

Syracuse University College of Law; Institute for the Study of the Judiciary, Politics,
and the Media; Syracuse Civics Initiative; Tully Center for Free Speech; and

NDNY-Federal Court Bar Association

present

US SUPREME COURT: THE 2020-2021 TERM

Program Materials

Friday, Sept. 25, 2020
1:30 to 4:15 p.m.
Online via Zoom

CLE CREDIT: Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation. You will be provided with an Attorney CLE Affirmation form for the code and credit.

Syracuse University College of Law and the Northern District of New York Federal Court Bar Association have been certified by the New York State Continuing Legal Education Board as Accredited Providers of Continuing Legal Education in the State of New York. "United States Supreme Court: the 2020-2021 Term" complies with the requirements of the New York State Continuing Legal Education Board for 3.0 credits towards the professional practice requirement. This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded.

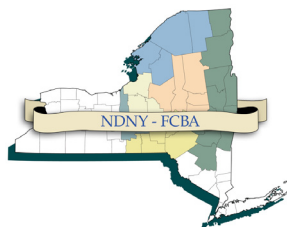


Table of Contents

Timed Agenda	1
Program Participants	2
I. Keynote Lecture: “The Supreme Court in the Trump Era: A Reporter’s Reflections”	
A. October Term 2020 (SCOTUSblog summaries).....	9
B. Adam Liptak	
i. “Virus Pushes a Staid Supreme Court Into Revolutionary Cases”	14
ii. “John Roberts Was Already Chief Justice. But Now It’s His Court”	18
iii. “In a Term Full of Major Cases, The Supreme Court Tacked to the Center”	21
II. Panel Discussion: “Supreme Court Preview: 2020-2021 Term”	
<u>R. Reeves Anderson</u>	
C. <i>Federal Republic of Germany v. Philipp</i> , No. 17-7064	25
i. “Justices Grant New Cases. . . .”	34
D. <i>Republic of Hungary v. Simon</i> , No. 17-7146	36
<u>Upnit Bhatti</u>	
E. <i>Texas v. California</i> , No. 19-10011	53
F. <i>California v. Texas</i> , ** consolidated case	53
i. “Supreme Court to Hear Obamacare Appeal”	101
<u>The Honorable Mae D’Agostino</u>	
G. <i>Fulton v. City of Philadelphia</i> , No. 18-2574.....	104
i. “Supreme Court to Hear Case on Gay Rights and Foster Care”	123
H. <i>Pereida v. Barr</i> , No. 17-3377.....	125
<u>Professor Paula C. Johnson</u>	
I. <i>Torres v. Madrid</i> , No. 18-2134	129
i. “A Timely Case of Police Violence at the Supreme Court”	133
J. <i>Borden v. U.S.</i> , No. 18-5409	135
K. <i>Jones v. Mississippi</i> , No. 2015-CT-00899-SCT.....	137
i. “Supreme Court to Consider When Juveniles May Get Life Without Parole”	151
<u>The Honorable Rosemary Pooler</u>	
L. <i>Nestle USA v. Doe I</i> , No. 17-55435	153
M. <i>Cargill v. Doe I</i> ** consolidated case	153
III. Links to Additional Sources	195

* Special thanks to Civics Fellows Mariah Almonte (Class of 2021) and Marina De Rosa (Class of 2022) for compiling these materials.

NDNY-Federal Court Bar Association

present

US SUPREME COURT: THE 2020-2021 TERM

Friday, Sept. 25, 2020

1:30 to 4:15 p.m.

Online via Zoom (registration link distributed closer to the event)

AGENDA

- 1:30-1:35 p.m. Welcome: **Craig M. Boise**, Dean and Professor of Law
- 1:35-2:35 p.m. Keynote: “The Supreme Court in the Trump Era: A Reporter’s Reflections”
Adam Liptak, Supreme Court Correspondent, *The New York Times*
Introduction by **Professor Roy Gutterman L’00**, Director, Tully Center for Free Speech
Q&A: Moderated by **Professor Lauryn Gouldin**, Associate Dean for Faculty Research
- 2:45- 4:15 p.m. Panel Discussion: “Supreme Court Preview: The 2020-2021 Term”
Moderated by **Keith J. Bybee**, Vice Dean and Paul E. and Hon. Joanne F. Alper ’72
Judiciary Studies Professor of Law
Panelists:
- **R. Reeves Anderson**, Supreme Court Litigator, Arnold & Porter
 - **Upnit K. Bhatti L’15**, Managing Associate, Orrick, Herrington & Sutcliffe
 - **The Hon. Mae D’Agostino L’80**, US District Court for the Northern District of New York
 - **Paula C. Johnson**, Professor of Law
 - **Adam Liptak**, Supreme Court Correspondent, *The New York Times*
 - **The Hon. Rosemary S. Pooler**, US Court of Appeals for the Second Circuit

This program is open to the public. There is no charge for this CLE program.

In order to receive the Zoom link for this event, you must register by Monday, September 21:

- Those affiliated with the College of Law (alumni, students, faculty, and staff) may register at alumniweekend.law.syr.edu.
- Members of the NDNY-FCBA, please register through the [NDNY-FCBA event page](#).
- All others, please [register here](#).
- Please contact Chris Ramsdell at ceramsde@law.syr.edu with any questions about this event.

PROGRAM PARTICIPANTS

KEYNOTE SPEAKER

Adam Liptak, *The New York Times* Supreme Court Reporter

Adam Liptak is the Supreme Court correspondent of The New York Times. Mr. Liptak, a lawyer, joined The Times's news staff in 2002 and began covering the Supreme Court in the fall of 2008. He has written a column, "Sidebar," on developments in the law, since 2007.

Mr. Liptak's series on ways in which the United States's legal system differs from those of other developed nations, "American Exception," was a finalist for the 2009 Pulitzer Prize in explanatory reporting.

In 2005, Mr. Liptak examined the rise in life sentences in the United States in a three-part series. The next year, he and two colleagues studied connections between contributions to the campaigns of justices on the Ohio Supreme Court and those justices' voting records. He was a member of the teams that examined the reporting of Jayson Blair and Judith Miller at The Times.

Mr. Liptak was born in Stamford, Conn., on Sept. 2, 1960. He first joined The Times as a copy boy in 1984, after graduation from Yale University, where he was an editor of The Yale Daily News Magazine, with a degree in English. In addition to clerical work and fetching coffee, he assisted the reporter M.A. Farber in covering the trial of a libel suit brought by Gen. William Westmoreland against CBS.

Mr. Liptak returned to Yale for a law degree, graduating in 1988. During law school, he worked as a summer clerk in The New York Times Company's legal department. After graduating, he spent four years at Cahill Gordon & Reindel, a New York City law firm, as a litigation associate specializing in First Amendment matters.

In 1992, he returned to The Times's legal department, spending a decade advising The Times and the company's other newspapers, television stations and new media properties on defamation, privacy, newsgathering and related issues, and he frequently litigated media and commercial cases. He has taught media law at the Columbia University School of Journalism, U.C.L.A. Law School and Yale Law School.

While working as a lawyer, Mr. Liptak wrote occasional book reviews for The Times and The New York Observer and contributed to other sections of The Times. His work has also appeared in The New Yorker, Vanity Fair, Rolling Stone, Business Week and The American Lawyer. He has written several law review articles as well, generally on First Amendment topics.

