Lieutenant Governor cast a tie-breaking vote — a procedure the legislators argued was impermissible under Article V of the Federal Constitution. As the Court has since observed, *Coleman* stands "at most" "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*. Nothing of that sort happened here. Unlike *Coleman*, this case does not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote. At issue here, instead, is the constitutionality of a concededly enacted redistricting plan. As we have already explained, a single House of a bicameral legislature generally lacks standing to appeal in cases of this order.

Aside from its role in enacting the invalidated redistricting plan, the House, echoed by the dissent, asserts that the House has standing because altered district boundaries may affect its composition. For support, the House and the dissent rely on *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972) (*per curiam*), in which this Court allowed the Minnesota Senate to challenge a District Court malapportionment litigation order that reduced the Senate's size from 67 to 35 members. The Court said in *Beens*: "[C]ertainly the [Minnesota Senate] is directly affected by the District Court's orders," rendering the Senate "an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal in a case of this kind."

Beens predated this Court's decisions in *Diamond v. Charles* and other cases holding that intervenor status alone is insufficient to establish standing to appeal. Whether *Beens* established law on the question of standing, as distinct from intervention, is thus less than pellucid. But even assuming, *arguendo*, that *Beens* was, and remains, binding precedent on standing, the order there at issue injured the Minnesota Senate in a way the order challenged here does not injure the Virginia House. Cutting the size of a legislative chamber in half would necessarily alter its day-to-day operations. Among other things, leadership selection,

committee structures, and voting rules would likely require alteration. By contrast, although redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members.[6] Although the House urges that changes to district lines will "profoundly disrupt its day-to-day operations," it is scarcely obvious how or why that is so. As the party invoking this Court's jurisdiction, the House bears the burden of doing more than "simply alleg[ing] a nonobvious harm."

Analogizing to "group[s] other than a legislative body," the dissent insists that the House has suffered an "obvious" injury. But groups like the string quartet and basketball team posited by the dissent select their own members. Similarly, the political parties involved in the cases the dissent cites, see *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008), and *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989)), select their own leadership and candidates. In stark contrast, the House does not select its own members. Instead, it is a representative body composed of members chosen by the people. Changes to its membership brought about by the voting public thus inflict no cognizable injury on the House.

The House additionally asserts injury from the creation of what it calls "divided constituencies," suggesting that a court order causing legislators to seek reelection in districts different from those they currently represent affects the House's representational nature. But legislative districts change frequently — indeed, after every decennial census — and the Virginia Constitution resolves any confusion over which district is being represented. It provides that delegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts. VA. CONST., art. 2, § 6 ("A member in office at the time that a decennial redistricting law is enacted shall complete his term of office and shall continue to represent the district from which he was elected for the duration of such term of office . . . ."). We see little reason why the same would not hold true after districting changes caused by judicial decisions, and we thus foresee no representational confusion. And if harms centered on costlier or more difficult election campaigns are cognizable — a question that . . . we need not decide today — those harms would be suffered by individual legislators or candidates, not by the House as a body.

In short, Virginia would rather stop than fight on. One House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process.

* * *

For the reasons stated, we dismiss the House's appeal for lack of jurisdiction.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH join, dissenting.

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[6] The dissent urges that changes to district lines will alter the House's future legislative output. A legislative chamber as an institution, however, suffers no legally cognizable injury from changes to the *content* of legislation its future members may elect to enact. By contrast, the House has an obvious institutional interest in the *manner* in which it goes about its business.

I would hold that the Virginia House of Delegates has standing to take this appeal. The Court disagrees for two reasons: first, because Virginia law does not authorize the House to defend the invalidated redistricting plan on behalf of the Commonwealth, and, second, because the imposition of the District Court's districting plan would not cause the House the kind of harm required by Article III of the Constitution. I am convinced that the second holding is wrong and therefore will not address the first.

I

Our decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), identified the three elements that constitute the "irreducible constitutional minimum of standing" demanded by Article III. A party invoking the jurisdiction of a federal court must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The Virginia House of Delegates satisfies all those requirements in this case.

I begin with "injury in fact." It is clear, in my judgment, that the new districting plan ordered by the lower court will harm the House in a very fundamental way. A legislative districting plan powerfully affects a legislative body's output of work. Each legislator represents a particular district, and each district contains a particular set of constituents with particular interests and views. The interests and views of these constituents generally have an important effect on everything that a legislator does — meeting with the representatives of organizations and groups seeking the legislator's help in one way or another, drafting and sponsoring bills, pushing for and participating in hearings, writing or approving reports, and of course, voting. When the boundaries of a district are changed, the constituents and communities of interest present within the district are altered, and this is likely to change the way in which the district's representative does his or her work. And while every individual voter will end up being represented by a legislator no matter which districting plan is ultimately used, it matters a lot how voters with shared interests and views are concentrated or split up. The cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.

All of this should really go without saying. After all, it is precisely because of the connections between the way districts are drawn, the composition of a legislature, and the things that a legislature does that so much effort is invested in drawing, contesting, and defending districting plans. Districting matters because it has institutional and legislative consequences. To suggest otherwise, to argue that substituting one plan for another has no effect on the work or output of the legislative body whose districts are changed, would really be quite astounding. If the selection of a districting plan did not alter what the legislative body does, why would there be such pitched battles over redistricting efforts?

What the Court says on this point is striking. According to the Court, "the House as an institution has no cognizable interest in the identity of its members," and thus suffers no injury from the imposition of a districting plan that "may affect the membership of the chamber" or the "content of legislation its future members may elect to enact." Really? It seems obvious that any group consisting of members who must work together to achieve the group's aims has a keen interest in the identity of its members, and it follows that the group also has a strong

interest in how its members are selected. And what is more important to such a group than the content of its work?

Apply what the Court says to a group other than a legislative body and it is immediately obvious that the Court is wrong. Does a string quartet have an interest in the identity of its cellist? Does a basketball team have an interest in the identity of its point guard? Does a board of directors have an interest in the identity of its chairperson? Does it matter to these groups how their members are selected? Do these groups care if the selection method affects their performance? Of course.

The Virginia House of Delegates exists for a purpose: to represent and serve the interests of the people of the Commonwealth. The way in which its members are selected has a powerful effect on how it goes about this purpose[1] — a proposition reflected by the Commonwealth's choice to mandate certain districting criteria in its constitution. *See* VA. CONST., art. II, § 6. As far as the House's standing, we must assume that the districting plan enacted by the legislature embodies the House's judgment regarding the method of selecting members that best enables it to serve the people of the Commonwealth. (Whether this is a permissible judgment is a merits question, not a question of standing. *Cf. Warth v. Seldin*, 422 U.S. 490 (1975)). It therefore follows that discarding that plan and substituting another inflicts injury in fact.

Our most pertinent precedent supports the standing of the House on this ground. In *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972) (*per curiam*), we held that the Minnesota Senate had standing to appeal a district court order reapportioning the Senate's seats. In reaching that conclusion, we noted that "certainly" such an order "directly affected" the Senate. The same is true here. There can be no doubt that the new districting plan "directly affect[s]" the House whose districts it redefines and whose legislatively drawn districts have been replaced with a court-ordered map. That the *Beens* Court drew its "directly affect[s]" language from a case involving a standard reapportionment challenge, see *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964) (*per curiam*), *aff'd*, 381 U.S. 415 (1965) (*per curiam*), only serves to confirm that the House's injury is sufficient to demonstrate standing under *Beens*.

In an effort to distinguish *Beens*, it is argued that the District Court decision at issue there, which slashed the number of senators in half, "ha[d] a distinct and more direct effect on the body itself than a mere shift in district lines." But even if the effect of the court order was greater in *Beens* than it is here, it is the existence — not the extent — of an injury that matters for purposes of Article III standing.

The Court suggests that the effects of the court-ordered districting plan in *Beens* were different from the effects of the plan now before us because the former concerned the legislature's internal operations. But even if the imposition of the court-ordered plan in this case would not affect the internal operations of the House (and that is by no means clear), it is very strange to think that changes to

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[1] The Court has not hesitated to recognize this link in other contexts. *See, e.g.*, *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989).

such things as "committee structures" and "voting rules" are more important than changes in legislative output.

In short, the invalidation of the House's redistricting plan and its replacement with a court-ordered map would cause the House to suffer a "concrete" injury. And as Article III demands, see *Spokeo*, that injury would also be "particularized" (because it would target the House); "imminent" (because it would certainly occur if this appeal is dismissed); "traceable" to the imposition of the new, court-ordered plan; and "redress[able]" by the relief the House seeks here.

II

Although the opinion of the Court begins by citing the three fundamental Article III standing requirements just discussed, it is revealing that the Court never asserts that the effect of the court-ordered plan at issue would not cause the House "concrete" harm. Instead, the Court claims only that any harm would not be " 'judicially cognizable.' " The Court lifts this term from *Raines v. Byrd*, 521 U.S. 811 (1997), where the Court held that individual Members of *Congress* lacked standing to challenge the constitutionality of the Line Item Veto Act. But the decision in *Raines* rested heavily on federal separation-of-powers concerns, which are notably absent here. *See id.* (Souter, J., concurring in judgment). And although the Court does not say so expressly, what I take from its use of the term "judicially cognizable" injury rather than "concrete" injury is that the decision here is not really based on the *Lujan* factors, which set out the "irreducible" minimum demanded by Article III. Instead, the argument seems to be that the House's injury is insufficient for some other, only-hinted-at reason.

Both the United States, appearing as an *amicus*, and the Commonwealth of Virginia are more explicit. The Solicitor General's brief argues as follows:

> In the federal system, the Constitution gives Congress only "legislative Powers," U.S. CONST., art. 1, § 1, and the "power to seek judicial relief . . . cannot possibly be regarded as merely in aid of the legislative function." *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). As a result, "once Congress makes its choice in enacting legislation, its participation ends." *Bowsher v. Synar*, 478 U.S. 714 (1986). . . . *The same is true here.* A branch of a state government that makes rather than enforces the law does not itself have a cognizable Article III interest in the defense of its laws. Brief for United States as *Amicus Curiae* (emphasis added).

The Virginia Solicitor General makes a similar argument.

These arguments are seriously flawed because the States are under no obligation to follow the Federal Constitution's model when it comes to the separation of powers. *See Whalen v. United States*, 445 U.S. 684 (1980); *cf. Raines*. If one House of Congress or one or more Members of Congress attempt to invoke the power of a federal court, the court must consider whether this attempt is consistent with the structure created by the Federal Constitution. An interest asserted by a Member of Congress or by one or both Houses of Congress that is inconsistent with that structure may not be judicially cognizable. But I do not see how we can say anything similar about the standing of state legislators or state

legislative bodies.[2] *Cf. Karcher v. May*, 484 U.S. 72 (1987). The separation of powers (or the lack thereof) under a state constitution is purely a matter of state law, and neither the Court nor the Virginia Solicitor General has provided any support for the proposition that Virginia law bars the House from defending, in its own right, the constitutionality of a districting plan.

* * *

For these reasons, I would hold that the House of Delegates has standing, and I therefore respectfully dissent.

Note: Standing to Appeal and Legislative Standing

1. As the Court explains in *Virginia House of Delegates*, an appellant who seeks review from a federal court must establish standing to appeal, just as a plaintiff who initially files an action federal court must establish standing to sue. Ordinarily, a party that loses in district court has little difficulty establishing standing to appeal. Can you explain why that is so? In an ordinary case, what injury gives a losing plaintiff, or a losing defendant, standing to appeal from the judgment of a district court to a court of appeals or to the U.S. Supreme Court?

2. In *Virginia House of Delegates*, standing to appeal was contested because the state officials who were named as defendants, represented by the state attorney general, elected not to appeal from the adverse judgment. Instead, an appeal was taken by a house of the state legislature, which had intervened as a defendant in the district court. That is no accident. Many of the Court's cases on appellate standing have arisen when state officials refuse to defend a law against constitutional attack, or refuse to take an appeal after suffering a loss. *See Hollingsworth v. Perry*, 570 U.S. 693 (2013) (appeal by official sponsors of statewide ballot measure prohibiting same-sex marriage); *Diamond v. Charles*, 476 U.S. 54 (1986) (appeal by physician personally opposed to abortion); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (appeal by single member of a school board).

Why do you suppose state attorneys general acquiesce in constitutional challenges to state law? Are there good reasons why state officials might decline to appeal after suffering a loss in federal district court? Are there bad reasons? In *Virginia House of Delegates*, the state attorney general who declined to appeal was a Democrat, while the legislative body that drew the map and sought to appeal was controlled by Republicans. Should that matter?

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[2] The Court's observation that the Virginia Constitution gives legislative districting authority to the General Assembly as a whole — in other words, to the House of Delegates and the Senate in combination — does not answer the question. To start, a similar argument against standing was pressed and rejected in *Sixty-seventh Minnesota State Senate* and the Court does not explain why a different outcome is warranted here. Nor am I persuaded by the Court's citation of *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652 (2015). There, the Court held that the Arizona Legislature had standing to bring a suit aimed at protecting its redistricting authority. But from the fact that a whole legislature may have standing to defend its redistricting authority, it does not follow that the House necessarily lacks standing to challenge a redistricting decision based on concrete injuries to its institutional interests. *Cf. Spokeo, Inc.*

3. As the Court observes, some states have chosen to centralize the representation of the state and its agencies and officials in a single attorney general in the executive branch. But others, including Indiana, by statute authorize the state legislature to defend state laws in some circumstances. Should states enact laws that designate a "pinch hitter," authorized to defend laws and take appeals when the attorney general refuses? And if so, should the state legislature perform that function?

In answering those questions, consider that most state attorneys general (including Virginia's) are elected officials, like state legislators. That means that the office charged with defending a state law may be held by someone who, for policy or political reasons, vigorously opposes it. At the same time, fully litigating a constitutional challenge in federal court may take many years. Intervening elections may entrust the defense of state law to an individual from a different party, or may flip the party composition of a state legislature, or may leave a bicameral legislature divided. How should states define who can litigate on behalf of the state, and thus who has standing to appeal, in the face of that uncertainty?

4. The majority and dissent in *Virginia House of Delegates* disagree about the Court's precedents concerning legislative standing. Before the decision, the case law might have been summarized as follows: (1) state legislatures have standing to assert injuries to the legislature as an institution, *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015); and (2) individual legislators have standing to assert an injury when their votes were "completely nullified" because legislation did or did not go into effect, *Coleman v. Miller*, 307 U.S. 433 (1939); but (3) individual members of a legislature do not have standing to assert injuries to the legislature as a whole, *Raines v. Byrd*, 521 U.S. 811 (1997). After *Virginia House of Delegates*, can you articulate when legislative standing is available? What would be the advantages and disadvantages of expanding legislative standing? Are there some types of cases in which looser rules for legislative standing would be especially valuable, or especially costly?

Page 100: ***Replace Note 7 with the following:***

7. *More on "injury in fact."* In *Lujan*, the Court acknowledged that Congress can create a legal right by statute, but it concluded that plaintiffs must still meet Article III's injury-in-fact requirement, which requires a "concrete" injury in bringing a suit against the government. The logic of that requirement extends to other suits as well.