Mr. Liptak lives in Washington with his wife, Jennifer Bitman, a veterinarian, and their children Ivan and Katie.

PANELISTS AND PANEL MODERATOR

R. Reeves Anderson, Partner, Appellate & Supreme Court Practice, Arnold & Porter

Reeves Anderson represents businesses, individuals, states, and foreign governments in appeals and trial litigation involving novel or complex questions of constitutional, statutory, or international law. He has represented parties and *amici* in over 40 cases before the US Supreme Court on topics ranging from water rights to sovereign immunity to commercial speech. Mr. Anderson also maintains an active practice before the federal courts of appeals and US district courts, where he focuses mainly on cross-border and foreign-affairs disputes. His work has been featured in *Chambers Global*, *National Law Journal's Appellate Hot List*, and *American Lawyer*.

Mr. Anderson was appointed to the firm's Pro Bono Committee in 2011. His pro bono clients have included Georgia death row inmate Troy Davis and the Adoptive Couple in the landmark Supreme Court case *Adoptive Couple v. Baby Girl*.

Mr. Anderson graduated as valedictorian from North Carolina State University with degrees in political science and chemistry. He earned his JD from Yale Law School and a Master's degree from Trinity College in Dublin, Ireland. Mr. Anderson's legal research and commentary have been published in the *National Law Journal*, the *Virginia Journal of International Law*, and *Nature*, and cited by the *New York Times*, *Washington Post*, and other prominent news outlets. In 2015, he received the US Chamber Institute for Legal Reform's national Research and Policy Award.

Upnit K. Bhatti L'15, Managing Associate, Supreme Court and Appellate Practice Orrick, Herrington & Sutcliffe

Upnit Bhatti represents clients in federal and state courts at both the trial and appellate levels. For example, she has been embedded in multiple trials as appellate counsel for Johnson & Johnson to preserve appellate issues. Ms. Bhatti also works with trial teams in complex commercial matters to draft dispositive motions and develop creative legal strategies. She has presented oral argument in state and federal courts and has co-authored briefs before state and federal trial and appellate courts, including the Supreme Court of the United States. In addition, Ms. Bhatti maintains an active pro bono practice.

Prior to joining Orrick, Ms. Bhatti focused on products liability and complex litigation work at Arnold & Porter, LLP and Bond, Schoeneck & King, PLLC. This included representing a consumer products company in the defense of thousands of personal injury cases in state and federal courts. She was the primary drafter of several motions and appellate briefs. She was also deeply involved in the firms' pro bono practice and first chaired a trial dealing with First and Eighth Amendment claims.

Outside of the firm, Ms. Bhatti serves as the Co-Chair of the DC Women's Bar Association's Amicus Committee and Diversity Committee. She is also the Secretary of the Board of her law school's Alumni Association.

Ms. Bhatti previously clerked for the Honorable Theodore A. McKee of the Third Circuit Court of Appeals and interned for the Honorable Thérèse Wiley Dancks of the Northern District

of New York. In law school, Ms. Bhatti served as the Managing Editor of the Syracuse Law Review and was an arguing member of the American Bar Association's National Appellate Team. She received the Moot Court Honor Society's Executive Director Award and the Syracuse Law Review Distinguished Leadership Award.

Keith J. Bybee, Vice Dean and Paul E. and Honorable Joanne F. Alper '72 Judiciary Studies Professor of Law

Keith Bybee is Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor at the College of Law. Vice Dean Bybee holds tenured appointments in the College of Law and in the Maxwell School of Citizenship and Public Affairs. He also directs the Institute for the Study of the Judiciary, Politics, and the Media (IJPM), a collaborative effort between the College of Law, the Maxwell School, and the S.I. Newhouse School of Public Communications. Vice Dean Bybee's areas of research interest include the judicial process, legal theory, political philosophy, LGBT politics, the politics of race and ethnicity, American politics, constitutional law, codes of conduct, and the media. His books include *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* (Princeton, 1998; second printing, 2002), *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford, 2007), and *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* (Stanford, 2010). His most recent book is *How Civility Works* (Stanford, 2016). He is currently at work on a grant-funded project examining the positive uses of fake news.

The Honorable Mae A. D'Agostino L'80, District Court Judge, Northern District of New York

Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers Award for distinguished achievement in the art and science of advocacy.

After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault. Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

The Honorable Rosemary S. Pooler, Circuit Judge, United States Court of Appeals for the Second Circuit

Rosemary S. Pooler is a United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit. At the time of her appointment in 1998, she was a United States District Judge for the Northern District of New York.

Judge Pooler received her B.A. from Brooklyn College in 1959, an M.A. in History from the University of Connecticut in 1961, and her J.D. from the University of Michigan Law School in 1965. She also attended the Program for Senior Managers in Government of Harvard University in 1978 and earned a Graduate Certificate in Regulatory Economics from the State University of New York at Albany in 1978.

Judge Pooler engaged in the private practice of law in Syracuse from 1966 until 1972. She served as Assistant Corporation Counsel/Director of the Consumer Affairs Unit for the City of Syracuse from 1972 to 1973. From 1974 to 1975, Judge Pooler was a District Representative on the Common Council of the City of Syracuse. From 1975 until 1980 she was Chair and Executive Director of the Consumer Protection Board of the State of New York. She served as a member of the New York State Public Service Commission from 1981 until 1986. In 1987, Judge Pooler was Staff Director of the Committee on Corporations, Authorities and Commissions of the New York State Assembly. She was Visiting Professor of Law at Syracuse University from 1987 until 1988 and was Vice-President for Legal Affairs of the Atlantic States Legal Foundation from 1989 until 1990. In 1990, she became a Justice of the Supreme Court, Fifth Judicial District, State of New York, and served in this position until becoming a United States District Judge for the Northern District of New York in 1994.

Judge Pooler is a native of the City of New York.

Paula C. Johnson, Professor of Law and Co-Director of the Cold Case Justice Initiative

Paula C. Johnson is professor of law at Syracuse University College of Law. She earned her B.A. from the University of Maryland, College Park; J.D. from Temple University School of Law; and her LL.M. from Georgetown University Law Center. Professor Johnson and Professor Janis McDonald (emerita), co-founded and direct the Cold Case Justice Initiative (CCJI) at Syracuse University College of Law, which investigates racially motivated murders committed during the civil rights era and in contemporary times. Professor Johnson has held several distinguished teaching posts, including the Haywood Burns Chair in Civil Rights at CUNY Law School (2005-2006), the Sparks Chair at the University of Alabama School of Law (2008), and the Syracuse University College of Law Bond, Schoeneck and King Distinguished Professorship (2004-2006). She also has taught at law schools at the University of Arizona, University of Baltimore, and Northern Illinois University.

In addition to CCJI-related courses, her teaching areas include criminal law, criminal procedure, race and law, voting rights, professional responsibility, and a seminar on women in the criminal justice system. Her scholarship and activism focus on matters of race, gender, sexuality, criminal law, international human rights, diversity and access to higher education. Her writings include “Beyond Displacement: Gentrification of Racialized Spaces as Violence—Harlem, New York and New Orleans, Louisiana,” in *Accumulating Insecurity: Violence and Dispossession in the Making of Everyday Life* (Feldman, Geisler & Menon, eds., Univ. Georgia

Press 2011); *Interrupted Life: Experiences of Incarcerated Women in the United States* (Univ. Calif. Press 2010); and *Inner Lives: Voices of African American Women in Prison* (NYU Press, 2003).

Professor Johnson is a member of the Democratizing Knowledge Collective at Syracuse University, an interdisciplinary collective that works to create just and inclusive spaces at the university and that values knowledge within and beyond the academy. From 2002-2003, she served as co-president of the Society of American Law Teachers (SALT), a national organization of approximately 900 law professors. At Syracuse University, Professor Johnson serves on a broad range of College of Law and University committees, including Curriculum (chair), Promotion and Tenure, Committee on Inclusion Initiatives, and International Programs. She is faculty advisor to the Black Law Students Association and OUTLAW (LGBTQ organization). She advises law students' research and serves on committees for joint degree students at SU College of Law and other schools/colleges and serves on committees for doctoral and master's degree candidates at Syracuse University.

Her honors and awards include the Syracuse University College of Law Award recognizing the Cold Case Justice Initiative on CCJI's Tenth Anniversary (2018); Syracuse University Black Law Students Association Outstanding Advisor Award (2018); the Syracuse University Office of Program Development, Office of Multicultural Affairs, and Black History Month Committee's Trailblazer Award (February 2016); Central New York ACLU Ralph E. Kharas Distinguished Service Award in Civil Liberties (2015); Emmett Till Legacy Foundation Woman of Courage Award in Honor of Mamie Till Mobley (2015); National Civil Rights Social Justice Award (Philadelphia, MS 2014); Syracuse University Chancellor's Citation for Excellence; and the Unsung Heroine Award from the Syracuse University Martin Luther King, Jr. Awards Committee.

OTHER PROGRAM PARTICIPANTS

Craig M. Boise, Dean and Professor of Law

Craig M. Boise is the 12th Dean and Professor of Law at Syracuse University College of Law, where he has established a reputation as one of legal education's leading innovators. During his nine years as a law school dean, he has established one of the nation's two largest hybrid online J.D. programs, the first online joint J.D./M.B.A. program, one of the earliest Master of Legal Studies programs for non-lawyers, the nation's first law-school based incubator for solo practitioners, and a "risk-free" J.D. program granting a master's degree in law to students who elect not to pursue a law career after successfully completing their first year of law school.

Before coming to Syracuse, Dean Boise was Dean and Joseph C. Hostetler-BakerHostetler Chair in Law at Cleveland State University's Cleveland-Marshall College of Law. He has held faculty positions at DePaul University College of Law, where he was also Director of the Graduate Tax Program, and Case Western Reserve University School of Law. He has taught a variety of tax courses, and his scholarship on US corporate and international tax policy and offshore financial centers has been published in the *Texas International Law Journal*, the *George Mason Law Review*, and the *Minnesota Law Review*, among others.

Before beginning his academic career, Dean Boise practiced tax law for more than eight years at Cleary Gottlieb and Akin Gump, in New York, and at Thompson Hine, in Cleveland, OH. He clerked for the Hon. Pasco M. Bowman II, of the US Court of Appeals for the Eighth Circuit. Dean Boise earned his LL.M. in Taxation from NYU, his J.D. from the University of Chicago, and his bachelor's degree in political science, summa cum laude, from the University of Missouri-Kansas City, where he also completed substantial coursework in piano performance at the university's Conservatory of Music.

Dean Boise a former member of the ABA's Standards Review Committee and the Steering Committee of the AALS's Deans' Forum. In 2018, he served as Co-Chair of the transition team for New York Attorney General Tish James. He is a member of the New York State Judicial Institute on Professionalism in the Law and is admitted to the bar in New York and Ohio.

Lauryn P. Gouldin, Associate Dean for Faculty Research, Crandall Melvin Associate Professor of Law

Lauryn Gouldin teaches constitutional criminal procedure, criminal law, evidence, constitutional law, and criminal justice reform. Her scholarship focuses on the Fourth Amendment, pretrial detention and bail reform, and judicial decision-making. Her articles have appeared in the *University of Chicago Law Review*, *BYU Law Review*, *Denver Law Review*, *Fordham International Law Journal*, and the *American Criminal Law Review*, among others. In 2017, the AALS Criminal Justice Section recognized her article, "Defining Flight Risk," as the first runner-up in the Section's Junior Scholars Paper Competition. In 2015, in recognition of her excellence in teaching, Gouldin was selected by the Syracuse University Meredith Professors to receive a Teaching Recognition Award. In 2014 and 2015, the College of Law Student Bar Association honored Gouldin with the Outstanding Faculty Award. At their commencement, the Class of 2018 awarded her the College of Law's Res Ipsa Loquitur Award for outstanding service, scholarship, and stewardship.

Professor Gouldin graduated from Princeton University with a major in the Woodrow Wilson School of Public and International Affairs and received her J.D., magna cum laude, from New York University School of Law. Following law school, Gouldin clerked for the Hon. Leonard B. Sand in the Southern District of New York and for the Hon. Chester J. Straub of the US Court of Appeals for the Second Circuit. She also spent several years as a litigation associate at Wachtell, Lipton, Rosen & Katz, working on matters involving white collar and regulatory defense, internal investigations and compliance, and securities litigation. Before joining the College of Law faculty, Professor Gouldin served as the Assistant Director of the Center for Research in Crime and Justice at New York University School of Law.

Roy Gutterman L'00, Director Tully Center for Free Speech, Associate Professor, Newhouse School

Roy Gutterman currently serves as director of the Newhouse School's Tully Center for Free Speech. He is a graduate of the Newhouse School and the Syracuse University College of Law. At Newhouse, Gutterman was the 2009-10 director of the Carnegie Legal Reporting Program. He also works with the Society of Professional Journalists student chapter and serves

on academic integrity committees. After graduating from Newhouse, Mr. Gutterman worked as a reporter for the Cleveland Plain Dealer, covering local and state government, crime, legal issues and general news. He later clerked for a New Jersey Superior Court judge and practiced business and general litigation.

Mr. Gutterman writes and speaks on media law, free speech, the intersection between courts and journalists and legal education issues. He has delivered lectures at the Communication University of China in Beijing, Fudan University in Shanghai and National Chengchi University in Taipei. Mr. Gutterman is a program director for the Burton Foundation for Legal Achievement; on the faculty committee for the Government Accountability Project in Washington, D.C., and on the honorary dinner committee for FIRE, the Foundation for Individual Rights in Education. As an undergraduate, he worked at The Boston Globe; The Courier-News in Bridgewater, N.J. The Post-Standard in Syracuse; and The Daily Orange. While in law school, he served as editor-in-chief of the law review. His book, “L.Rev: the Law Review Experience in American Legal Education” (Academica Press 2002), is in law school libraries around the world.