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Court applied the standing requirements to a plaintiff who sued a consumer reporting agency for violating the Fair Credit Reporting Act of 1970 (FCRA). The FCRA obligates agencies to follow procedures to ensure maximum accuracy of consumer reports and authorizes an action for liquidated damages for willful violations. Robins alleged that the defendant had violated the Act by falsely reporting some information about him, such as stating that he was married when he was not and that he was employed when he was out of work. In an opinion by Justice Alito, the Court held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in fact." But a "bare procedural violation" is not enough. A plaintiff must still have a "concrete" harm, a "real" and not an "abstract" harm, to satisfy the Article III injury-in-fact requirement. That inquiry requires courts to ask "whether an alleged intangible

harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."

On remand, the Ninth Circuit looked to Robins's "actual harm," which the court described as a "material risk of harm" to his interests. The court found that Robins had standing because he suffered a "real risk of harm" to his employment prospects and that he suffered anxiety from the disclosure. *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

The Supreme Court built upon *Spokeo* in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Credit-reporting agency TransUnion developed what proved to be a rather unsophisticated system to determine whether a consumer's name appeared on the U.S. Treasury Department's list of terrorists, drug traffickers, and other serious criminals — a listing that is consequential, as it is generally unlawful to do business with these individuals. The system looked at first and last name, but nothing else, a procedure that generated a significant number of false positives. When Ramirez attempted to buy a car, the dealership ran a credit check, and the TransUnion report asserted that he was on a "terrorist list." Ramirez's wife had to purchase the car in her name. When Ramirez asked for his credit report, TransUnion sent a first report that did not mention he was on the list. It sent a second letter alerting him that he was a potential match, but it did not provide a summary of his rights as required by statute, although it had included the summary in the first letter. Ramirez contacted a lawyer and canceled a planned trip to Mexico to address these concerns.

Ramirez sued on behalf of a class of 8,185 members. Ramirez alleged three injuries under the FCRA: TransUnion failed to follow reasonable procedures to ensure accurate information in its files, TransUnion did not include all the information in its file in response to Ramirez's first request, and TransUnion did not include a summary of rights in each mailing.

Justice Kavanaugh wrote the opinion for the Court and found that most of the class members lacked standing to pursue the claims asserted. First, the Court looked back to *Lujan* and emphasized that while Congress can create a cause of action, there must still be a "concrete harm" under Article III. Congress cannot authorize "citizen suits," which would enable it to recognize any harm it wanted and transfer enforcement of the law to the judiciary. Without a concrete-harm requirement, the Court said, Congress might "provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law." Such a regime "not only would violate Article III but also would infringe on the Executive Branch's Article II authority."

Second, the Court looked to whether the harm had a "close relationship" with a common law harm. The closest analogy was defamation, but the Court noted that defamation requires publication to a third party. Because 6,332 class members did not have their reports disclosed to potential creditors during a 7-month period of alleged injury, these class members lacked a concrete injury. Ramirez and the remaining class members, however, did suffer a concrete injury.

Third, the Court rejected the argument that the risk of future harm is sufficient. The class members here sought damages, not injunctive relief. While the material risk of future harm is sometimes sufficient to confer standing for injunctive relief, the Court concluded that it is not sufficient in a damages action. Plaintiffs must wait for harm to materialize before they have a concrete injury to proceed with a damages action.

The Court acknowledged that Ramirez suffered an injury when TransUnion did not include the proper information in its mailings. But the Court rejected those claims for all other class members. The Court found that there was no evidence that any other class member even opened any such mailings, much less suffered any concrete injury from them.

Justice Thomas dissented, joined by Justices Breyer, Sotomayor, and Kagan. He focused on the scope of the judicial power as understood at the founding, which led him to distinguish between private rights and public rights that could amount to an "injury in fact." Plaintiffs could "enforce a right held privately by an individual" simply by asserting a violation of the right, with no showing of actual damages. Any violation of a private right, including a right created by statute, would be sufficient to demonstrate an "injury in fact." In contrast, a violation of a "duty owed broadly to the whole community" requires the showing of injury and damages. *Lujan*, for example, was a public rights case, and plaintiffs needed to demonstrate a concrete injury beyond the mere violation of the statute.

Justice Thomas argued that the Court had never declared that a legal injury is inherently insufficient to establish standing. He contended, "In the name of protecting the separation of powers the Court has relieved the legislature of its power to create and define rights." Justice Thomas concluded:

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

Justice Kagan also wrote a dissenting opinion, largely agreeing with Justice Thomas's opinion.

Who has the better argument after *Lujan* and *Spokeo*? Justice Thomas also suggested that one consequence of the Court's decision is that "state courts will exercise exclusive jurisdiction over these sorts of class actions." Is he right about that? See Chapter 4, section C.

C. Mootness

Page 145: ***Insert the following notes:***

3. What happens if a civil case becomes moot on appeal? In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the Supreme Court explained that if the case becomes moot by "happenstance" — through no fault of the parties — the "established practice" is to reverse or vacate the judgment and remand with direction to dismiss the case. This procedure "clears the path for future relitigation of the issues between the parties and eliminates a judgment." In contrast, "mootness by reason of settlement does not justify vacatur of a judgment" in the ordinary case. *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).

4. In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), the Supreme Court addressed mootness in a nominal damages case. Uzuegbunam, an evangelical Christian, was instructed not to speak about his religious faith on a college campus

and was directed to a "free speech zone"; once there, he was again asked not to speak about his faith. He sued, alleging a First Amendment violation and seeking nominal damages and injunctive relief. The college voluntarily changed its policy and argued that the case was moot. Uzuegbunam countered that his nominal damages claim defeated mootness, and the Court agreed. In an 8-1 decision, Justice Thomas recognized that, historically, nominal damages could provide relief to a litigant after the "completed violation of a legal right." Plaintiffs may "pursue nominal damages whenever they suffered a personal legal injury." Nominal damages would therefore meet the "redressability" prong of standing, even if the injunctive claim is moot. Chief Justice Roberts dissented, arguing that there is "no limiting principle" to prevent every claimant from requesting nominal damages of one dollar to avoid mootness. Is *Uzuegbunam*'s conclusion consistent with *Spokeo*'s conclusion that the violation of a legal right is not always sufficient for standing?

D. The Political Question Doctrine

Page 164–66: ***omit the second paragraph of Note 3 and Note 5 and replace with the following principal case:***

Rucho v. Common Cause

Supreme Court of the United States, 2019.
139 S. Ct. 2484 (2019).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs' [main allegation is] that the gerrymandering violated the Equal Protection Clause of the Fourteenth Amendment. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable" — that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would

be] possible to draw a map with 11 Republicans and 2 Democrats." One Democratic state senator objected that entrenching the 10-3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court.

* * *

B

The second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature — dominated by Democrats — undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. "[A] decision was made to go for the Sixth," which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

II

A

. . . In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' "

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable — outside the courts' competence and therefore beyond the courts' jurisdiction. Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]."

. . . The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering — whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates — in particular James Madison, who ultimately prevailed over fellow future President James Monroe.

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength."

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," in "an attempt to forbid the practice of the gerrymander." Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas — one-person, one-vote and racial gerrymandering — our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts.

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions.

In the leading case of *Baker v. Carr*, 369 U.S. 186 (1962), voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. This Court identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541 (1999) [citing four decisions along with *Gaffney v. Cummings*, 412 U.S. 735 (1973), which recognized that "[p]olitics and political considerations are inseparable from districting and apportionment"].

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* (plurality opinion).

* * *

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." An important reason for those careful constraints is that, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts — even when proceeding with best intentions — would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering." *Cromartie*.

B

Partisan gerrymandering claims invariably sound in a desire for proportional representation. [S]uch claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve* — based on the votes of their supporters — and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature."

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities

of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State — such as the fact that urban electoral districts are often dominated by one political party — can itself lead to inherently packed districts.

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," and "results from one gerrymandering case to the next would likely be disparate and inconsistent."

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating

generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race — would seem to compel the opposite conclusion." Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. In reaching that result the court first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.' " The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district — by virtue of cracking or packing — is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation."

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant intent" inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent — securing partisan advantage — does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the

outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent. Judges not only have to pick the winner — they have to beat the point spread.

The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters' selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

B

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C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. Judges began with a significant body of law about what constituted a legal violation. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1.

D

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V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles" does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court *can* address the problem of partisan gerrymandering because it *must*." That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional — despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration — it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can't do the same. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in

state statutes and state constitutions can provide standards and guidance for state courts to apply.

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. Dozens of bills have been introduced to limit reliance on political considerations in redistricting. [One] example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence.

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

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

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become

omnipresent players in the political process. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

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A

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B

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." If there is a single idea that made our Nation, it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people."

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Election day — next year, and two years later, and two years after that — is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme the practice amounts to "rigging elections." By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives." Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people."

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said about how gerrymanders undermine democracy. Indeed, the majority concedes that gerrymandering is "incompatible with democratic principles." And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem — a proposition dubious on its face. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. But big data and modern technology make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders — gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's — let alone the Framers '— gerrymanders.

C

Partisan gerrymandering of the kind before us not only subverts democracy. It violates individuals' constitutional rights as well. Partisan gerrymandering operates through vote dilution — the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight — has less consequence — than it would under a neutrally drawn map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. As Justice Kennedy once hypothesized: If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause.

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering violates the Constitution. Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights — in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends — the majority declines to provide any remedy. [T]he majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline — one not based on contestable notions of political fairness — from which to measure injury. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." But the Constitution does not mandate proportional representation. So, the majority contends, courts would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?' " No

"discernible and manageable" standard is available, the majority claims — and so courts could willy-nilly become embroiled in fixing every districting plan.

I'll give the majority this one — and important — thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. Respect for state legislative processes — and restraint in the exercise of judicial authority — counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country have largely converged on a standard for adjudicating partisan gerrymandering claims. And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness — either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

A

Start with the standard the lower courts used. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. But [i]t cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. Consider the sort of evidence used in North Carolina. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." The approach begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.*, the number of Democratic and

Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum — the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome — that is, the outcome smack dab in the center — in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum — at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans — all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data that [the mapmaker] employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They looked at the evidence and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." Courts, the majority argues, will have to choose among contested notions of electoral fairness. And even once courts have chosen, the majority continues, they will have to decide "[h]ow much is too much?" In answering that question, the majority surmises, they will likely go far too far. So the whole thing is impossible, the majority concludes. But it never tries to analyze the serious question presented here — whether the kind of standard developed below allows for neutral and manageable oversight. That kind of oversight is not only possible; it's been done.

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to — and in fact did not — choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one. Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[ ] outlier." Those maps took the

State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. On top of that, the maps took the State's legal landscape as a given. They incorporated the State's districting priorities, excluding partisanship. The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." But that is a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis — exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage has distorted the State's districting decisions.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10-3 partisan split even as Republicans got a bare majority of the statewide vote. If the majority had done nothing else, it could have set the line here.

And if the majority thought that approach too case-specific, it could have used the lower courts' general standard — focusing on "predominant" purpose and "substantial" effects — without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. [C]ontrary to the majority's suggestion, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling — by even the strictest measure, inordinately partisan.

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." But that is not so. The plaintiffs objected to one specific practice — the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led

to nothing close. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable — and eminently legal — standards, provided that relief.

III

[T]he need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. One was "introduced in 2005 and has been reintroduced in every Congress since." And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

The majority's most perplexing "solution" is to look to state courts. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

We could have, and we should have. The gerrymanders here — and they are typical of many — violated the constitutional rights of many hundreds of thousands of American citizens. Those voters did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene.

[G]errymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, "all political power flows from the people." And that means "that the people should choose whom they please to govern them." But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Note: Partisan Gerrymandering as a Political Question

1. *Gill v. Whitford* held that allegations of statewide harms are insufficient to establish Article III standing in partisan-gerrymandering cases. In doing so, it discussed in some length what plaintiffs would need to do to prove that they have standing to challenge a partisan gerrymander. But just a year later, the Court ruled that partisan-gerrymandering claims pose political questions that courts are not permitted to resolve regardless of whether plaintiffs would otherwise have

standing. Should the Court have decided the political-question issue in *Gill*? Why wait?

2. The majority opinion stressed that it would be highly controversial for courts to interject themselves into sensitive political matters like districting. To what extent do you think the Court ruled the way it did to preserve its legitimacy? Is preserving judicial legitimacy itself a "legitimate" basis for deciding something is a "political question?"

3. The majority claimed that it did not condone "excessive partisan gerrymandering" and noted that Congress and each state could take steps to address the problem. Shortly after the opinion was released, commentators likened the majority's proposed solution to asking foxes to guard a henhouse. Is that a fair assessment? Can partisan gerrymandering be addressed through the political process? If not, does that call into question the holding?

4. The central holding is that there are no "judicially discoverable and manageable standards" for analyzing partisan-gerrymandering claims. Unlike other areas of law, the majority notes, these claims lack any grounding in the Constitution, statutes, or the common law and so judges would be unfamiliar with how to approach them. Judges would have no way of knowing, for example, whether the "prohibited deviation from [the median map] should kick in at 25 percent or 75 percent or some other point." The dissent, in contrast, discusses the empirical methods employed by experts to identify "outlier" gerrymanders. Do you think courts could competently address these questions? If so, how would the court choose?

5. According to the dissent's logic, how would a court analyze a partisan-gerrymandering claim if a state passed a law explicitly permitting it? What about for a state that lacks any statutory guidance for districting at all? Does it "make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution?"

Chapter 8
Federal Common Law

D. Implied Remedies for Violation of Constitutional Rights

Page 468: ***insert after the Note:***

Hernandez v. Mesa

Supreme Court of the United States, 2020.
140 S. Ct. 735.

JUSTICE ALITO delivered the opinion of the Court.

We are asked in this case to extend *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and create a damages remedy for a cross-border shooting. As we have made clear in many prior cases, however, the Constitution's separation of powers requires us to exercise caution before extending *Bivens* to a new "context," and a claim based on a cross-border shooting arises in a context that is markedly new. Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Because of the distinctive characteristics of cross-border shooting claims, we refuse to extend *Bivens* into this new field.

I

. . . Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, was with a group of friends in a concrete culvert that separates El Paso, Texas, from Ciudad Juarez, Mexico. The border runs through the center of the culvert. . . . After Hernández, who was also on the United States' side, ran back across the culvert onto Mexican soil, [Border Patrol Agent Jesus Mesa, Jr.] fired two shots at Hernández; one struck and killed him on the other side of the border.

Petitioners and Agent Mesa disagree about what Hernández and his friends were doing at the time of shooting. According to petitioners, they were simply playing a game, running across the culvert, touching the fence on the U.S. side, and then running back across the border. According to Agent Mesa, Hernández and his friends were involved in an illegal border crossing attempt, and they pelted him with rocks.

The shooting quickly became an international incident, with the United States and Mexico disagreeing about how the matter should be handled. On the United States' side, the Department of Justice conducted an investigation. When it finished, the Department, while expressing regret over Hernández's death, concluded that Agent Mesa had not violated Customs and Border Patrol policy or training, and it declined to bring charges or take other action against him. Mexico was not and is not satisfied with the U.S. investigation. It requested that Agent Mesa be extradited to face criminal charges in a Mexican court, a request that the United States has denied.