October Term 2020

October Sitting

[Carney v. Adams](#), No. [19-309](#) [Arg: 10.5.2020]

Issue(s): (1) Whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a “bare majority” on the state’s three highest courts, with the other seats reserved for judges affiliated with the “other major political party”; (2) whether the U.S. Court of Appeals for the 3rd Circuit erred in holding that a provision of the Delaware Constitution requiring that no more than a “bare majority” of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other “major political party,” when the former requirement existed for more than 50 years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts; and (3) whether the respondent, James Adams, has demonstrated Article III standing.

[Texas v. New Mexico](#), No. [22065](#) [Arg: 10.5.2020]

Issue(s): Whether the River Master correctly allocated evaporation losses under the Pecos River Compact.

[Rutledge v. Pharmaceutical Care Management Association](#), No. [18-540](#) [Arg: 10.6.2020]

Issue(s): Whether the U.S. Court of Appeals for the 8th Circuit erred in holding that Arkansas’ statute regulating pharmacy benefit managers’ drug-reimbursement rates, which is similar to laws enacted by a substantial majority of states, is pre-empted by the Employee Retirement Income Security Act of 1974, in contravention of the Supreme Court’s precedent that ERISA does not pre-empt rate regulation.

[Tanzin v. Tanvir](#), No. [19-71](#) [Arg: 10.6.2020]

Issue(s): Whether the Religious Freedom Restoration Act of 1993, [42 U.S.C. § 2000bb](#), permits suits seeking money damages against individual federal employees.

[Ford Motor Company v. Montana Eighth Judicial District Court](#), No. [19-368](#) [Arg: 10.7.2020]

Issue(s): Whether the “arise out of or relate to” requirement for a state court to exercise specific personal jurisdiction over a nonresident defendant under [Burger King Corp. v. Rudzewicz](#) is met when none of the defendant’s forum contacts caused the plaintiff’s claims, such that the plaintiff’s claims would be the same even if the defendant had no forum contacts.

[Google LLC v. Oracle America Inc.](#), No. [18-956](#) [Arg: 10.7.2020]

Issue(s): (1) Whether copyright protection extends to a software interface; and (2) whether, as the jury found, the petitioner’s use of a software interface in the context of creating a new computer program constitutes fair use.

[Ford Motor Company v. Bandemer](#), No. [19-369](#) [Arg: 10.7.2020]

Issue(s): Whether the “arise out of or relate to” requirement of the 14th Amendment’s due process clause is met when none of the defendant’s forum contacts caused the plaintiff’s claims, such that the plaintiff’s claims would be the same even if the defendant had no forum contacts.

[City of Chicago, Illinois v. Fulton](#), No. [19-357](#) [Arg: 10.13.2020]

Issue(s): Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code’s automatic stay, [11 U.S.C § 362](#), to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.

[U.S. v. Briggs](#), No. [19-108](#) [Arg: 10.13.2020]

Issue(s): Whether the U.S. Court of Appeals for the Armed Forces erred in concluding – contrary to its own longstanding precedent – that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.

[U.S. v. Collins](#), No. [19-184](#) [Arg: 10.13.2020]

Issue(s): Whether the U.S. Court of Appeals for the Armed Forces erred in concluding – contrary to its own longstanding precedent – that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.

[Pereida v. Barr](#), No. [19-438](#) [Arg: 10.14.2020]

Issue(s): Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.

[Torres v. Madrid](#), No. [19-292](#) [Arg: 10.14.2020]

Issue(s): Whether an unsuccessful attempt to detain a suspect by use of physical force is a “seizure” within the meaning of the Fourth Amendment, as the U.S. Courts of Appeals for the 8th, 9th and 11th Circuits and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a “seizure,” as the U.S. Court of Appeals for the 10th Circuit and the District of Columbia Court of Appeals hold.

November Sitting

[U.S. Fish and Wildlife Service v. Sierra Club](#), No. [19-547](#) [Arg: 11.02.20]

Issue(s): Whether [Exemption 5 of the Freedom of Information Act](#), by incorporating the deliberative process privilege, protects against compelled disclosure of a federal agency’s draft documents that were prepared as part of a formal interagency consultation process under [Section 7 of the Endangered Species Act of 1973](#) and that concerned a proposed agency action that was later modified in the consultation process.

[Salinas v. U.S. Railroad Retirement Board](#), No. [19-199](#) [Arg: 11.02.20]

Issue(s): Whether, under Section 5(f) of the [Railroad Unemployment Insurance Act](#) and Section 8 of the [Railroad Retirement Act](#), the Railroad Retirement Board’s denial of a request to reopen a prior benefits determination is a “final decision” subject to judicial review.

[Borden v. U.S.](#), No. [19-5410](#) [Arg: 11.03.20]

Issue(s): Whether the “use of force” clause in the [Armed Career Criminal Act](#) encompasses crimes with a mens rea of mere recklessness.

[Jones v. Mississippi](#), No. [18-1259](#) [Arg: 11.03.20]

Issue(s): Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

[Fulton v. City of Philadelphia, Pennsylvania](#), No. [19-123](#) [Arg: 11.04.20]

Issue(s): Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim — namely that the government would allow the same conduct by someone who held different religious views — as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held; (2) whether [Employment Division v. Smith](#) should be revisited; and (3) whether the government violates the First Amendment by conditioning a religious agency’s ability to participate in the foster care system on taking actions and making statements that directly contradict the agency’s religious beliefs.

[Brownback v. King](#), No. [19-546](#) [Arg: 11.09.20]

Issue(s): Whether a final judgment in favor of the United States in an action brought under [Section 1346\(b\)\(1\)](#) of the Federal Tort Claims Act, on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#) that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant’s FTCA claim.

[Niz-Chavez v. Barr](#), No. [19-863](#) [Arg: 11.09.20]

Issue(s): Whether, to serve notice in accordance with [8 U.S.C. § 1229\(a\)](#) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in Section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

[Texas v. California](#), No. [19-1019](#) [Arg: 11.10.20]

Issue(s): (1) Whether the unconstitutional individual mandate to purchase minimum essential coverage is severable from the remainder of the Patient Protection and Affordable Care Act; and (2) whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

[California v. Texas](#), No. [19-840](#) [Arg: 11.10.20]

Issue(s): (1) Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum-coverage provision in [Section 5000A\(a\)](#) of the Patient Protection and Affordable Care Act (ACA); (2) whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum-coverage provision unconstitutional; and (3) if so, whether the minimum-coverage provision is severable from the rest of the ACA.

Cases Not (Yet) Set for Argument

[Republic of Hungary v. Simon](#), No. [18-1447](#)

Issue(s): Whether a district court may abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reasons of international comity, in a matter in which former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II but the plaintiffs made no attempt to exhaust local Hungarian remedies.

Federal Republic of Germany v. Philipp, No. **19-351**

Issue(s): (1) Whether the “expropriation exception” of the [Foreign Sovereign Immunities Act](#), which abrogates foreign sovereign immunity when “rights in property taken in violation of international law are in issue,” provides jurisdiction over claims that a foreign sovereign has violated international human-rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing states’ responsibility for takings of property; and (2) whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even when the foreign nation has a domestic framework for addressing the claims.

Nestlé USA v. Doe I, No. **19-416**

Issue(s): (1) Whether an aiding and abetting claim against a domestic corporation brought under the [Alien Tort Statute](#) may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where the plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity; and (2) whether the judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

Collins v. Mnuchin, No. **19-422**

Issue(s): (1) Whether the Federal Housing Finance Agency’s structure violates the separation of powers; and (2) whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent

Cargill v. Doe I, No. **19-453**

Issue(s): (1) Whether the presumption against extraterritorial application of the Alien Tort Statute is displaced by allegations that a U.S. company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in – and the plaintiffs suffered their injuries in – a foreign country; and (2) whether a domestic corporation is subject to liability in a private action under the Alien Tort Statute.

AMG Capital Management, LLC v. Federal Trade Commission, No. **19-508**

Issue(s): Whether Section 13(b) of the Federal Trade Commission Act, by authorizing “injunction[s],” also authorizes the Federal Trade Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief.

Facebook Inc. v. Duguid, No. **19-511**

Issue(s): Whether the definition of an “automatic telephone dialing system” in the Telephone and Consumer Protection Act of 1991 encompasses any device that can “store” and “automatically dial” telephone numbers, even if the device does not “us[e] a random or sequential number generator.”

Mnuchin v. Collins, No. **19-563**

Issue(s): (1) Whether the statute’s anti-injunction clause, which precludes courts from taking any action that would “restrain or affect the exercise of powers or functions of the Agency as a conservator,” 12 U.S.C. 4617(f), precludes a federal court from setting aside the Third Amendment. 2. Whether the statute’s succession clause—under which FHFA, as conservator, inherits the shareholders’ rights to bring derivative actions on behalf of the enterprises—precludes the shareholders from challenging the Third Amendment.

[Van Buren v. U.S.](#), No. **[19-783](#)**

Issue(s): Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.

[Federal Trade Commission v. Credit Bureau Center, LLC](#), No. **[19-825](#)**

Issue(s): Whether Section 13(b) of the [Federal Trade Commission Act](#) authorizes district courts to enter an injunction that orders the return of unlawfully obtained funds.

[Albence v. Guzman Chavez](#), No. **[19-897](#)**

Issue(s): Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by [8 U.S.C. § 1231](#), or instead by [8 U.S.C. § 1226](#).

[CIC Services, LLC v. Internal Revenue Service](#), No. **[19-930](#)**

Issue(s): Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.

[Henry Schein Inc. v. Archer and White Sales Inc.](#), No. **[19-963](#)**

Issue(s): Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

[Uzuegbunam v. Preczewski](#), No. **[19-968](#)**

Issue(s): Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

[Department of Justice v. House Committee on the Judiciary](#), No. **[19-1328](#)**

Issue(s): Whether an impeachment trial before a legislative body is a "judicial proceeding" under [Rule 6\(e\)\(3\)\(E\)\(i\)](#) of the Federal Rules of Criminal Procedure.

[Edwards v. Vannoy](#), No. **[19-5807](#)**

Issue(s): Whether the Supreme Court's decision in [Ramos v. Louisiana](#) applies retroactively to cases on federal collateral review.

[Virus Pushes a Staid Supreme Court Into Revolutionary Changes](#)

The New York Times

May 12, 2020 Tuesday 15:55 EST

Copyright 2020 The New York Times Company All Rights Reserved

Section: US; politics

Length: 1613 words

Byline: Adam Liptak

Highlight: The court is set to depart from history twice on Monday: The justices will hear arguments by conference call, and the public will be able to listen in.

Body

The court is set to depart from history twice on Monday: The justices will hear arguments by conference call, and the public will be able to listen in.

WASHINGTON — A few months ago, a coalition of news organizations [asked the Supreme Court](#) to allow live audio coverage of major arguments on gay rights and immigration. Chief Justice John G. Roberts Jr. [rejected the request](#) within hours, in keeping with longstanding practice at an institution that almost never departs from tradition.

But on Monday, the court will break with history twice: hearing the first of 10 cases that will be argued in a telephone conference call, and letting the public listen in. It is a momentous step for a cautious and secretive institution and yet another way in which the coronavirus pandemic has forced American society to adjust to a new reality.

“It’s a remarkable development and completely unexpected,” said Bruce Collins, the general counsel of C-SPAN, which will offer live coverage of the arguments.

Among the cases the justices will hear by phone over the next two weeks are three on May 12 about subpoenas from prosecutors and Congress [seeking President Trump’s financial records](#), which could yield a politically explosive decision this summer as the presidential campaign enters high gear.

The court has never before heard a case by phone, a move that some lawyers fear will degrade the quality of the arguments and the spirited give-and-take of the courtroom. Nor has it allowed live audio coverage of its arguments, on rare occasions releasing same-day audio, but usually waiting until the end of the week to do so.

Now that those barriers have been broken, the question is whether at least some of the changes may last far beyond the coming two weeks.

The justices may not return to the bench in October if the virus is still a threat, as several of them are in the demographic group thought to be most at risk. Justice Ruth Bader Ginsburg is 87, and Justice Stephen G. Breyer is 81. Four additional members of the court — Chief Justice Roberts and Justices Clarence Thomas, Samuel A. Alito Jr. and Sonia Sotomayor — are 65 or older.

Courts around the nation and the world routinely allow not only audio but camera coverage of their arguments.

Virus Pushes a Staid Supreme Court Into Revolutionary Changes

The justices have offered various explanations for their resistance to live access to their work. Some have said they feared showboating from the lawyers. Others have worried that their questions, some including colorful hypotheticals, would be taken out of context.

Justice Sotomayor has said she feared the public would not understand the arguments. “I don’t think most viewers take the time to actually delve into either the briefs or the legal arguments to appreciate what the court is doing,” [she said in 2013](#).

Lawyers who argue before the court and experts on its history and procedures said that arguments conducted by telephone are likely to be more stilted and less valuable than ones in the courtroom.

“It’s better than nothing, but it’s no substitute for the real thing,” said Kannon K. Shanmugam, an experienced Supreme Court lawyer with Paul, Weiss, Rifkind, Wharton & Garrison. “It’s hard to have the back-and-forth that you have in open court. And it’s that much harder without videoconferencing, where you can at least see each other.”

Instead of the unruly but productive commotion that characterizes the modern Supreme Court argument, the court has announced that the justices will ask questions one by one, in order of seniority.

That seemingly small adjustment will have important consequences, notably in diminishing the ability of the justices to use their questions to talk to one another by jumping in to build on or respond to their colleagues’ concerns. The court will mute the lines of lawyers before and after they argue, but it has not said whether or how the justices themselves will be muted when it is not their turn to ask questions.

Other courts that have heard arguments by conference call have experienced hiccups, including dropped calls and background noise. The Supreme Court is unlikely to be immune to such glitches.

Even if the technical aspects of the arguments are seamless, the new format will impose problematic constraints.

“The justices will find these arguments materially less useful,” said Tom Goldstein, a lawyer who argues frequently before the court and is the publisher of *Scotusblog*.

Chief Justice Roberts, who was an accomplished Supreme Court lawyer before he took the bench, has explained that oral arguments are largely a way for justices to begin their deliberations.

“Quite often the judges are debating among themselves and just using the lawyers as a backboard,” [he told students](#) at Columbia Law School in 2008.

Those interactions will largely disappear in the new format, which may take on the disjointed quality of questioning at a congressional hearing.