Petitioners, Hernández's parents, were also dissatisfied and therefore brought suit for damages in the United States District Court for the Western District of Texas. [The District Court dismissed, and the Fifth Circuit sitting en banc affirmed.]

We granted certiorari, and now affirm.

II

In *Bivens*, the Court broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim. The Court subsequently extended *Bivens* to cover two additional constitutional claims: in *Davis v. Passman*, 442 U.S. 228 (1979), a former congressional staffer's Fifth Amendment claim of dismissal based on sex, and in *Carlson v. Green*, 446 U.S. 14 (1980), a federal prisoner's Eighth Amendment claim for failure to provide adequate medical treatment. After those decisions, however, the Court changed course.

Bivens, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred "causes of action" that were "not explicit" in the text of the provision that was allegedly violated. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). As *Abbasi* recounted:

> During this "*ancien regime*," . . . the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose. . . . Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.

Bivens extended this practice to claims based on the Constitution itself.

In later years, we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power. The Constitution grants legislative power to Congress; this Court and the lower federal courts, by contrast, have only "judicial Power." Art. III, § 1. But when a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the law, the court risks arrogating legislative power. No law "pursues its purposes at all costs." Instead, lawmaking involves balancing interests and often demands compromise. Thus, a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages. For this reason, finding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.

This problem does not exist when a common-law court, which exercises a degree of lawmaking authority, fleshes out the remedies available for a common-law tort. Analogizing *Bivens* to the work of a common-law court, petitioners and some of their *amici* make much of the fact that common-law claims against federal officers for intentional torts were once available. But *Erie R. Co. v. Tompkins* [Chapter 7] held that "[t]here is no federal general common law," and therefore federal courts today cannot fashion new claims in the way that they could before 1938.

With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy. . . .

In both statutory and constitutional cases, our watchword is caution. For example, in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), we expressed doubt about our authority to recognize any causes of action not expressly created by

Congress. And we declined to recognize a claim against a foreign corporation under the Alien Tort Statute.

In constitutional cases, we have been at least equally reluctant to create new causes of action. We have recognized that Congress is best positioned to evaluate "whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government" based on constitutional torts. *Abbasi*. We have stated that expansion of *Bivens* is "a 'disfavored' judicial activity" and have gone so far as to observe that if "the Court's three *Bivens* cases [had] been . . . decided today," it is doubtful that we would have reached the same result. *Id.* And for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.

When asked to extend *Bivens*, we engage in a two-step inquiry. We first inquire whether the request involves a claim that arises in a "new context" or involves a "new category of defendants." And our understanding of a "new context" is broad. We regard a context as "new" if it is "different in a meaningful way from previous *Bivens* cases decided by this Court."

When we find that a claim arises in a new context, we proceed to the second step and ask whether there are any "special factors [that] counse[l] hesitation" about granting the extension. *Abbasi*. If there are — that is, if we have reason to pause before applying *Bivens* in a new context or to a new class of defendants — we reject the request.

We have not attempted to "create an exhaustive list" of factors that may provide a reason not to extend *Bivens*, but we have explained that "central to [this] analysis" are "separation-of-powers principles." *Id.* We thus consider the risk of interfering with the authority of the other branches, and we ask whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," and "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.*

III

A

The *Bivens* claims in this case assuredly arise in a new context. Petitioners contend that their Fourth and Fifth Amendment claims do not involve a new context because *Bivens* and *Davis* involved claims under those same two amendments, but that argument rests on a basic misunderstanding of what our cases mean by a new context. A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized. And once we look beyond the constitutional provisions invoked in *Bivens*, *Davis*, and the present case, it is glaringly obvious that petitioners' claims involve a new context, *i.e.*, one that is meaningfully different. *Bivens* concerned an allegedly unconstitutional arrest and search carried out in New York City; *Davis* concerned alleged sex discrimination on Capitol Hill. There is a world of difference between those claims and petitioners' cross-border shooting claims, where "the risk of disruptive intrusion by the Judiciary into the functioning of other branches" is significant.

Because petitioners assert claims that arise in a new context, we must proceed to the next step and ask whether there are factors that counsel hesitation. As we will explain, there are multiple, related factors that raise warning flags.

B

The first is the potential effect on foreign relations. "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." Indeed, we have said that "matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " . . . We must therefore be especially wary before allowing a *Bivens* remedy that impinges on this arena.

A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests. Such an incident may lead to a disagreement between those countries, as happened in this case.

The United States, through the Executive Branch, which has "the lead role in foreign policy," has taken the position that this incident should be handled in a particular way — namely, that Agent Mesa should not face charges in the United States nor be extradited to stand trial in Mexico. As noted, the Executive decided not to take action against Agent Mesa because it found that he "did not act inconsistently with [Border Patrol] policy or training regarding use of force." DOJ Press Release. We presume that Border Patrol policy and training incorporate both the Executive's understanding of the Fourth Amendment's prohibition of unreasonable seizures and the Executive's assessment of circumstances at the border. . . . The Executive does not want a Mexican criminal court to judge Agent Mesa's conduct by whatever standards would be applicable under Mexican law; nor does it want a jury in a *Bivens* action to apply its own understanding of what constituted reasonable conduct by a Border Patrol agent under the circumstances of this case. Such a jury determination, the Executive claims, would risk the "embarrassment of our government abroad" through "multifarious pronouncements by various departments on one question."

The Government of Mexico has . . . . requested that Agent Mesa be extradited for criminal prosecution in a Mexican court under Mexican law, and it has supported petitioners' *Bivens* suit. In a brief filed in this Court, Mexico suggests that shootings by Border Patrol agents are a persistent problem and argues that the United States has an obligation under international law . . . to provide a remedy for the shooting in this case. . . .

Both the United States and Mexico have legitimate and important interests that may be affected by the way in which this matter is handled. [But it] is not our task to arbitrate between them.

In the absence of judicial intervention, the United States and Mexico would attempt to reconcile their interests through diplomacy. . . .

For these reasons, petitioners' assertion that their claims have "nothing to do with the substance or conduct of U.S. foreign . . . policy" is plainly wrong.

C

Petitioners are similarly incorrect in deprecating the Fifth Circuit's conclusion that the issue here implicates an element of national security.

One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task. The United States' border with Mexico extends for 1,900

miles, and every day thousands of persons and a large volume of goods enter this country at ports of entry on the southern border. . . .

Unfortunately, there is also a large volume of illegal cross-border traffic. During the last fiscal year, approximately 850,000 persons were apprehended attempting to enter the United States illegally from Mexico, and large quantities of drugs were smuggled across the border. In addition, powerful criminal organizations operating on both sides of the border present a serious law enforcement problem for both countries.

On the United States' side, the responsibility for attempting to prevent the illegal entry of dangerous persons and goods rests primarily with the U.S. Customs and Border Protection Agency. . . . While Border Patrol agents often work miles from the border, some, like Agent Mesa, are stationed right at the border and have the responsibility of attempting to prevent illegal entry. For these reasons, the conduct of agents positioned at the border has a clear and strong connection to national security, as the Fifth Circuit understood.

Petitioners protest that "shooting people who are just walking down a street in Mexico" does not involve national security, but that misses the point. The question is not whether national security requires such conduct — of course, it does not — but whether the Judiciary should alter the framework established by the political branches for addressing cases in which it is alleged that lethal force was unlawfully employed by an agent at the border.

. . . Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.

D

Our reluctance to take that step is reinforced by our survey of what Congress has done in statutes addressing related matters. We frequently "loo[k] to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action." When foreign relations are implicated, it "is even more important . . . to look for legislative guidance before exercising innovative authority over substantive law." Accordingly, it is "telling" that Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders.

A leading example is 42 U.S.C. § 1983, which permits the recovery of damages for constitutional violations by officers acting under color of *state* law. We have described *Bivens* as a "more limited" "federal analog" to § 1983. It is therefore instructive that Congress chose to make § 1983 available only to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." It would be "anomalous to impute . . . a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action." Thus, the limited scope of § 1983 weighs against recognition of the *Bivens* claim at issue here.

[Moreover, we] presume that statutes do not apply extraterritorially to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."

If this danger provides a reason for caution when Congress has enacted a statute but has not provided expressly whether it applies abroad, we have even greater reason for hesitation in deciding whether to extend a judge-made cause of

action beyond our borders. "[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified" where "the question is not what Congress has done but instead what courts may do." . . .

Congress's treatment of ordinary tort claims against federal officers is also revealing. [The] traditional way in which civil litigation addressed abusive conduct by federal officers was by subjecting them to liability for common-law torts. For many years, such claims could be raised in state or federal court, and this Court occasionally considered tort suits against federal officers for extraterritorial injuries. After *Erie*, federal common-law claims were out, but we recognized the continuing viability of state-law tort suits against federal officials as recently as *Westfall v. Erwin*, 484 U.S. 292 (1988).

In response to that decision, Congress passed the so-called Westfall Act. . . . That Act makes the Federal Tort Claims Act (FTCA) "the exclusive remedy for most claims against Government employees arising out of their official conduct." Thus, a person injured by a federal employee may seek recovery directly from the United States under the FTCA, but the FTCA bars "[a]ny claim arising in a foreign country." The upshot is that claims that would otherwise permit the recovery of damages are barred if the injury occurred abroad. [The Court then provided several other examples of statutes precluding recovery for foreign claims.]

When Congress has enacted statutes creating a damages remedy for persons injured by United States Government officers, it has taken care to preclude claims for injuries that occurred abroad.

Instead, when Congress has provided compensation for injuries suffered by aliens outside the United States, it has done so by empowering Executive Branch officials to make payments under circumstances found to be appropriate. Thus, the Foreign Claims Act . . . allows the Secretary of Defense to appoint claims commissions to settle and pay claims for personal injury and property damage resulting from the noncombat activities of the Armed Forces outside this country. [The Court then provided several other examples.]

This pattern of congressional action — refraining from authorizing damages actions for injury inflicted abroad by Government officers, while providing alternative avenues for compensation in some situations — gives us further reason to hesitate about extending *Bivens* in this case.

E

In sum, this case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern — respect for the separation of powers. "Foreign policy and national security decisions are 'delicate, complex, and involve large elements of prophecy' for which 'the Judiciary has neither aptitude, facilities[,] nor responsibility.' " To avoid upsetting the delicate web of international relations, we typically presume that even congressionally crafted causes of action do not apply outside our borders. These concerns are only heightened when judges are asked to fashion constitutional remedies. . . .

When evaluating whether to extend *Bivens*, the most important question "is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" The correct "answer most often will be Congress." That is undoubtedly the answer here.

[Affirmed.]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

* * *

I write separately because, in my view, the time has come to consider discarding the *Bivens* doctrine altogether. The foundation for *Bivens* — the practice of creating implied causes of action in the statutory context — has already been abandoned. And the Court has consistently refused to extend the *Bivens* doctrine for nearly 40 years, even going so far as to suggest that *Bivens* and its progeny were wrongly decided. *Stare decisis* provides no "veneer of respectability to our continued application of [these] demonstrably incorrect precedents."

* * *

Our continued adherence to even a limited form of the *Bivens* doctrine appears to "perpetuat[e] a usurpation of the legislative power." Federal courts lack the authority to engage in the distinctly legislative task of creating causes of action for damages to enforce federal positive law.

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

[The dissent argued that the plaintiff's *Bivens* claim did not arise in a new context and that, even if it did arise in a new context, no special factors counseled against extending *Bivens* to this context.]

III

Plaintiffs' *Bivens* action arises in a setting kin to *Bivens* itself: Mesa . . . acted in disregard of instructions governing his conduct and of Hernández's constitutional rights. . . . Using lethal force against a person who "poses no immediate threat to the officer and no threat to others" surely qualifies as an unreasonable seizure. The complaint states that Mesa engaged in that very conduct; it alleged, specifically, that Hernández was unarmed and posed no threat to Mesa or others. For these reasons, as Mesa acknowledged at oral argument, Hernández's parents could have maintained a *Bivens* action had the bullet hit Hernández while he was running up or down the United States side of the embankment.

The only salient difference here: the fortuity that the bullet happened to strike Hernández on the Mexican side of the embankment. But Hernández's location at the precise moment the bullet landed should not matter one whit. After all, "[t]he purpose of *Bivens* is to deter the *officer*." . . . Mesa's allegedly unwarranted deployment of deadly force occurred on United States soil. It scarcely makes sense for a remedy trained on deterring rogue officer conduct to turn upon a happenstance subsequent to the conduct — a bullet landing in one half of a culvert, not the other.

Nor would it make sense to deem some culvert locations "new settings" for *Bivens* purposes, but others (those inside the United States), familiar territory. . . .

IV

Even accepting, *arguendo*, that the setting in this case could be characterized as "new," there is still no good reason why Hernández's parents should face a closed courtroom door. . . .

A

. . . Here, as Judge Prado, dissenting below, observed, "[i]t is uncontested that plaintiffs find no alternative relief in Mexican law, state law, [federal statutory

tort law], or federal criminal law." While the absence of alternative remedies, standing alone, does not warrant a *Bivens* action, it remains a significant consideration.

B

The special factors featured by the Court relate, in the main, to foreign policy and national security. But . . . no policies or policymakers are challenged in this case. Plaintiffs target the rogue actions of a rank-and-file law enforcement officer acting in violation of rules controlling his office. . . .

The Court nevertheless asserts that the instant suit has a "potential effect on foreign relations" because it invites courts "to arbitrate between" the United States and Mexico. Plaintiffs, however, have brought a civil damages action, no different from one a federal court would entertain had the fatal shot hit Hernández before he reached the Mexican side of the border. True, cross-border shootings spark bilateral discussion, but so too does a range of smuggling and other border-related issues that courts routinely address "concurrently with whatever diplomacy may also be addressing them." . . .

Moreover, the Court, in this case, cannot escape a "potential effect on foreign relations" by declining to recognize a *Bivens* action. As the Mexican Government alerted the Court: "[R]efus[al] to consider [Hernández's] parents' claim on the merits . . . is what has the potential to negatively affect international relations."

Notably, recognizing a *Bivens* suit here honors our Nation's international commitments. Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR) provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The United States ratified the ICCPR with the "understandin[g]" that Article 9(5) "require[s] the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity." One fitting mechanism to obtain compensation is a *Bivens* action. . . .

The Court also asserts, as cause for hesitation, "the risk of undermining border security." But . . . [i]nstructions regulating Border Patrol agents tell them to guard against deploying unjustified deadly force. Given that instruction, I do not grasp how allowing a *Bivens* action here would intrude upon the political branches' national-security prerogatives.

Congress, although well aware of the Court's opinion in *Bivens*, has not endeavored to dislodge the decision. The Court cites several statutes in support of the argument that affording a *Bivens* action to Hernández's parents would be inconsistent with measures Congress has taken. None of the cited statutes should stand in plaintiffs' way.

* * *

I resist the conclusion that "nothing" is the answer required in this case. I would reverse the Fifth Circuit's judgment and hold that plaintiffs can sue Mesa in federal court for violating their son's Fourth and Fifth Amendment rights.

Note: The Demise of Bivens*?*

1. *Hernandez* describes a significant shift in the analysis for determining whether to recognize a *Bivens* remedy. In *Bivens*, the Court adopted a presumption that individuals could bring an implied damages action for violations

of the Constitution, invoking the traditional maxim that where there is a violation of a legal right, there is a remedy. The *Bivens* Court suggested that such an action would lie unless Congress had created an alternative remedy or if anomalous, special factors counseled hesitation. But over the years, the Court became increasingly hostile towards recognizing new *Bivens* remedies. By the time of *Hernandez*, the Court had rejected the presumption in favor of recognizing *Bivens* actions, stating that expanding *Bivens* is now a "disfavored" judicial activity. Although continuing to maintain the rule that a *Bivens* remedy is available unless there are special factors counseling hesitation, the Court suggested that most cases present such special factors and accordingly that there is no basis for creating an implied remedy for damages for constitutional violations.

2. *Hernandez* instructs courts to perform a two-step inquiry to determine whether to recognize a *Bivens* claim. A court should first ask whether the claim arises in a new context and if the claim is in a new context, it should then ask whether there are any special factors counseling hesitation. With respect to the first question, *Hernandez* stated that a *Bivens* claim arises in a new context if it is "different in a meaningful way from previous *Bivens* cases decided by *this Court*." (Emphasis added). The Supreme Court has recognized only three *Bivens* claims: the Fourth Amendment claim in *Bivens* itself, a congressional staffer's Fifth Amendment claim of dismissal based on sex in *Davis v. Passman*, 442 U.S. 228 (1979), and a federal prisoner's Eighth Amendment claim for failure to provide adequate medical treatment in *Carlson v. Green*, 446 U.S. 14 (1980). Does this statement in *Hernandez* suggest that lower courts must reconsider decisions recognizing *Bivens* actions outside of those three contexts?

3. One of the reasons the *Hernandez* Court gave for limiting *Bivens* is that inferring a damages remedy is a form of common law and *Erie* established that there is no federal general common law. Accordingly, the Court stated, "a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy." Does this logic preclude all *Bivens* actions? Does it also prohibit actions seeking injunctions to prevent federal officials from violating the Constitution?

4. One of the cases extensively discussed in *Hernandez* is *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In *Abbasi*, the Court stated that, although *Bivens* remedies may deter officials from violating the Constitution, they may overdeter and otherwise interfere with executive officials. According to the Court, the "balance" between these competing interests "is one for the Congress, and not the Judiciary, to undertake." Does this reasoning provide a separate reason to think that expanding *Bivens* is not merely disfavored, but prohibited? In what situations might the Court recognize a new *Bivens* remedy?

Problem

FBI Agent Sara Williams led a task force investigating a multi-state sex-trafficking conspiracy. She was convinced that two men — Tom Jones and Harold Smith — were involved, and she filed investigative reports with false information and exaggerated facts to implicate them in the crime; hid evidence that pointed toward their innocence; and even convinced the victims to falsely identify them as the masterminds. Her efforts were successful: other investigators, the prosecutors, and the grand jury believed that the two men were guilty. Eventually, the two men were acquitted, but only after spending three years in jail awaiting trial. They sued the United States under a statute allowing for damages by those who have been

"unjustly convicted" and "imprisoned," but this claim was dismissed because they were never *convicted* of a crime. *See* 28 U.S.C. § 1495 (providing a cause of action for damages against the United States "by any person unjustly convicted of a [federal] offense").

Now the two men are suing Agent Williams directly. They say that she violated their Fourth Amendment rights. They cite *Bivens* itself as the closest case. Williams has moved to dismiss. She says that even if the allegations are true, this case is not *Bivens*. Applying the analysis from *Hernandez*, is she right?

Chapter 12
Special Problems of Removal Jurisdiction

A. Introduction

Page 614: ***insert at end of section:***

Home Depot U.S.A., Inc. v. Jackson

Supreme Court of the United States, 2019.
139 S. Ct. 1743.

JUSTICE THOMAS delivered the opinion of the Court.

The general removal statute, 28 U.S.C. § 1441(a), provides that "any civil action" over which a federal court would have original jurisdiction may be removed to federal court by "the defendant or the defendants." The Class Action Fairness Act of 2005 (CAFA) provides that "[a] class action" may be removed to federal court by "any defendant without the consent of all defendants." 28 U.S.C. § 1453(b). In this case, we address whether either provision allows a third-party counterclaim defendant — that is, a party brought into a lawsuit through a counterclaim filed by the original defendant — to remove the counterclaim filed against it. Because in the context of these removal provisions the term "defendant" refers only to the party sued by the original plaintiff, we conclude that neither provision allows such a third party to remove.

I

A

We have often explained that "[f]ederal courts are courts of limited jurisdiction." . . . In 28 U.S.C. §§ 1331 and 1332(a), Congress granted federal courts jurisdiction over two general types of cases: cases that "aris[e] under" federal law, § 1331, and cases in which the amount in controversy exceeds $75,000 and there is diversity of citizenship among the parties, § 1332(a). These jurisdictional grants are known as "federal-question jurisdiction" and "diversity jurisdiction," respectively. Each serves a distinct purpose: Federal-question jurisdiction affords parties a federal forum in which "to vindicate federal rights," whereas diversity jurisdiction provides "a neutral forum" for parties from different States.

Congress has modified these general grants of jurisdiction to provide federal courts with jurisdiction in certain other types of cases. As relevant here, CAFA provides district courts with jurisdiction over "class action[s]" in which the matter in controversy exceeds $5,000,000 and at least one class member is a citizen of a State different from the defendant. § 1332(d)(2)(A). A "class action" is "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure." § 1332(d)(l)(B).

In addition to granting federal courts jurisdiction over certain types of cases, Congress has enacted provisions that permit parties to remove cases originally filed in state court to federal court. Section 1441(a), the general removal statute, permits "the defendant or the defendants" in a state-court action over which the federal courts would have original jurisdiction to remove that action to federal court. To remove under this provision, a party must meet the requirements for removal detailed in other provisions. For one, a defendant cannot remove unilaterally. Instead, "all defendants who have been properly joined and served must join in or consent to the removal of the action." § 1446(b)(2)(A). Moreover,

when federal jurisdiction is based on diversity jurisdiction, the case generally must be removed within "1 year after commencement of the action," § 1446(c)(l), and the case may not be removed if any defendant is "a citizen of the State in which such action is brought," § 1441(b)(2).

CAFA also includes a removal provision specific to class actions. That provision permits the removal of a "class action" from state court to federal court "by any defendant without the consent of all defendants" and "without regard to whether any defendant is a citizen of the State in which the action is brought." § 1453(b).

At issue here is whether the term "defendant" in either § 1441(a) or § 1453(b) encompasses a party brought into a lawsuit to defend against a counterclaim filed by the original defendant or whether the provisions limit removal authority to the original defendant.

B

In June 2016, Citibank, N.A., filed a debt-collection action against respondent George Jackson in North Carolina state court. Citibank alleged that Jackson was liable for charges he incurred on a Home Depot credit card. In August 2016, Jackson answered and filed his own claims: an individual counterclaim against Citibank and third-party class-action claims against Home Depot U.S.A., Inc., and Carolina Water Systems, Inc.

Jackson's claims arose out of an alleged scheme between Home Depot and Carolina Water Systems to induce homeowners to buy water treatment systems at inflated prices. The crux of the claims was that Home Depot and Carolina Water Systems engaged in unlawful referral sales and deceptive and unfair trade practices in violation of North Carolina law. Jackson also asserted that Citibank was jointly and severally liable for the conduct of Home Depot and Carolina Water Systems and that his obligations under the sale were null and void.

In September 2016, Citibank dismissed its claims against Jackson. One month later, Home Depot filed a notice of removal, citing 28 U.S.C. §§ 1332, 1441, 1446, and 1453. Jackson moved to remand, arguing that precedent barred removal by a "third-party/additional counter defendant like Home Depot." Shortly thereafter, Jackson amended his third-party class-action claims to remove any reference to Citibank.

The District Court granted Jackson's motion to remand, and the Court of Appeals for the Fourth Circuit granted Home Depot permission to appeal and affirmed. Relying on Circuit precedent, it held that neither the general removal provision, § 1441(a), nor CAFA's removal provision, § 1453(b), allowed Home Depot to remove the class-action claims filed against it.

We granted Home Depot's petition for a writ of certiorari to determine whether a third party named in a class-action counterclaim brought by the original defendant can remove if the claim otherwise satisfies the jurisdictional requirements of CAFA. We also directed the parties to address whether the holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) — that an

original plaintiff may not remove a counterclaim against it — should extend to third-party counter-claim defendants.[1]

II

A

We first consider whether 28 U.S.C. § 1441(a) permits a third-party counterclaim defendant to remove a claim filed against it.[2] Home Depot contends that because a third-party counterclaim defendant is a "defendant" to the claim against it, it may remove pursuant to § 1441(a). The dissent agrees, emphasizing that "a 'defendant' is a 'person sued in a civil proceeding.' " This reading of the statute is plausible, but we do not think it is the best one. Of course the term "defendant," standing alone, is broad. But the phrase "the defendant or the defendants" "cannot be construed in a vacuum." . . . Considering the phrase "the defendant or the defendants" in light of the structure of the statute and our precedent, we conclude that § 1441(a) does not permit removal by any counterclaim defendant, including parties brought into the lawsuit for the first time by the counterclaim.[3]

Home Depot emphasizes that it is a "defendant" to a "claim," but the statute refers to "civil action[s]," not "claims." This Court has long held that a district court, when determining whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court. *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 461 (1894) [Casebook p. 492]. This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court's diversity jurisdiction. *E.g.*, *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 10 (1983); *cf. Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002) ("[A] counterclaim . . . cannot serve as the basis for 'arising under' jurisdiction"); § 1446(c)(2) (deeming the "sum demanded in good faith in the initial pleading . . . the amount in controversy"). Section 1441(a) thus does not permit removal based on counterclaims at all, as a counterclaim is irrelevant to whether the district court had "original jurisdiction" over the civil action. And because the "civil action . . . of which the district cour[t]" must have "original jurisdiction" is the action as defined by the plaintiff's complaint, "the defendant" to that action is the defendant to that complaint, not a party named in a counterclaim. It is this statutory context, not [as stated in the dissent] "the policy

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[1] In this opinion, we use the term "third-party counterclaim defendant" to refer to a party first brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff.

[2] Section 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

[3] Even the dissent declines to rely on the dictionary definition of "defendant" alone, as following that approach to its logical conclusion would require overruling *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

goals behind the [well-pleaded complaint] rule," that underlies our interpretation of the phrase "the defendant or the defendants."

The use of the term "defendant" in related contexts bolsters our determination that Congress did not intend for the phrase "the defendant or the defendants" in § 1441(a) to include third-party counterclaim defendants. For one, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. Rule 14, which governs "Third-Party Practice," distinguishes between "the plaintiff," a "defendant" who becomes the "third-party plaintiff," and "the third-party defendant" sued by the original defendant. Rule 12 likewise distinguishes between defendants and counterclaim defendants by separately specifying when "[a] defendant must serve an answer" and when "[a] party must serve an answer to a counterclaim."

Moreover, in other removal provisions, Congress has clearly extended the reach of the statute to include parties other than the original defendant. For instance, § 1452(a) permits "[a] party" in a civil action to "remove any claim or cause of action" over which a federal court would have bankruptcy jurisdiction. And §§ 1454(a) and (b) allow "any party" to remove "[a] civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." Section 1441(a), by contrast, limits removal to "the defendant or the defendants" in a "civil action" over which the district courts have original jurisdiction.

Finally, our decision in *Shamrock Oil* suggests that third-party counterclaim defendants are not "the defendant or the defendants" who can remove under § 1441(a). *Shamrock Oil* held that a counterclaim defendant who was also the original plaintiff could not remove under § 1441(a)'s predecessor statute. We agree with Home Depot that *Shamrock Oil* does not specifically address whether a party who was not the original plaintiff can remove a counterclaim filed against it. And we acknowledge, as Home Depot points out, that a third-party counterclaim defendant, unlike the original plaintiff, has no role in selecting the forum for the suit. But the text of § 1441(a) simply refers to "the defendant or the defendants" in the civil action. If a counterclaim defendant who was the original plaintiff is not one of "the defendants," we see no textual reason to reach a different conclusion for a counterclaim defendant who was not originally part of the lawsuit. In that regard, *Shamrock Oil* did not view the counterclaim as a separate action with a new plaintiff and a new defendant. Instead, the Court highlighted that the original plaintiff was still "the plaintiff." *Id.* at 108 ("We can find no basis for saying that Congress, by omitting from the present statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others"). Similarly here, the filing of counterclaims that included class-action allegations against a third party did not create a new "civil action" with a new "plaintiff" and a new "defendant."

Home Depot asserts that reading "the defendant" in § 1441(a) to exclude third-party counterclaim defendants runs counter to the history and purposes of removal by preventing a party involuntarily brought into state-court proceedings from removing the claim against it. But the limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove. *E.g.*, § 1441(b)(2) (preventing removal based on diversity jurisdiction where any defendant is a citizen of the State in which the action is brought). Moreover, Home Depot's interpretation makes little sense in the context of other removal provisions. For instance, when removal is based on § 1441(a), all

defendants must consent to removal. See § 1446(b)(2)(A). Under Home Depot's interpretation, "defendants" in § 1446(b)(2)(A) could be read to require consent from the third-party counterclaim defendant, the original plaintiff (as a counterclaim defendant), *and* the original defendant asserting claims against them. Further, Home Depot's interpretation would require courts to determine when the original defendant is also a "plaintiff" under other statutory provisions. *E.g.*, § 1446(c)(l). Instead of venturing down this path, we hold that a third-party counterclaim defendant is not a "defendant" who can remove under § 1441(a).

B

We next consider whether CAFA's removal provision, § 1453(b), permits a third-party counterclaim defendant to remove. Home Depot contends that even if it could not remove under § 1441(a), it could remove under § 1453(b) because that statute is worded differently. It argues that although § 1441(a) permits removal only by "the defendant or the defendants" in a "civil action," § 1453(b) permits removal by "*any* defendant" to a "class action." (Emphasis added.) Jackson responds that this argument ignores the context of § 1453(b), which he contends makes clear that Congress intended only to alter certain restrictions on removal, not expand the class of parties who can remove a class action. Although this is a closer question, we agree with Jackson. [Discussion omitted.]

* * *

Because neither § 1441(a) nor § 1453(b) permits removal by a third-party counterclaim defendant, Home Depot could not remove the class-action claim filed against it. Accordingly, we affirm the judgment of the Fourth Circuit.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join, dissenting.

The rule of law requires neutral forums for resolving disputes. Courts are designed to provide just that. But our legal system takes seriously the risk that for certain cases, some neutral forums might be more neutral than others. Or it might appear that way, which is almost as deleterious. For example, a party bringing suit in its own State's courts might (seem to) enjoy, so to speak, a home court advantage against outsiders. Thus, from 1789 Congress has opened federal courts to certain disputes between citizens of different States. Plaintiffs, of course, can avail themselves of the federal option in such cases by simply choosing to *file* a case in federal court. But since their defendants cannot, the law has always given defendants the option to *remove* (transfer) cases to federal court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 105 (1941). The general removal statute, which authorizes removal by "the defendant or the defendants," thus ensures that defendants get an equal chance to choose a federal forum. 28 U.S.C. § 1441(a).