Lawyers may also lose the ability to respond to a hostile question by pivoting to a different point in the hope of engaging a more friendly justice.

Indeed, the court has issued new instructions to the lawyers who will be arguing by phone. “Please be concise and responsive to each question so that each justice will have adequate time for questioning,” Scott Harris, the clerk of the Supreme Court, wrote to the lawyers.

It is hardly clear that there will be enough time even so. When the United States Court of Appeals for the District of Columbia Circuit adopted one-by-one questioning in [recent cases](#) heard by nine judges by teleconference, the session lasted for hours. The Supreme Court, by contrast, has in the past tried very hard to keep most arguments to an hour.

In the ordinary Supreme Court argument, most justices ask questions largely or solely of the lawyer for the side they will vote against.

Virus Pushes a Staid Supreme Court Into Revolutionary Changes

In remarks in 2004 to the Supreme Court Historical Society, Chief Justice Roberts, then an appeals court judge, made a playful point grounded in widely accepted statistics: “The secret to successful advocacy is simply to get the court to ask your opponent more questions.”

But the forced march of serial questions is likely to put pressure on the justices to ask questions of both sides, whether they would ordinarily be inclined to or not. (The exception may be Justice Thomas, who very seldom asks questions of either side.)

“When your side is up, instead of remaining silent you’re going to be handed the microphone,” said Irv Gornstein, the executive director of Georgetown’s Supreme Court Institute. “Are you going to use that opportunity to throw softballs? I don’t know.”

The institute, which has a [widely admired moot court program](#) that lets lawyers test-drive their arguments before appearing in front of the justices, has a new menu of options.

“We’re going to offer the traditional free-for-all, and we’re now offering judge by judge,” Mr. Gornstein said. “And then we’re going to offer a combination.”

Roman Martinez, a lawyer with Latham & Watkins who is getting ready to argue [a First Amendment case](#) on Wednesday, said he had doubled his usual number of moot courts, from two to four. “What I’ve been trying to do is to set up the moot courts to mirror, as best as possible, what the real-life argument experience will be like,” he said.

That means arguing from his office, alone, sitting in front of a fancy new speakerphone bought for the occasion. He is not planning to wear a suit. (The court has not said whether the justices will be wearing robes, though it seems unlikely.)

“I think an argument like this can be extraordinarily substantive and can be very helpful to the justices even though it’s not in person,” Mr. Martinez said. “It’s a second-best solution. Obviously, we would all prefer to be there live in person.”

There are some advantages. It will be possible to consult with colleagues, though that may be distracting.

“It does make it easier to look down at notes or look at particular, say, statutory language,” Mr. Martinez said. “But on balance, that minor advantage is outweighed by the disadvantage of not being able to see the justices.”

The court’s initial reaction to the pandemic was to postpone some 20 arguments that had been scheduled for March and April, ordinarily the last sittings of the term. Last month, it announced it would hear half of them in May and defer the rest to its next term, starting in October.

Scheduling arguments for May means that the court may not finish its work by late June, when its term ordinarily ends and the justices leave for their summer break.

Monday’s argument is a sort of dry run, concerning as it does a minor trademark dispute. But other cases to be argued in the next two weeks are important.

In addition to the cases on Mr. Trump’s financial records, a major test of presidential power, the court will hear arguments on whether members of the Electoral College [may cast their votes](#) for presidential candidates other than the ones they had pledged to support.

The court will also hear arguments in two cases involving religion. One concerns [how broadly federal employment discrimination laws apply](#) to schools run by churches. In the other, the court will decide whether the Trump administration may allow employers [to limit women’s access to free birth control](#) under the Affordable Care Act.

Virus Pushes a Staid Supreme Court Into Revolutionary Changes

There will still be elements of ceremony in the telephone arguments, some of them a little comic. “At 10 a.m.,” [a news release](#) describing the court’s new procedures said, “the justices will enter the main conference call.”

PHOTO: Even the Supreme Court will work from home. This week it will start with a minor trademark dispute, before moving on to more important cases. (PHOTOGRAPH BY CAROL M. HIGHSMITH/BUYENLARGE, VIA GETTY IMAGES) (A18)

Load-Date: May 12, 2020

End of Document

[John Roberts Was Already Chief Justice. But Now It's His Court.](#)

The New York Times

July 1, 2020 Wednesday 10:02 EST

Copyright 2020 The New York Times Company All Rights Reserved

Section: US

Length: 1527 words

Byline: Adam Liptak

Highlight: Chief Justice Roberts has replaced Justice Anthony M. Kennedy as the member of the Supreme Court at its ideological center, and his vote is now the crucial one in closely divided cases.

Body

Chief Justice Roberts has replaced Justice Anthony M. Kennedy as the member of the Supreme Court at its ideological center, and his vote is now the crucial one in closely divided cases.

WASHINGTON — In a series of stunning decisions over the past two weeks, Chief Justice John G. Roberts Jr. has voted to [expand L.G.B.T.Q. rights](#), [protect the young immigrants known as Dreamers](#) and [strike down a Louisiana abortion law](#). In all three decisions, he voted with the court's four-member liberal wing.

On Tuesday, he joined his usual conservative allies in a 5-to-4 ruling that [bolstered religious schools](#).

The decisions may be hard to reconcile as a matter of brute politics. But they underscored the larger truth about Chief Justice Roberts: 15 years into his tenure, he now wields a level of influence that has sent experts hunting for historical comparisons.

"Roberts is not only the most powerful player on the court," said Lee Epstein, a law professor and political scientist at Washington University in St. Louis. "He's also the most powerful chief justice since at least 1937."

An incrementalist and an institutionalist, the chief justice generally nudges the court to the right in small steps, with one eye on its prestige and legitimacy. He is impatient with legal shortcuts and, at only 65, can well afford to play the long game.

Taking the place of Justice Anthony M. Kennedy, [who retired in 2018](#), at the court's ideological center, Chief Justice Roberts's vote is now the crucial one in closely divided cases. To be both the chief justice and the swing vote confers extraordinary power.

His pivotal role on the court could be fleeting. Were President Trump able to appoint a replacement for Justice Ruth Bader Ginsburg, who is 87, or Justice Stephen G. Breyer, who is 81, the chief justice would almost certainly be outflanked by a conservative majority on his right.

A President Joseph R. Biden Jr., on the other hand, may have fewer opportunities to reshape the court in the short term. Replacing Justices Ginsburg or Breyer with another liberal would not alter the court's ideological balance or the chief justice's influence.

John Roberts Was Already Chief Justice. But Now It's His Court.

And that would mean Chief Justice Roberts would continue to assign the majority opinion when he is in the majority, which these days is almost always. He uses that power strategically, picking colleagues likely to write broadly or narrowly and saving important decisions for himself.

In his first 14 terms, he was in the majority about 88 percent of the time. So far this term, that number has shot up to 98 percent, Professor Epstein found. “Even more stunning,” she said, “is that Roberts voted with the majority in 97 percent of the non-unanimous decisions, compared to his average of 80 percent. This is the best showing by a chief justice since at least the 1953 term.”

But this may be the most striking statistic: He has been in the majority in every one of the 11 rulings decided by 5-to-4 or 5-to-3 votes [so far this term](#). No chief justice has been in the majority in every closely divided case over an entire term since Chief Justice Charles Evans Hughes in the term that ended in 1938 — and that was in only four cases.