But defendants cannot remove a case unless it meets certain conditions. Some of those conditions have long made important (and often costly) consumer class actions virtually impossible to remove. Congress, concerned that state courts were biased against defendants to such actions, passed a law facilitating their removal. The Class Action Fairness Act of 2005 (CAFA) allows removal of certain class actions "by any defendant." 28 U.S.C. § 1453(b). Our job is not to judge whether Congress's fears about state-court bias in class actions were warranted or indeed whether CAFA should allay them. We are to determine the scope of the term "defendant" under CAFA as well as the general removal provision, § 1441.

All agree that if one party sues another, the latter — the original defendant — is a "defendant" under both removal laws. But suppose the original defendant then countersues, bringing claims against both the plaintiff and a new party. Is this new defendant — the "third-party defendant" — also a "defendant" under CAFA and § 1441? There are, of course, some differences between original and third-party defendants. One is brought into a case by the first major filing, the other by the second. The one filing is called a complaint, the other a countercomplaint.

But both kinds of parties are defendants to legal claims. Neither chose to be in state court. Both might face bias there, and with it the potential for crippling unjust losses. Yet today's Court holds that third-party defendants are not "defendants." It holds that Congress left them unprotected under CAFA and § 1441. This reads an irrational distinction into both removal laws and flouts their plain meaning, a meaning that context confirms and today's majority simply ignores.

[In Parts I through III of his opinion, Justice Alito argued that Home Depot could remove the case under 28 U.S.C. § 1453(b), which as noted above allows removal of certain class actions "by any defendant."]

IV

So far I have accepted, *arguendo*, the majority and respondent's view that third-party defendants are *not* covered by the general removal provision, § 1441. But I agree with petitioner that this is incorrect. On a proper reading of § 1441, too, third-party defendants are "defendants" entitled to remove. Though a majority of District Courts would disagree, their exclusion of third-party defendants has rested (in virtually every instance) on a misunderstanding of a previous case of ours, and the mere fact that this misreading has spread is no reason for us to go along with it. Nor, contrary to the majority, does a refusal to recognize third-party defendants under § 1441 find support in our precedent embracing the so-called "well-pleaded complaint" rule, which is all about how a plaintiff can make its case unremovable, not about which defendants may seek removal in those cases that *can* be removed.

A

Look at lower court cases excluding third-party defendants from § 1441. Trace their lines of authority — the cases and sources they cite, and those *they* cite — and the lines will invariably converge on one point: our decision in *Shamrock Oil*. But nothing in that case justifies the common reading of § 1441 among the lower courts, a reading that treats some defendants who never chose the state forum differently from others.

As a preliminary matter, *Shamrock Oil* is too sensible to produce such an arbitrary result. That case involved a close ancestor of today's general removal provision, one that allowed removal of certain state-court actions at the motion of "the defendant or defendants therein." And our holding was simple: If *A* sues *B* in state court, and *B* brings a counterclaim against *A*, this does not then allow *A* to remove the case to federal court. As the original plaintiff who chose the forum, *A* does not get to change its mind now. That is all that *Shamrock Oil* held. The issue of third-party defendants never arose. And none of the Court's three rationales would support a bar on removal by parties *other than* original plaintiffs.

Shamrock Oil looked to statutory history, text, and purpose. As to history, it noted that removal laws had evolved to give the power to remove first to "defendants," then to " 'either party, or any one or more of the plaintiffs or defendants,' " and finally to "defendants" again. The last revision must have been designed to withdraw removal power from someone, we inferred, and the only candidate was the plaintiff. Second, we said there was no basis in the text for distinguishing mere plaintiffs from plaintiffs who had been countersued, so we would treat them the same; neither could remove. Third, we offered a policy rationale: "[T]he plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." In this vein, we quoted a House Report calling it " 'just and proper to require the plaintiff to abide his selection of a forum.' " So history, language, and logic demanded that original plaintiffs remain unable to remove even if countersued.

None of these considerations applies to third-party defendants. If anything, all three point the other way. First, the statutory history cited by the Court shows that Congress (and the *Shamrock Oil* Court itself) took "the plaintiffs or defendants" to be jointly exhaustive categories. By that logic, since third-party defendants are certainly not plaintiffs — in any sense — they must be "defendants" under § 1441. *Cf.* WEBSTER 591 (defining "defendant" as "opposed to *plaintiff*"); 4 OED 377 (same). Second, and relatedly, the text of the general removal statute, then and now, does not distinguish original from third-party defendants when it comes to granting removal power — any more than it had distinguished plaintiffs who were and were not countersued when it came to *withdrawing* the right to remove, as *Shamrock Oil* emphasized. And finally, *Shamrock Oil*'s focus on fairness — reflected in its point that plaintiffs may fairly be stuck with the forum they chose — urges the opposite treatment for third-party defendants. Like original defendants, they never chose to submit themselves to the state-court forum.

Thus, all three grounds for excluding original plaintiffs in *Shamrock Oil* actually support *allowing* third-party defendants to remove under § 1441.

B

Respondent leans on his claim that District Courts to address the issue have reached a "consensus" that *Shamrock Oil* bars third-party defendants from removing. [But] rumors of a "consensus" have been greatly exaggerated. [As part of his discussion of CAFA, omitted here, Justice Alito reviewed the decisions supposedly giving rise to the "consensus."] And in any case, no interpretive principle requires leaving intact the lower courts' misreading of a case of ours.

Certainly there is no reason to presume that Congress embraces the lower courts' majority view. For one thing, the cases distorting § 1441 postdate the last revision of the relevant statutory language, so they could not have informed Congress's view of what it was signing onto. And it would be naive to assume that Congress now agrees with those lower court cases just because it has not reacted to them. Congress does not accept the common reading of every law it leaves alone. Because life is short, the U.S. Code is long, and court cases are legion, it normally takes more than a court's misreading of a law to rouse Congress to issue a correction. That is why " 'Congressional inaction lacks persuasive significance' in most circumstances." In particular, "it is inappropriate to give weight to 'Congress' unenacted opinion' when construing judge-made doctrines, because doing so allows

the Court to create law and then 'effectively codif[y]' it 'based only on Congress' failure to address it.' " *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 299 (2014) (Thomas, J., concurring in judgment). Because the decisions misreading *Shamrock Oil* are not a reliable indicator of Congress's intent regarding § 1441, we owe them no deference.

C

Finally, according to the majority, reading § 1441 to include third-party defendants would run afoul of our precedent establishing the "well-pleaded complaint" rule (WPC rule). Assuming that I have been able to reconstruct the majority's argument from this rule accurately, I think it rests on a non sequitur. The WPC rule is all about a plaintiff's ability to choose the forum in which its case is heard, by controlling whether there is federal jurisdiction; the rule has nothing to do with the division of labor or authority among defendants.

Under the WPC rule, we consider only the plaintiff's claims to see if there is federal-question jurisdiction. Whether the defendant raises federal counterclaims (or even federal defenses) is irrelevant. See, *e.g.*, *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002). Likewise, in a case involving standard diversity jurisdiction (based on complete diversity under § 1332(a) rather than minimal diversity under CAFA), it is "the sum demanded . . . in the initial pleading" that determines whether the amount in controversy is large enough. § 1446(c)(2). In both kinds of cases, a federal court trying to figure out if it has "original jurisdiction," as required for removal of cases under § 1441(a), must shut its eyes to the defendant's filings. Only the plaintiff's complaint counts. So says the WPC rule.

But that is all about *jurisdiction*. The majority and respondent would take things a step further. Even after assuring itself of jurisdiction, they urge, a court should consult only the plaintiff's complaint to see if a party *is a "defendant"* empowered to remove under § 1441. Since third-party defendants (by definition) are not named until the countercomplaint, they are not § 1441 "defendants."

I cannot fathom why this rule about who is a "defendant" should follow from the WPC rule about when there is federal jurisdiction. And the majority makes no effort to fill the logical gap; it betrays almost no awareness of the gap, drawing the relevant inference in two conclusory sentences. But since this Court's reasons for the WPC rule have sounded in policy, the argument could only be that the same policy goals would support today's restriction on who is a § 1441 "defendant."[4] What *are* the policy goals behind the WPC rule? We have described them as threefold. See *Holmes Group, Inc.*, 535 U.S. at 831-32.

First,

> since the plaintiff is "the master of the complaint," the well-pleaded-complaint rule enables him, "by eschewing claims based on federal law, . . . to have the cause heard in state court."

[4] The Court insists that its position is based on "statutory context," not the logic behind the well-pleaded complaint rule. But the only context to which the Court points is our precedent establishing the well-pleaded complaint rule. It is that rule — the rule that federal jurisdiction over an action turns entirely on the plaintiffs complaint — that leads the Court to think furthermore that " 'the defendant' to [an] action is the defendant to that complaint."

> *Caterpillar Inc.*, [482 U.S.] at 398-99. [Allowing a defendant's counterclaims or defenses to create federal-question jurisdiction], in contrast, would leave acceptance or rejection of a state forum to the master of the counterclaim. It would allow a defendant to remove a case brought in state court under state law, thereby defeating a plaintiff's choice of forum, simply by raising a federal counterclaim. *Ibid.*

But this concern is not implicated here; adopting petitioner's reading of "defendant" would in no way reduce the extent of a plaintiff's control over the forum. Plaintiffs would be able to keep state-law cases in state court no matter what we held about § 1441, and any cases removable by third-party defendants would have been removable by original defendants anyway. In other words, the issue here is *who* can remove under that provision, not *which cases* can be removed. However we resolved that "who" question, removability under § 1441(a) would still require cases to fall within federal courts' "original jurisdiction," § 1441(a), and *that* would still turn just on the plaintiff's choices — on whether the plaintiff had raised federal claims (or sued diverse parties for enough money). So a case that a plaintiff had brought "in state court under state law" would remain beyond federal jurisdiction, and thus unremovable under § 1441(a), even if we held that third-party defendants are "defendants" under that provision.

By the same token, such a holding would not undermine the *second* policy justification that *Holmes* gave for the WPC rule: namely, to avoid "radically expand[ing] the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments.' " As noted, our decision on the scope of § 1441's "defendants" would not expand the class of removable cases *at all*, because it would have no impact on whether a case fell within federal courts' jurisdiction. It would only expand the set of people ("the defendants") who would have to consent to such removal: Now third-party *and* original defendants would have to agree.

The majority declares that treating third-party defendants as among "the defendants" under § 1441 "makes little sense." Perhaps its concern is that such a ruling would make no meaningful difference since third-party defendants would still be powerless to remove unless they secured the consent of the original defendants, who are their adversaries in litigation. But for one thing, there may be cases in which original defendants do consent. Though original and third-party defendants are rivals as to claims brought by the one against the other, they may well agree that a federal forum would be preferable. After all, neither will have chosen the state forum in which both find themselves prior to removal.[5]

More to the point, even if third-party defendants could not secure the agreement needed to remove an entire civil action under § 1441(a), counting them as "defendants" under § 1441 would make a difference by allowing them to invoke

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[5] Or perhaps the majority fears that petitioner's position would make it harder for *original* defendants under § 1441(a), by requiring them to get the consent of the third-party defendants against whom they have just brought suit. But this is an illusory problem. Original defendants hoping to remove under § 1441(a) without having to get their adversaries to agree could simply remove the case *before* roping in any third-party defendants.

§ 1441(c)(2), which would permit them to remove certain claims (not whole actions) *without* original defendants' consent. Being able to remove claims under § 1441(c)(2) has, in fact, been the main benefit to third-party defendants in those jurisdictions that have ruled that they are "defendants" under § 1441. But *this* effect of such a ruling is immune to the objection that it would "radically expand the class of removable cases" since § 1441(c)(2) does not address the removal of a whole case (a "civil action") at all, but only of some claims within a case — and only those that could have been brought in federal court from the start, "in a separate suit from that filed by the original plaintiff." Notably, then, any claims that were raised by the original plaintiff would get to remain in state court. Here too, the WPC rule's concern to avoid "radically expand[ing] the class of removable cases" is just not implicated.

This leaves *Holmes*'s final rationale for the WPC rule: that it promotes "clarity and ease of administration" in the resolution of procedural disputes. But petitioner's and respondent's views on who is a "defendant" are equally workable, so this last factor does not cut one way or the other.

In sum, the actual WPC rule, which limits the filings courts may consult in determining if they have jurisdiction, is based on policy concerns that do not arise here. There is, therefore, no justification for inventing an ersatz WPC rule to limit which filings may be consulted by courts deciding who is a "defendant" under § 1441.

* * *

All the resources of statutory interpretation confirm that under CAFA and § 1441, third-party defendants are defendants. I respectfully dissent.

Note: Removal by Third Party Defendants

1. This case began as a debt-collection action in North Carolina state court brought by Citibank, N.A. against George Jackson. But as it comes to the Supreme Court, the case is a class action by Jackson against Home Depot U.S.A. Inc. and Carolina Water Systems Inc. Citibank is no longer a party. Does the Court adequately consider the import of this procedural history?

2. In arguing that it should be permitted to remove, Home Depot relied on two sections of Chapter 89: section 1441(a), the general removal statute, and section 1453, enacted as part of the Class Action Fairness Act of 2005 (CAFA). Most of the discussion of CAFA in the majority and dissenting opinions is omitted from the report above, but one aspect of the dissent deserves attention. Justice Alito pointed out that in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), the Supreme Court rejected the lower court's reliance on a "purported 'presumption' against removal" and said: "[No] antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." See Casebook p. 614. The Court does not respond to Justice Alito's citation of *Dart Cherokee*, and indeed the Court's discussion of § 1453 is quite brief.

3. In explaining why a third-party counterclaim defendant like Home Depot cannot remove under § 1441(a), the Court invokes the well pleaded complaint rule, citing a predecessor case to *Mottley* (Casebook p. 491). Justice Alito, in dissent, insists that the well pleaded complaint rule is irrelevant. Who has the better of this argument?

4. Under Rule 21 of the Federal Rules of Civil Procedure, the court "may sever any claim against a party." Suppose that in the *Home Depot* case Jackson's class action was formally severed from the original civil action. Could Home Depot then remove?

C. Diversity Jurisdiction, Removal, and Litigation Strategy

Page 649*: Omit the Problem, insert instead new subsection [3], and renumber the subsections that follow.*

[3] The Forum Defendant Rule

The complete-diversity requirement — which of course applies to original as well as removal jurisdiction — is not the only weapon available to plaintiffs who wish to keep their state-law claims in state court. Plaintiffs can also take advantage of a statutory provision uniquely applicable in removal cases, the forum defendant rule. Section 1441(b)(2), as revised in 2011, provides: "A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Although the forum defendant rule often overlaps with the complete-diversity requirement to prevent removal based on diversity jurisdiction (why?), there are two important differences between the two limitations. First, complete diversity depends on the citizenship of the parties in relation to each other; the forum defendant rule considers only the citizenship of the defendants. Second, the requirement of complete diversity is jurisdictional and cannot be waived. *See* Chapter 8. In contrast, all of the circuits to consider the question have held that the forum defendant rule is not jurisdictional. *See Holbein v. Taw Enterprises, Inc.*, 983 F.3d 1049 (8th Cir. 2020) (overruling circuit precedents and eliminating intercircuit conflict). This means that any violation of the rule will be waived if not raised in a motion to remand made within 30 days after the notice of removal is filed. *See* 28 U.S.C. § 1447(c), discussed in section D[2] of this chapter.