Chief Justice Roberts has spoken admiringly of Chief Justice Hughes and his deft management of a clash with President Franklin D. Roosevelt. It arose in 1937, when Roosevelt, unhappy with Supreme Court decisions striking down his New Deal programs, announced a plan to add justices to the court.

“One of the greatest crises facing the Supreme Court since *Marbury v. Madison* was F.D.R.’s court-packing plan,” Chief Justice Roberts said in 2015 at New York University, “and it fell to Hughes to guide a very unpopular Supreme Court through that high-noon showdown against America’s most popular president since George Washington.”

“There are things to learn from it,” Chief Justice Roberts said, and he has seemed to apply those lessons to his relationship with Mr. Trump, who has attacked the very idea of judicial independence.

Chief Justice Roberts was appointed by President George W. Bush in 2005, and he was, back then, thought to be a reliable product of the conservative legal movement. Over the years, he occasionally disappointed his supporters and allies, notably in twice voting to [sustain the Affordable Care Act](#) and in [rejecting the Trump administration’s efforts](#) to add a question on citizenship to the census.

But those disappointments do not compare to the fury that followed the recent decisions. Conservatives said the chief justice has abandoned principle in an effort to protect the court’s reputation — and his own — from accusations that it is a political institution.

“Americans hoping for justice for women and unborn babies were let down again today by John Roberts,” said Senator Tom Cotton, Republican of Arkansas. “The chief justice may believe that he’s protecting the institutional integrity of the court, but in reality, his politicized decision-making only undermines it.”

Conservatives said they suspected the chief justice was acting at least partly based on a distaste for Mr. Trump, who has for years lashed out at federal judges who rule against him and his policies. They cited the chief justice’s majority opinions rejecting the administration’s rationales in the cases on the census and the Dreamers.

A pair of cases concerning Mr. Trump’s efforts to block disclosure of his financial records are among those that remain to be decided by the court this term. They will test Chief Justice Roberts’s leadership, and his votes in them will add important details to the portrait of him that has emerged thus far.

Chief Justice Roberts has tangled with the president before, issuing an extraordinary statement in 2018 after Mr. Trump criticized a ruling from an “Obama judge.”

“We do not have Obama judges or Trump judges, Bush judges or Clinton judges,” the chief justice said. “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”

In other settings, the chief justice has insisted that the justices do not act as partisans. “We don’t work as Democrats or Republicans,” he said in 2016.

John Roberts Was Already Chief Justice. But Now It's His Court.

Richard J. Lazarus, a law professor at Harvard, said Monday's abortion decision vindicated Chief Justice Roberts's statements.

"The chief is sending a broader message to both parties, and this time in this case it is the Republicans who take the hit," Professor Lazarus said. "But the message would be the same if it were the Democrats and their favored position had lost."

The message was this, Professor Lazarus said: "You cannot expect us to behave like partisan legislators."

The abortion case concerned a Louisiana law that was essentially identical to one from Texas that the court had struck down just four years ago, before Mr. Trump appointed two new justices. In dissent in 2016, Chief Justice Roberts had voted to uphold the Texas law.

Professor Lazarus said he suspected the chief justice was offended by the idea that a change in the composition of the court should warrant a different outcome in what was, at bottom, the identical case.

This term, Professor Epstein found, Chief Justice Roberts has voted with liberal and conservative justices at roughly equivalent rates.

"In a day and age of 'fear and loathing' between opposing partisans," she said, "this is pretty extraordinary."

Mike Davis, a former Senate Judiciary Committee counsel who is now head of the conservative Article III Project, said he was puzzled by Chief Justice Roberts's votes.

"The chief rules on these cases in such a way where he believes he is protecting the integrity of the Supreme Court," Mr. Davis said. "And only the chief understands the method to this madness."

But he added that the rulings would motivate conservative voters in the coming election to back Mr. Trump and Republican Senate candidates in hopes of cementing a more reliable conservative majority on the court.

"Over the next four years, the president of the United States could appoint four or more justices to the Supreme Court," Mr. Davis said. "And that is why it is so critically important that conservatives turn out and vote."

Professor Lazarus said that sort of thinking missed a distinction between politics and law.

"The chief's clear message is that is not how justices do their work," he said. "It is a shot across the bow at presidential candidates who campaign with lists of nominees based on the assumption that, if confirmed, they will of course necessarily vote based on the preferences of the majority who supported that candidate."

Carl Hulse contributed reporting.

PHOTOS: Chief Justice John G. Roberts Jr. is now at the court's center. (PHOTOGRAPH BY ERIN SCHAFF/THE NEW YORK TIMES) (A1); Chief Justice John G. Roberts Jr., who was chosen by President George W. Bush, being sworn in by Justice John Paul Stevens in 2005. Fifteen years later, he may be the most powerful chief justice since Charles Evans Hughes, left, who served from 1930 to 1941, said Lee Epstein, a law professor and political scientist. (PHOTOGRAPHS BY DOUG MILLS/THE NEW YORK TIMES; ASSOCIATED PRESS) (A16)

Load-Date: July 14, 2020

[In a Term Full of Major Cases, the Supreme Court Tacked to the Center](#)

The New York Times

July 10, 2020 Friday 20:30 EST

Copyright 2020 The New York Times Company All Rights Reserved

Section: US

Length: 1707 words

Byline: Adam Liptak

Highlight: Doling out victories to both sides, the court led by Chief Justice John Roberts seemed to strive to avoid charges of partisanship.

Body

Doling out victories to both sides, the court led by Chief Justice John Roberts seemed to strive to avoid charges of partisanship.

WASHINGTON — In an era of stark partisan polarization, Chief Justice John G. Roberts Jr. steered the [Supreme Court](#) toward the middle, doling out victories to both left and right in the most consequential term in recent memory.

The term, which ended Thursday, included rulings that will be taught to law students for generations — on [presidential power](#) and on [the rights of gay and transgender workers](#). The court [turned back an effort](#) to narrow abortion rights, and it [protected young immigrants known as Dreamers](#).

It expanded [the role of religion in public life](#), and it cut back on [the power of independent agencies](#). It took steps [to prevent chaos](#) when the Electoral College meets after the presidential election. And it handed Native Americans [their biggest legal victory](#) in decades.

A term that included just two or three such decisions would stand out. The term that just ended was a buffet of blockbusters.

It was also the term in which Chief Justice Roberts emerged as the member of the court at its ideological center, his vote the crucial one in closely divided cases, [a role no chief justice has played since 1937](#). He was in the majority in all but one of the term's 5-to-4 or 5-to-3 decisions.

But the chief justice was not alone in guiding the court toward the center: The percentage of 5-to-4 rulings dropped to a little more than 20, down from an average of 30 in the previous two terms.

Several major decisions were decided by 7-to-2 votes, including ones on [subpoenas for President Trump's financial records](#) and [the rights of religious employers](#). In some ways, the most prominent losers this term were the members of the court on its far right (Justices Clarence Thomas and Samuel A. Alito Jr.) and far left (Justices Ruth Bader Ginsburg and Sonia Sotomayor). They were the least likely to be in the majority in divided cases.