Note that § 1441(b)(2) refers to "parties in interest properly joined *and served* as defendants." (Emphasis added.) Suppose that one defendant removes before any in-state defendant is served. Does that avoid the prohibition of the forum defendant rule? That was the question for the Third Circuit in the next principal case.

Encompass Insurance Co. v. Stone Mansion Restaurant Inc.

United States Court of Appeals for the Third Circuit, 2018.
902 F.3d 147.

Before: CHAGARES, JORDAN, and FUENTES, Circuit Judges.

CHAGARES, Circuit Judge.

This appeal, which presents issues of statutory interpretation, stems from a tragic automobile crash that killed the intoxicated driver and seriously injured the sole passenger. Encompass Insurance Company ("Encompass"), the liability carrier for the vehicle, settled the passenger's claims against the driver's estate and all other possible parties, including Stone Mansion Restaurant Incorporated ("Stone Mansion") — the restaurant that allegedly overserved the driver. Thereafter, Encompass brought the instant action against Stone Mansion in Pennsylvania state court, seeking contribution under state law. Stone Mansion

removed the case to the United States District Court for the Western District of Pennsylvania. Following a dispute over removal, the District Court concluded that the case was properly before it and later dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6). Encompass appeals both the decision on the removal and the dismissal. For the reasons stated below, we will affirm in part and reverse in part.

I.

On the night of March 20 and the early morning of March 21, 2011, Brian Viviani attended an event at Stone Mansion, a restaurant in Pittsburgh, Pennsylvania. The restaurant allegedly furnished him with alcohol until he became intoxicated and then continued to serve him alcohol. Thereafter, Viviani left Stone Mansion and drove away in an automobile with Helen Hoey, who had hosted the event. After Viviani drove a short distance, the vehicle struck a guardrail and flipped onto its roof, killing him and causing Hoey significant injury.

Hoey filed a civil action against Viviani's estate on July 25, 2013, in the Court of Common Pleas of Allegheny County, Pennsylvania. She alleged that the accident occurred because Viviani was driving while intoxicated. His estate tendered the defense against the lawsuit to Encompass, which was at all relevant times the liability insurance carrier for the vehicle. Encompass reached a settlement agreement with Hoey, whereby it paid her $600,000 and she released her claims against all possible defendants.

Encompass, a citizen of Illinois, then brought the instant action against Stone Mansion, a Pennsylvania corporation, in the Court of Common Pleas of Allegheny County. Encompass alleged that: (1) it stands in the shoes of the insured, Viviani's estate; (2) Stone Mansion served Viviani alcohol while he was visibly intoxicated; (3) "[u]nder Pennsylvania's Dram Shop law, a business or individual who serves alcohol to a visibly intoxicated person is legally responsible for any damage that person might cause"; and (4) as a joint tortfeasor under the Uniform Contribution Among Tort-feasors Act ("UCATA"), Stone Mansion is liable to Encompass for contribution.

In email correspondence between counsel for Encompass and for Stone Mansion, counsel for Stone Mansion agreed to accept electronic service of process instead of requiring formal service. Specifically, counsel for Stone Mansion informed counsel for Encompass that "[i]n the event your client chooses to file suit in this matter, I will be authorized to accept service of process" and that "if and when you do file, provide your Complaint to me along with an Acceptance form."[1] Minutes later, counsel for Encompass replied in relevant part, "Thank you . . . for agreeing to accept service." On January 23, 2017, Encompass sent Stone Mansion a copy of the filed complaint and a service acceptance form via email. Counsel for Stone Mansion replied, "I will hold the acceptance of service until I get the docket n[umber]." That same day, Encompass provided the docket number; however,

[1] In lieu of the usual manner of service, Pennsylvania's Rules of Civil Procedure permit a "defendant or his authorized agent [to] accept service of original process by filing a separate document" that is "substantially in the [provided] form." PA. R. CIV. P. 402(b). The form provided contains a caption, the heading "Acceptance of Service," and a brief statement that the undersigned accepts service and is authorized to do so.

Stone Mansion did not return the acceptance form. Instead, on January 26, counsel for Stone Mansion responded:

> Thank you for your patience in this regard. . . . I want to explain why I have not yet returned the Acceptance of Service form.
>
> Noting that there is diversity of citizenship, and an amount in controversy in excess of $75,000, we are considering removing this action to federal court. While 28 USC [sic] § 1441(b) generally prevents a resident defendant from removing an action to federal court in its own state, the language of the statute precludes such removal when a resident defendant has been "properly joined and served." We are aware of an opinion from Chief Judge Conti in the Western District of PA, interpreting this to mean that a resident defendant can remove prior to being served.
>
> I fully acknowledge having agreed prior to your filing suit that we will accept service. I maintain that agreement, but because it may affect our client's procedural ability to remove the case, I have to hold off doing so until after the Notice of Removal is filed. I expect this will happen in the next one or two days. Happy to discuss this with you over the phone if you desire.

Thereafter, prior to formal acceptance, Stone Mansion timely removed the matter to the United States District Court for the Western District of Pennsylvania. Encompass filed a motion to remand the matter to the Pennsylvania state trial court on the grounds that removal was improper pursuant to the forum defendant rule; however, the District Court denied the motion. The District Court concluded that the forum defendant rule does not apply because it precludes removal only "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action is brought" and because Stone Mansion's counsel "did not accept service of [Encompass'] Complaint until after [it] filed a Notice of Removal."

Stone Mansion then moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6), arguing that Pennsylvania's Dram Shop law establishes liability for liquor licensees only "in favor of third persons on account of damages inflicted upon them" and that neither Encompass nor the estate of Viviani are in that class of persons. The District Court [agreed with the argument and] granted the motion to dismiss with prejudice. . . . Encompass timely filed a notice of appeal.

III.

On appeal, Encompass raises two issues: (1) whether the District Court erred in denying Encompass' motion to remand the matter to the Pennsylvania state trial court; and (2) whether the District Court erred in dismissing the matter.

A.

We first consider whether the District Court erred in denying Encompass' motion to remand this case to the Pennsylvania state trial court. Removal of state court actions to federal district court is governed by 28 U.S.C. §§ 1441-55. The general removal statute provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by

> the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). Where federal jurisdiction is premised only on diversity of the parties, the forum defendant rule applies. That rule provides that "[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.* § 1441(b)(2). This Court has long held that the forum defendant rule is procedural rather than jurisdictional, except where "the case could not initially have been filed in federal court."

1.

Encompass first argues that the District Court misinterpreted the forum defendant rule, ignoring its intent and construing it "in a manner that necessarily would create a nonsensical result that Congress could not have intended." When interpreting a statute, we "must begin with the statutory text." "It is well-established that, '[w]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.' " Nevertheless, it is also a "basic tenet of statutory construction . . . that courts should interpret a law to avoid absurd or bizarre results." An absurd interpretation is one that "defies rationality or renders the statute nonsensical and superfluous."

Starting with the text, we conclude that the language of the forum defendant rule in section 1441(b)(2) is unambiguous. Its plain meaning precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served. Thus, it remains for us to determine whether there has been a "most extraordinary showing of contrary intentions" and consider whether this literal interpretation leads to "absurd or bizarre results."

We therefore turn to section 1441, which contains the forum defendant rule. Section 1441 exists in part to prevent favoritism for in-state litigants, and discrimination against out-of-state litigants. The specific purpose of the "properly joined and served" language in the forum defendant rule is less obvious. The legislative history provides no guidance; however, courts and commentators have determined that Congress enacted the rule "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve." Arthur Hellman et al., *Neutralizing the Strategem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 108 (2016) (quoting *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2009)).

Citing this fraudulent-joinder rationale, Encompass argues that it is "inconceivable" that Congress intended the "properly joined and served" language to permit an in-state defendant to remove an action by delaying formal service of process. This argument is unavailing. Congress' inclusion of the phrase "properly joined and served" addresses a specific problem — fraudulent joinder by a plaintiff — with a bright-line rule. Permitting removal on the facts of this case does

not contravene the apparent purpose to prohibit that particular tactic.[3] Our interpretation does not defy rationality or render the statute nonsensical or superfluous, because: (1) it abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal; and (3) it protects the statute's goal without rendering any of the language unnecessary. Thus, this result may be peculiar in that it allows Stone Mansion to use pre-service machinations to remove a case that it otherwise could not; however, the outcome is not so outlandish as to constitute an absurd or bizarre result.

In short, Stone Mansion has availed itself of the plain meaning of the statute, for which there is precedential support. Encompass has not provided, nor have we otherwise uncovered, an extraordinary showing of contrary legislative intent. Furthermore, we do not perceive that the result in this case rises to the level of the absurd or bizarre. There are simply no grounds upon which we could substitute Encompass' interpretation for the literal interpretation. Reasonable minds might conclude that the procedural result demonstrates a need for a change in the law; however, if such change is required, it is Congress — not the Judiciary — that must act.

2.

We next consider whether the District Court erred by declining to remand the matter on grounds of preclusion. Again, we conclude that it did not. Encompass argues that because Stone Mansion had agreed to *accept* service electronically, it was precluded from arguing for removal on grounds of incomplete service of process. Encompass suggests that Stone Mansion's "assurances . . . that it would accept service were the only reason that Encompass did not take steps to have Stone Mansion served by sheriff pursuant to the Pennsylvania Rules of Civil Procedure" and argues that Stone Mansion itself caused the lack of service. Stone Mansion argues that although it agreed to accept electronic service, it never indicated that it "would not avail itself of federal jurisdiction."

We are mindful, as Encompass points out in its briefs, that the Pennsylvania Rules of Professional Conduct prohibit lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation," PA. RULES OF PROF. CONDUCT 8.4; however, we need not pass judgment on whether Stone Mansion violated this rule, because Encompass has failed to provide any support for the proposition that Stone Mansion's conduct carried preclusive effect. We also discount Encompass' unsupported argument that Stone Mansion's agreement to *accept* service (the Pennsylvania state court method) rather than to *waive* service (the federal court method) required it to submit to state court jurisdiction. Finally, we conclude that Encompass' position is not saved by its emphasis on the District Court's finding that Stone Mansion agreed to accept service of a *state court* complaint. By its nature, removal of a matter from state to federal court presupposes the existence of a state court complaint. Stone Mansion's statements

[3] We are also mindful of the Supreme Court's direction that "by interpretation we should not defeat" Congress' purpose of abridging the right of removal. *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 12 (1951). However, as we determined in a related context, we conclude that this general rule is "not sufficient to displace the plain meaning" of the statute.

of its willingness to accept electronic service did not include language regarding its position on jurisdiction and removal. For these reasons, we are unconvinced that Stone Mansion's conduct — even if unsavory — precludes it from arguing that incomplete service permits removal. As a result, the District Court's order denying Encompass' motion to remand will be affirmed.

B.

Having determined that the case was properly removed to federal court, we turn next to whether the District Court erred in granting Stone Mansion's motion to dismiss. [Discussion omitted. The court held that the district court erred in dismissing the claim. Encompass was not seeking recovery in tort but rather "a distinct claim for contribution under the UCATA. Pennsylvania's Dram Shop law does not prohibit this manner of recovery."]

IV.

For the foregoing reasons, we will affirm in part and reverse in part.

Note: "Snap Removal"

1. The Third Circuit notes, in an omitted footnote, that "district courts that have considered application of the forum defendant rule to pre-service removal are split on the issue." That is an understatement. In at least six judicial districts, including three in the Third Circuit, there were conflicting decisions by different district judges. The Third Circuit's decision was the first by a court of appeals. In short order, the Second and Fifth Circuits endorsed the Third Circuit's position. *See Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Texas Brine Co. v. American Arbitration Ass'n*, 955 F.3d 482 (5th Cir. 2020). The Second Circuit, in rejecting the plaintiffs' "absurdity" argument, said:

> Congress may well have adopted the "properly joined and served" requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant.

2. In another footnote, the Third Circuit explained how recent technological developments have contributed to the proliferation of "snap" removals:

> We are aware of the concern that technological advances since enactment of the forum defendant rule now permit litigants to monitor [state-court] dockets electronically, potentially giving defendants an advantage in a race-to-the-courthouse removal scenario. However, the briefs fail to address this concern, let alone argue that the practice is widespread. If a significant number of potential defendants (1) electronically monitor dockets; (2) possess the ability to quickly determine whether to remove the matter before a would-be state court plaintiff can serve process; and (3) remove the matter contrary to Congress' intent, the legislature is well-suited to address the issue.

Subsequently, testimony at a House Judiciary Committee hearing indicated that the practice of monitoring state-court dockets is indeed widespread. Does that suggest that the court reached the wrong result in *Encompass Insurance*?

3. At this writing, no court of appeals has disagreed with *Encompass Insurance* and the two circuit decisions that endorsed its position. However, the

three appellate decisions have not put the issue to rest. Some district courts outside the three circuits have taken the other side of the split and have rejected snap removal. One such case, *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372 (N.D. Ga. 2018), apparently involved the kind of docket monitoring referred to in *Encompass Insurance*.

The court in *Delaughder* acknowledged that "the literal application of the statutory language favors snap removals." But "statutory language should not be applied literally if doing so would produce an absurd result." The court then explained "why snap removal creates an absurd result by cutting against the purpose of the form-defendant rule." The court said:

> The purpose of the forum-defendant rule and Congress's intent in enacting the statute, as well as including the "properly joined and served" language, has been widely analyzed by district courts across the country. . . . [The forum-defendant rule reinforces] "the underlying reason behind the perceived need for diversity jurisdiction, to wit, protecting out-of-state defendants from homegrown, local juries." . . . [The "properly joined and served" language] was included in the removal statute to prevent gamesmanship by keeping "plaintiffs from blocking removal by joining a forum defendant against whom the plaintiff does not intend to proceed against." . . .
>
> Thus, "because the likely purpose of this language is to prevent gamesmanship by plaintiffs" the Court cannot accept that it is prevented from undoing Defendants' gamesmanship, especially under these circumstances. . . . The Court does not criticize Colonial for applying a now wide-spread litigation tactic. Rules will inherently empower sharp lawyers to find ways around them, and that is not inappropriate. Instead, this decision is meant to close an absurd loophole in the forum-defendant rule and to uphold the purpose and integrity of the rule. The fact that the very words included to prevent gamesmanship have opened an avenue for more gamesmanship is an ironic absurdity that the Court will not enforce simply because the words "properly joined and served" appear unambiguous in isolation, and Congress has not provided more guidance on the issue.

Do you agree that the language of § 1441(b) is unambiguous only "in isolation"? Does the district court adequately justify its conclusion that literal interpretation of the statute produces an "absurd" result?

4. The continuing disagreement in the district courts calls attention to two important aspects of removal practice. First, district court decisions are not binding even within the judicial district. Thus, if there is a recurring issue of removal jurisdiction or procedure and no controlling precedent of the court of appeals, whether removal is allowed may depend on which judge the case is assigned to — generally by a spin of the (computerized) wheel.

Second, it is quite common to find that there is a recurring issue of removal law and no controlling circuit precedent. This is in part because 28 U.S.C. § 1441(d) ordinarily prohibits appellate review of remand orders. See section D[3] of this chapter. If the district court *denies* the remand motion, appellate review is theoretically possible, but only after final judgment. And "after final judgment in a

removed case that is not remanded, only the most disappointed and dogged of parties would have sufficient incentive to pursue this threshold issue." *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313 (D. Mass. 2013). Moreover, even if the plaintiff were "dogged" enough to pursue the issue, the court of appeals might be able to dispose of the case without deciding whether the snap removal was proper. Note that in *Encompass Insurance*, the district court denied the motion to remand, then ruled against the plaintiff on the merits. That teed up the case for appellate review on both issues.

5. In *Encompass Insurance*, as the Third Circuit notes, counsel for Stone Mansion initially agreed to accept electronic service of process in lieu of requiring formal service. Instead, he removed the case to federal court and invoked the literal language of § 1441(b)(2) to argue that the removal was not barred by the forum defendant rule. The Third Circuit says that Stone Mansion's conduct may have been "unsavory," but it holds that the removal was proper.

Do you agree that Stone Mansion's conduct was "unsavory"? If it was, should that have any bearing on the propriety of removal?

The Third Circuit quotes the language of Rule 8.4 of the Pennsylvania Rules of Professional Conduct. Another Rule, Rule 4.1 ("Truthfulness in Statements to Others"), provides: "In the course of representing a client, a lawyer shall not make a false statement of material fact or law to a third person." Did the conduct of Stone Mansion's lawyer violate that rule?

6. In November 2019, the House Judiciary Committee held a hearing on the practice of snap removal. *See* https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2279. Based on the hearing record, the subcommittee chair, Rep. Henry C. "Hank" Johnson Jr., introduced H.R. 5801, the Removal Jurisdiction Clarification Act of 2020. The bill would add a new subsection (f) to 28 U.S.C. § 1447, as follows:

> (f)(1) A court shall remand a case described in paragraph (2) to the State court from which it was removed if —
>
> (A) within 30 days after filing of the notice of removal under section 1446(a), or within the time specified by State law for service of process, whichever is shorter, a defendant described in paragraph (2)(B) is properly served in the manner prescribed by State law; and
>
> (B) a motion to remand is made in accordance with, and within the time specified by, the first sentence of subsection (c) [of 28 U.S.C. § 1447].
>
> (2) This subsection shall apply to a case in which —
>
> (A) a civil action is removed solely on the basis of the jurisdiction under section 1332(a) of this title; and
>
> (B) at the time of removal, any party in interest properly joined as a defendant is a citizen of the State in which such action is brought, but has not been properly served.

A conforming amendment specifies that Section 1448 of title 28, United States Code, is amended by striking "In all cases" and inserting "Except as provided in section 1447(f), in all cases."

The first section of subsection (c) of 28 U.S.C. § 1447, referred to in the bill, provides: "A motion to remand the case on the basis of any defect other than lack

of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)."

The senior author of this casebook, testifying in support of the legislation, stated that it would "neutralize" the practice of snap removal. Do you think the measure would accomplish that purpose? What assumptions about lawyer behavior underlie the proposal?

7. The proposed legislation, like the forum defendant rule itself, makes no distinctions between cases like *Encompass Insurance*, in which there is only one defendant and that defendant is a forum citizen, and cases in which there are both forum and non-forum defendants. Should those situations be treated alike? This question was debated at the House Judiciary Committee hearing on snap removal. A witness who supported legislation to neutralize snap removal commented that the forum defendant rule rests on the assumption that as long as there is at least one defendant from the forum state, no defendant in the case needs protection from bias at the hands of the state court. Snap removal, he added, is inconsistent with that assumption.

A witness arguing against the need for legislation to limit snap removal took issue with the speaker's assumption. He said that when an out-of-state defendant is sued in state court, the fact that a small local business or a local individual is also joined as a defendant will give only "cold comfort." In "actual practice," he told the Subcommittee, the out-of-state defendant "would have little confidence that its interests would be protected in the same way that they would be in federal court."

Under what circumstances would the presence of an in-state defendant provide particularly "cold comfort" to an out-of-state defendant? Consider the cases on fraudulent joinder in the preceding subsection of this chapter.

D. Some Procedural Aspects of Removal

Page 671*: replace Note 3 with the following:*

3. As noted in section C[3], all circuits to consider the question have now held that the forum defendant rule is a "defect" that is waived if not raised within 30 days of removal. *See Holbein v. Taw Enterprises, Inc.*, 983 F.3d 1049 (8th Cir. 2020) (overruling circuit precedents and eliminating intercircuit conflict).

Chapter 13
State Sovereign Immunity

C. Congressional Power and State Sovereign Immunity

Page 735: ***insert before part B of the Note:***

5. Fifteen years later, the Court returned to the reasoning of *Katz*, concluding in another context that the assertion of state sovereign immunity is inconsistent with "the plan of the Convention." In *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), the Court held that state sovereign immunity affords no protection against the federal government's power of eminent domain, even if that power is delegated to private parties who exercise it by initiating judicial proceedings to condemn state property.

The case involved the Natural Gas Act, which authorizes the Federal Energy Regulatory Commission (FERC) to approve the construction and extension of interstate natural gas pipelines. When authorized by FERC, the Act grants private parties the power to obtain any necessary right-of-way from reluctant property owners "by the exercise of the right of eminent domain." In *PennEast Pipeline*, a joint venture by energy companies filed an action in federal district court, relying on a FERC certificate of public convenience and necessity and seeking to condemn various parcels in which the State of New Jersey held property interests.

In a 5-4 decision authored by Chief Justice Roberts, the Court rejected the state's assertion of state sovereign immunity as a defense. More than a century earlier, the Court had recognized the federal government's power to exercise eminent domain over state lands, and to delegate that power to private parties by an Act of Congress. *See Cherokee Nation v. Southern Kan. R. Co.*, 135 U.S. 641 (1890); *Stockton v. Baltimore & N.Y. R. Co.*, 32 F. 9 (C.C.N.J. 1887) (Bradley, J., riding circuit). The majority therefore viewed this action as falling within a recognized exception to the general rule that states may not be sued without their consent:

> [In addition to other exceptions,] a State may be sued if it has agreed to suit in the "plan of the Convention," which is shorthand for "the structure of the original Constitution itself." *Alden*; *see* THE FEDERALIST NO. 81 (A. Hamilton). The "plan of the Convention" includes certain waivers of sovereign immunity to which all States implicitly consented at the founding. *See Alden*. We have recognized such waivers in the context of bankruptcy proceedings, *Katz*; *see Allen v. Cooper*, 140 S. Ct. 994 (2020), suits by other States, *South Dakota v. North Carolina*, 192 U.S. 286 (1904), and suits by the Federal Government, *United States v. Texas*, 143 U.S. 621 (1892). . . .
>
> As the cases discussed [earlier] show, the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees. The plan of the Convention reflects the "fundamental postulates implicit in the constitutional design." *Alden*. And we have said regarding the exercise of federal eminent domain within the States that one "postulate of the Constitution [is] that the government of the United States is invested with full

> and complete power to execute and carry out its purposes." *Cherokee Nation* (quoting *Stockton*). Put another way, when the States entered the federal system, they renounced their right to the "highest dominion in the lands comprised within their limits." . . .
>
> The respondents and the dissent do not dispute that the Federal Government enjoys a power of eminent domain superior to that of the States. Nor do they dispute that the Federal Government can delegate that power to private parties. They instead assert that the only "question is whether Congress can authorize a private party to bring a condemnation suit against a State." And they argue that because there is no founding-era evidence of such suits, States did not consent to them when they entered the federal system.
>
> The flaw in this reasoning is that it attempts to divorce the eminent domain power from the power to bring condemnation actions — and then argue that the latter, so carved out, cannot be delegated to private parties with respect to state-owned lands. But the eminent domain power is inextricably intertwined with the ability to condemn. Separating the eminent domain power from the power to condemn — when exercised by a delegatee of the Federal Government — would violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign.
>
> If private parties authorized by the Federal Government were unable to condemn States' property interests, then that would leave delegatees with only one constitutionally permissible way of exercising the federal eminent domain power: Take property now and require States to sue for compensation later. It is difficult to see how such an arrangement would vindicate the principles underlying state sovereign immunity. Whether the purpose of that doctrine is to "shield[] state treasuries" or "accord the States the respect owed them as joint sovereigns," *Fed. Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743 (2002), it would hardly be served by favoring private or Government-supported invasions of state-owned lands over judicial proceedings.

The principal dissent, written by Justice Barrett and joined by Justices Thomas, Kagan, and Gorsuch, maintained that "[a] straightforward application of our precedent resolves this case." In passing the Natural Gas Act, Congress relied on its power to regulate interstate commerce, and "we have repeatedly held that the Commerce Clause does not permit Congress to strip the States of their sovereign immunity." In the dissenters' view, the Court had "recognized but one exception to this general limit on Congress's Article I powers: the Bankruptcy Clause"; indeed, the Court previously had described *Katz* as announcing a "good-for-one-clause-only holding." And the dissent saw no reason to extend the "plan of the Convention" exception here:

> According to the Court, the States surrendered their immunity to private condemnation suits in the "plan of the Convention." Making this showing is no easy task. We will not conclude that

States relinquished their sovereign immunity absent "compelling evidence that the Founders thought such a surrender inherent in the constitutional compact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). . . .

[T]he Constitution enumerates no stand-alone "eminent-domain power." The Court recognizes — as does our precedent — that the Federal Government may exercise the right of eminent domain only "so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." *Kohl v. United States*, 91 U.S. 367 (1876); *see McCulloch v. Maryland*, 4 Wheat. 316 (1819). Any taking of property provided for by Congress is thus an exercise of another constitutional power — in the case of the Natural Gas Act, the Commerce Clause — augmented by the Necessary and Proper Clause. So when Congress allows a private party to take property in service of a federally authorized project, it is choosing a means by which to carry an enumerated power into effect. . . .

The Court relies exclusively on the fact that Congress and the States, like the Colonies before them, have consistently authorized private parties to exercise the right of eminent domain to obtain property for mills, roads, and other public improvements. . . . But the question before us is not whether Congress can authorize a private party to exercise the right of eminent domain against another private party, which is the proposition this history supports. Nor is it whether Congress can authorize a private entity to take state property through means other than a condemnation suit. The question is whether Congress can authorize a private party to bring a condemnation suit against a State. And on that score, the Court comes up dry. The Court cannot muster even a single decision involving a private condemnation suit against a State, let alone any decision holding that the States lack immunity from such suits. . . .

While the Court cloaks its analysis in the "plan of the Convention," it seems to be animated by pragmatic concerns. Congress judged private condemnation suits to be the most efficient way to construct natural gas pipelines, and to this point, States have cooperated. But now that New Jersey has chosen to object, it threatens to "thwart" federal policy. If the Court sided with New Jersey and Congress did not amend [the Natural Gas Act], New Jersey (not to mention other States) could hold up construction of the pipeline indefinitely. . . .

Our precedents provide a ready response: The defense of sovereign immunity always has the potential of making it easier for States to get away with bad behavior — like copyright infringement, *Allen*, patent infringement, *Florida Prepaid*, and even reneging on debts, *Chisholm v. Georgia*, 2 Dall. 419 (1793). Indeed, concern about States using sovereign immunity to thwart federal policy is precisely why many Justices of this Court have dissented from our sovereign immunity jurisprudence. *See, e.g.*,

> *Seminole Tribe* (Stevens, J., dissenting). The availability of the defense does not depend on whether a court approves of the State's conduct.
>
> The Court also brushes past New Jersey's interests by failing to acknowledge that [these] actions implicate state sovereignty. PennEast has haled a State into court to defend itself in an adversary proceeding about a forced sale of property. . . . [I]t is difficult to see how the initiation of a judicial proceeding that seeks to wrest title to state property from the State does not subject the State to coercive legal process.

A central disagreement between the majority and dissent concerns the nature of federal eminent domain, and how it fits into the "plan of the Convention." Which account do you find more persuasive? As to the strength of the state's interest, the dissent is surely correct that states have a strong sovereign interest in their own real property. Consider, however, the majority's contention that if state sovereign immunity were available as a defense, private parties acting with delegated federal eminent-domain authority would have no alternative but to physically seize state lands and wait to be sued. Sovereign immunity, after all, would not assist states who choose to initiate legal action against others. Should that affect the Court's calculus when assessing the strength of a state's interest?

6. In *PennEast Pipeline*, Justices Gorsuch joined the principal dissent in full. Separately, however, he wrote an additional dissent joined only by Justice Thomas. That opinion floated an alternative ground for dismissal — and one with far-reaching implications:

> States have two distinct federal-law immunities from suit.
>
> The first — "structural immunity" — derives from the structure of the Constitution. Because structural immunity is a constitutional entitlement of a sovereign State, it applies in both federal tribunals, *Seminole Tribe*, and in state tribunals, *Alden*. And it applies regardless of whether the plaintiff is a citizen of the same State, *Allen*, a citizen of a different State, or a *non*-citizen — like a foreign nation, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), or an Indian tribe, *Blatchford*. Structural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity by "consent" if it wishes.
>
> The second — what is properly termed "Eleventh Amendment immunity" — derives from the text of the Eleventh Amendment. In light of its swift adoption in response to *Chisholm v. Georgia*, this Court has read the Eleventh Amendment as pointing to the structural principle just discussed. But the Eleventh Amendment can do two things at once. In addition to pointing us back to the States' structural immunity, it also provides an ironclad rule for a particular category of diversity suits:
>
> > "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., Amdt. 11.

> This text "means what it says. It eliminates federal judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs." Baude & Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609 (2021).
>
> The Eleventh Amendment sometimes does less than structural immunity: It applies only in federal court ("the Judicial power *of the United States*"). And it applies only to diversity suits ("by Citizens of *another State*"). But sometimes the Amendment does more: It imposes an Article III subject-matter jurisdiction barrier ("The judicial Power . . . *shall not* be construed to *extend*"), not a mere privilege of personal jurisdiction. And it admits of no waivers, abrogations, or exceptions ("to *any suit* in law or equity").
>
> This case appears to present "the rare scenario" that comes within the Eleventh Amendment's text. Because PennEast sued New Jersey in federal court, this suit implicates "the Judicial power of the United States." This condemnation suit, by any stretch, is "a[] suit in law or equity." PennEast "commenced" this suit "against" New Jersey. It named the State in its complaint as a defendant as required by the Civil Rules. FED. RULE CIV. PROC. 71.1(c)(1). And it asked the court for an injunction permitting it to take "immediate possession" of New Jersey's soil. Because the parties agree that PennEast is a citizen of Delaware, this suit is brought "by [a] Citizen[ ] of another State."
>
> If that's all true, then a federal court "shall not" entertain this suit. The Eleventh Amendment's text, no less than the Constitution's structure, may bar it. This Court, understandably, does not address that issue today because the parties have not addressed it themselves and "there is no mandatory sequencing of jurisdictional issues." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). The lower courts, however, have an obligation to consider this issue on remand before proceeding to the merits.

Based on the Court's existing precedent, should the lower courts on remand accept Justice Gorsuch's invitation to dismiss the suit as barred by the Eleventh Amendment? Regardless, do you find the separate dissent's approach attractive? Does it effectively reconcile the text of the Eleventh Amendment with the Court's decisions holding that state sovereign immunity is implicit in the Constitution's structure? If the Court were to accept it, what practical consequences would follow? Note, as Justice Gorsuch did, that the Eleventh Amendment by its terms "admits of no waivers, abrogations, or exceptions."

Chapter 14
The Section 1983 Cause of Action

E. Official Immunities

Page 833*: insert before the Note:*

Note: Qualified Immunity Reform

1. Many scholars have criticized the Court's approach to qualified immunity, and in the last decade calls for reform have become especially pointed. Some have challenged the Court's premise that qualified immunity finds support in any common-law "good-faith" defense recognized at the time § 1983 was enacted. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018). Others have argued that qualified immunity in practice does not accomplish its intended purposes, failing to shield officers from the burdens of liability and litigation while doing little to safeguard against overdeterrence. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018). And many commentators have charged that, in practice, defeating qualified immunity almost always requires a binding prior precedent that is precisely on point, which "goes a long way toward disabling the damages remedy for violations of constitutional rights." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010).

Some judges have echoed those concerns. Justice Thomas has expressed "growing concern with our qualified immunity jurisprudence," arguing that qualified immunity today bears little resemblance to the common-law immunity recognized in 1871 and that the Court should therefore "reconsider" its approach in an appropriate case. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (Thomas, J., concurring in part and concurring in the judgment). Justice Sotomayor also has criticized qualified immunity doctrine, faulting the Court for a "one-sided approach to qualified immunity" that effectively "transforms the doctrine into an absolute shield for law enforcement officers." *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting). In a searing 72-page opinion, Judge Carlton Reeves recently called for overturning qualified immunity, cataloguing a litany of cases in which officers have received immunity despite alarming facts, and concluding that the status quo is "extraordinary and unsustainable." *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

2. In the summer of 2020, Black Lives Matter protests in cities across the country prompted millions of Americans to take to the streets. Sparked by a string of fatal encounters with police, including the death of George Floyd in Minneapolis, the protests produced a rare moment of sustained public attention to qualified immunity. Members of Congress have introduced dozens of bills calling for the repeal or reform of qualified immunity. For example, one bill (entitled the "Ending Qualified Immunity Act") would amend § 1983 by adding the following language:

> [I]t shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly

> established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

Not all reform bills introduced in Congress would sweep so far, however. Key differences among the competing proposals include:

- whether to change qualified immunity for all defendants, or only for law enforcement officers like police and investigators;
- whether to change qualified immunity only in actions against state officers under § 1983, or also for actions against federal officers under *Bivens* (see Chapter 8);
- whether the repeal of qualified immunity should apply only to cases filed in the future, or also to cases pending on the effective date of the legislation; and
- whether to eliminate qualified immunity altogether, or to preserve some form of defense in narrow circumstances (for example, when a defendant acted in accordance with a state statute that had never been struck down as unconstitutional).

Which variation on those proposals, if any, do you find attractive as a way of balancing the competing interests of plaintiffs and defendants in § 1983 cases? Which would best respond to criticisms of qualified immunity grounded in the common law and history of the statute? Which would best respond to criticisms that qualified immunity, in practice, is virtually impossible for plaintiffs to overcome?

3. Is modifying the law of qualified immunity the best solution to the problem of misconduct by police officers and other individual government employees? Recall that in *Monell* (section D *supra*), the Court interpreted § 1983 to preclude imposing liability on a local government for injuries "inflicted solely by its employees or agents." Congress could change that rule, and at least one bill introduced in Congress would override *Monell* by imposing *respondeat superior* liability on municipalities.

Would it be preferable to leave the law of qualified immunity as it is and instead impose liability on the government agency that employs any officer who causes injury through a constitutional violation? How would that approach strengthen or weaken the deterrent effect of § 1983? How would it alter the incentives of officers and municipalities, and how might they respond to those changes?

4. Despite the flurry of proposals for change in Congress, so far the Supreme Court has offered little indication that it might reform qualified immunity on its own. In May and June of 2020, the Court denied certiorari in thirteen qualified immunity cases, including three in which the petitioners expressly invited the Court to reexamine qualified immunity doctrine. Only Justice Thomas dissented, elaborating in one case on his previously expressed "doubts about our qualified immunity jurisprudence." *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari).

Perhaps feeling some pressure, however, in November 2020 the Court issued a decision that marked just the second time since *Harlow* that the Court rejected a claim of qualified immunity. The plaintiff in *Taylor v. Riojas*, 141 S. Ct. 52 (2020)

(per curiam), was an inmate in a Texas prison, and his allegations were stomach-churning:

> Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in " 'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even "packed inside the water faucet." Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage. . . .
>
> [O]ne officer, upon placing Taylor in the first feces-covered cell, remarked to another that Taylor was "going to have a long weekend." . . . [A]nother officer, upon placing Taylor in the second cell, told Taylor he hoped Taylor would "f***ing freeze."

Taylor filed suit under § 1983 against the officers, alleging that his treatment violated the Eighth Amendment's prohibition against cruel and unusual punishment. But the U.S. Court of Appeals for the Fifth Circuit held that the defendants were entitled to qualified immunity because it was not "clearly established" in previous case law that "prisoners couldn't be housed in cells teeming with human waste" for "only six days," and as a result the defendants lacked " 'fair warning' that their specific acts were unconstitutional."

The Supreme Court reversed, holding that "under the extreme circumstances of this case" no reasonable correctional officer could have concluded that the alleged conduct was permissible. Although no prior decision involved precisely the same facts, the Court reiterated that "a general constitutional rule already identified in the decisional law may apply with obvious clarify to the specific conduct in question." *Taylor* (quoting *Hope v. Pelzer*, 536 U.S. 730 (2002)). And it disagreed with the Fifth Circuit that one of that court's prior decisions, which had found no Eighth Amendment violation where an inmate "was detained for three days in [a] dirty cell and provided cleaning supplies," created enough "ambiguity in the caselaw" to afford the defendants qualified immunity on these "particularly egregious facts." Only Justice Thomas dissented, and without opinion.

Does the decision in *Taylor* suggest that the Court might gradually recalibrate the qualified immunity standard, making it less difficult for plaintiffs to overcome? Or do the extreme facts of the case only serve to reinforce that officers will enjoy immunity for all but the most shocking misconduct?

As an alternative to directly altering qualified immunity rules, the Court could indirectly address concerns about qualified immunity in police misconduct cases by changing its approach to the Fourth Amendment. As discussed in the previous Note, claims of excessive force are governed by a flexible totality-of-the-circumstances test, making it difficult for plaintiffs to find precisely analogous cases that "clearly establish" that a police officer's conduct was unlawful. Should the Court make its Fourth Amendment doctrine more rule-like, weakening

qualified immunity as a defense but affording police with clearer notice of which actions violate the Constitution? Recall that the Court took a similar approach to address concerns that § 1983 might displace state tort-law claims against government officials. Rather than alter its interpretation of § 1983, it held that many tortious acts by state officers do not violate due process, and that various constitutional claims have exhaustion or state-of-mind requirements beyond what § 1983 requires. (See *supra* section A.)

5. Qualified immunity as defined by the Supreme Court applies only to claims under federal law. Misconduct by state officials may also violate state law, however, and when creating rights of action for such violations states are free to afford a lesser (or greater) degree of immunity than qualified immunity. *See, e.g.*, *Dorwart v. Caraway*, 58 P.3d 128, 140 (Mont. 2002) (holding that state law prohibits any form of immunity for defendants against state constitutional claims). Since the summer of 2020, the legislatures of Colorado, Connecticut, New Mexico, and Massachusetts, as well as the city council in New York City, have passed police reform measures that would curtail or eliminate qualified immunity as a defense to claims under state law.

6. As cases like *White v. Pauly* make clear, the constitutional standard for excessive force under the Fourth Amendment is a flexible, totality-of-the-circumstances inquiry that makes it difficult for plaintiffs to demonstrate that any particular set of unique facts violates clearly established federal law. Following the killing of George Floyd, dozens of police departments have adopted new bans or restrictions on the use of neck restraints; by one count, 40 of the nation's largest 65 police departments now prohibit chokeholds, and 38 further prohibit carotid holds. *See* Kimberly Kindy et al., *George Floyd's Killing Has Already Prompted Some Police Departments to Ban Neck Holds and Require Intervention*, WASH. POST, July 16, 2020. Minnesota and a growing number of states likewise have adopted bright-line rules prohibiting certain chokeholds except in circumstances where deadly force is justified.

Suppose a police officer injures or kills a suspect by using a chokehold that is widely prohibited under departmental use-of-force policies and state laws, and the officer is sued under § 1983. The court concludes, based on the totality of the circumstances, that the defendant's actions violated the Fourth Amendment's prohibition against unreasonable seizures. But the officer interposes a defense of qualified immunity, correctly noting that no decision of the U.S. Supreme Court or the relevant federal court of appeals has previously held that use of the chokehold violates the Fourth Amendment, let alone in precisely these circumstances. Should the adoption of specific state and local rules that prohibit the defendant's actions affect the qualified immunity analysis? Why or why not? Should it matter whether the officer's *own* state law or police department's policy prohibits the chokehold, as opposed to a critical mass of laws or policies in other states and departments?

Chapter 15
Federal Habeas Corpus

B. The Scope and Standard of Review on Collateral Attack

Page 870: ***insert before Note 3:***

After decades of doubt about the exception for watershed rules, the Court delivered the *coup de grâce* in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). A year earlier, in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Court had held that state-court juries must reach a unanimous verdict in criminal cases to comply with the Sixth Amendment. In *Edwards*, the Court considered whether that unanimity requirement would apply retroactively to cases on collateral review. It had little trouble concluding that *Ramos* had announced a "new rule," as the decision had overruled previous case law upholding nonunanimous jury verdicts in state courts. Instead of applying the exception for watershed rules, however, the Court eliminated it. Writing for the six Justices in the majority, Justice Kavanaugh explained:

> In the abstract, those various adjectives — watershed, narrow, bedrock, essential — do not tell us much about whether a particular decision of this Court qualifies for the watershed exception. In practice, the exception has been theoretical, not real. . . .
>
> At this point, some 32 years after *Teague*, we think the only candid answer is that . . . no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts. . . .
>
> Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time — probably long past time — to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must "be regarded as retaining no vitality." *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

Justice Kagan dissented, emphasizing language from *Ramos* that described the Sixth Amendment right to a unanimous jury as "vital," "essential," "indispensable," and "fundamental." She also noted that *Ramos* vindicated "core principles of racial justice" because state laws allowing nonunanimous verdicts "originated in white supremacism and continued in our own time to have racially discriminatory effects." "If you were scanning a thesaurus for a single word to describe the decision," she wrote, "you would stop when you came to 'watershed.' " She therefore objected to the Court's decision "to overrule *Teague*'s holding on watershed rules," a move the parties had not requested or briefed. The fact that the Court had not found a watershed rules since *Teague* "does not mean it could or

would not in the future," and the jury-unanimity requirement is "an airtight match" with the kind of watershed rule contemplated in *Teague*.

Was the Court right to close the door permanently on the retroactive application of new rules of criminal procedure? Before *Edwards*, it had repeatedly described the right to appointed counsel, first announced in *Gideon v. Wainwright*, as a "watershed" new rule that deserved retroactive application. Does a decision like *Gideon*, which radically transformed states' obligations to criminal defendants, demonstrate a need for a continuing exception? Or does it set a daunting high bar, reinforcing the majority's conclusion that the exception had become effectively impossible to satisfy?

Appendix B
The Justices of the United States Supreme Court, 1946-2020 Terms

U.S. Reports	Term*	The Court**
329-332[1]	1946	**Vinson**, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton
332[1]-335[2]	1947	"
335[2]-338[3]	1948	"
338[3]-339	1949	Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
340-341	1950	"
342-343	1951	"
344-346[4]	1952	"
346[4]-347	1953	**Warren**, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
348-349	1954	Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan[5]
350-351	1955	"
352-354	1956	Warren, Black, Reed,[6] Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker[7]
355-357	1957	Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
358-360	1958	Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart
361-364[8]	1959	"
364[8]-367	1960	"

* Rule 3 of the Supreme Court's Rules provides in part: "The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year."

** Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[1] The 1947 Term begins at 332 U.S. 371.

[2] The 1948 Term begins at 335 U.S. 281.

[3] The 1949 Term begins at 338 U.S. 217.

[4] The 1953 Term begins at 346 U.S. 325.

[5] Participation begins with 349 U.S.

[6] Participation ends with 352 U.S. 564.

[7] Participation begins with 353 U.S.

[8] The 1960 Term begins with 364 U.S. 285.

U.S. Reports	Term	The Court*
368-370	1961	Warren, Black, Frankfurter,[9] Douglas, Clark, Harlan, Brennan, Whittaker,[10] Stewart, White[11]
371-374	1962	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg
375-378	1963	"
379-381	1964	"
382-384	1965	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas
385-388	1966	"
389-392	1967	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall
393-395	1968	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas,[12] Marshall
396-399	1969	**Burger**, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, [vacancy]
400-403	1970	Burger, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, Blackmun
404-408	1971	Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell,[13] Rehnquist[18]
409-413	1972	"
414-418	1973	"
419-422	1974	"
423-428	1975	Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens[14]
429-433	1976	"
434-438	1977	"
439-443	1978	"
444-448	1979	"
449-453	1980	"
454-458	1981	Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor
459-463	1982	"
464-468	1983	"
469-473	1984	"
474-478	1985	"
479-483	1986	**Rehnquist**, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia
484-487	1987	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[9] Participation ends with 369 U.S. 422.

[10] Participation ends with 369 U.S. 120.

[11] Participation begins with 370 U.S.

[12] Participation ends with 394 U.S.

[13] Participation begins with 405 U.S.

[14] Participation begins with 424 U.S.

U.S. Reports	Term	The Court*
488-492	1988	Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy
493-497	1989	"
498-501	1990	Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter
502-505	1991	Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas
506-509	1992	"
510-512	1993	Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg
513-515	1994	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
516-518	1995	"
519-521	1996	"
522-524	1997	"
525-527	1998	"
528-530	1999	"
531-533	2000	"
534-536	2001	"
537-539	2002	"
540-542	2003	"
543-545	2004[15]	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
546-548	2005	**Roberts**, Stevens, O'Connor,[16] Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito[17]
549-551	2006	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito
552-554	2007	"
555-557	2008	"
558-561	2009	Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor
562-564	2010	Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
565-567	2011	"
568-570	2012	"
571-573	2013	"
574-576	2014	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[15] Chief Justice Rehnquist died on Sept. 3, 2005, shortly before the 2004 Term officially concluded, but after all opinions from that Term had been delivered.

[16] Participation ends with 546 U.S. 417.

[17] Participation begins with 547 U.S.

U.S. Reports	Term	The Court*
577-579	2015	Roberts, Scalia,[18] Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
580-582	2016	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch[19]
583-585	2017	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch
586-588	2018	Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh
589-591	2019	"
592-594	2020	Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[18] Justice Scalia died on February 13, 2016, before most of the cases argued in the 2015 Term were decided. His participation ended with 136 S. Ct. 760.

[19] Justice Gorsuch joined the Court on April 10, 2017. He took no part in any of the cases from the 2016 Term discussed in this Supplement.