Chief Justice Roberts, 65, is a work in progress.

"This is the term where those of us who thought we understood John Roberts came to understand that we didn't," said [Irv Gornstein](#), the executive director of Georgetown's Supreme Court Institute. "I know some are already

In a Term Full of Major Cases, the Supreme Court Tacked to the Center

spinning out theories to explain how his votes fit into a coherent judicial philosophy. But as it was happening, it was one shock after another.”

In [a two-week stretch last month](#), for instance, Chief Justice Roberts voted with the court’s four-member liberal wing in cases on [abortion](#), [the Dreamers](#) and [job protections for L.G.B.T.Q. workers](#).

The trend is clear, said [Lee Epstein](#), a law professor and political scientist at Washington University in St. Louis. “He is drifting left at a statistically significant rate — and at a rate roughly resembling Souter’s liberal turn in the 1990s,” she said.

Justice David H. Souter, who was appointed in 1990 by President George Bush, soon emerged over his two decades on the court as a leading member of its liberal wing, much to the distress of his conservative sponsors.

Chief Justice Roberts dissented only twice in the entire term, in cases on [unanimous juries](#) and [Native American jurisdiction over eastern Oklahoma](#). Put another way, he was in the majority in divided decisions at a higher rate than any chief justice since at least 1953. That and other conclusions in this article are drawn from [data compiled](#) by Professor Epstein, [Andrew D. Martin](#) of Washington University and [Kevin Quinn](#) of the University of Michigan.

The chief justice was in the majority in divided cases 94 percent of the time, trailed by Mr. Trump’s two appointees: Justice Brett M. Kavanaugh, who voted with the majority 89 percent of the time, and Justice Neil M. Gorsuch, who voted with it 83 percent of the time. Together, Professor Epstein said, those three justices make up the “soft middle” of the court.

In divided cases, the chief justice voted with Justice Kavanaugh 89 percent of the time, and Justice Gorsuch 77 percent.

Other rates of agreement were more striking. Chief Justice Roberts voted with Justice Elena Kagan, a member of the court’s liberal wing, 69 percent of the time. By contrast, he voted with Justice Alito 63 percent of the time — the same rate as with Justice Stephen G. Breyer, another liberal. And the chief justice voted with Justice Thomas just 54 percent of the time.

Over all, Chief Justice Roberts’s rate of agreement with Democratic appointees was 61 percent, up from 44 percent in the previous term.

Mr. Trump has had a bad run at the court over his time in office, becoming the first president since Franklin D. Roosevelt whose administration lost more cases than it won.

The result was that a court dominated by five Republican appointees, including two named by Mr. Trump, disappointed conservatives at a notable rate. “This term spectacularly frustrated the conservative ambition to transform the Supreme Court into the G.O.P.’s lap dog,” said [Justin Driver](#), a law professor at Yale.

The court did its work in the middle of a pandemic, [hearing arguments by telephone](#) and allowing live audio coverage, both firsts. It typically ends its term in late June, but this year it issued its last decisions in July, which has not happened since 1996.

The court [postponed arguments in 10 cases](#) to the term that starts in October, and it decided just 53 argued cases with signed opinions, the smallest number since the 1860s. During the Spanish flu epidemic in the term that started in 1918, the court [also postponed arguments](#) but nonetheless decided 163 cases, or more than three times as many as the current court.

It was hardly a uniformly liberal term. Eight of the 12 closely divided cases featured the classic lineup, with the five Republican appointees in the majority. In two, on abortion and immigration, Chief Justice Roberts voted with the four Democratic appointees. In one, on Native American rights, Justice Gorsuch voted with them. (In the last 5-to-4 decision, in [a copyright case](#), the alliances were scrambled.)

In a Term Full of Major Cases, the Supreme Court Tacked to the Center

Justice Gorsuch drew fire from the right for his majority opinion in [Bostock v. Clayton County, Ga.](#), ruling that a landmark federal civil rights law protects L.G.B.T.Q. workers. The court's four-member liberal wing and the chief justice joined his opinion in the 6-to-3 decision.

The [retirement in 2018 of Justice Anthony M. Kennedy](#), who wrote the majority opinions in all four of the earlier landmark gay rights decisions, had made that outcome uncertain.

"With Justice Kennedy's departure, some court watchers justifiably feared that the movement toward accepting gay equality would stall, or perhaps even be reversed," Professor Driver said. "Instead, in a historic decision, the court redoubled its egalitarian efforts and even afforded protection to the trans community. Until quite recently, such a decision would have been unfathomable."

Justice Gorsuch's opinion employed textualism, the mode of statutory interpretation that looks to the words of the law under consideration rather than the intentions of the lawmakers who voted for it.

Professor Gornstein said the reaction from the right was telling.

"Rather than celebrating the opinion as the high-water mark for textualism," he said, "the conservative reaction has been to excoriate Justice Gorsuch as a betrayer of the conservative cause, leading to this question: Do conservatives want a justice who will follow the judicial method favored by conservatives, or do they want a justice who uses all the tools available to reach conservative policy results?"

[Sarah Harrington](#), a Supreme Court specialist with Goldstein & Russell, said Chief Justice Roberts has exerted a moderating influence on colleagues inclined to lurch right.

"I think we can expect that he will oversee a general shift toward more conservative rulings over time," she said, "but he continues to pump the brake on that shift, adhering for now to recent precedent and requiring the federal government to follow administrative-law rules in order to implement its conservative policy agenda."

An example of adherence to recent precedent was the chief justice's vote in the 5-to-4 decision to strike down a Louisiana law on the ground that the court had invalidated the identical law from Texas just four years before.

An example of requiring the government to follow administrative law principles was Chief Justice Roberts's majority opinion in a 5-to-4 decision rejecting the Trump administration's justifications for trying to shut down a program protecting the Dreamers.

The court was exceptionally active in cases involving religious institutions, siding with them three times in a row. The court ruled that state programs supporting private schools [must include religious ones](#), that the Trump administration could allow employers with religious objections [to deny contraception coverage](#) to female workers and that [employment discrimination laws do not apply](#) to many teachers at religious schools.

Not all of the court's actions are reflected in data on argued cases. The justices have also ruled on a series of emergency applications, some prompted by the pandemic. Chief Justice Roberts joined the court's four liberals, for instance, in [a 5-to-4 order rejecting a California church's challenge](#) to the state's shutdown policies.

But he twice joined his conservative colleagues in similar orders making it harder to vote in [Wisconsin](#) and [Texas](#). "When it comes to state efforts to suppress the vote," Professor Gornstein said, "the chief continues to vote in lock step with the rest of the right."

Over all, though, Professor Epstein said, the court has provided a welcome contrast to the partisan turmoil around the nation.

"This term, most justices — and Roberts, in particular — modeled centrist, nonpartisan behavior for the country," she said. "The data show a decline in 5-4 decisions, more agreement across party lines and a roughly 50-50 split in

In a Term Full of Major Cases, the Supreme Court Tacked to the Center

liberal and conservative decisions. The big cases, too, went 'one for you, one for me,' which may help bolster the court's legitimacy."

Alicia Parlapiano contributed reporting.

PHOTO: Chief Justice John G. Roberts Jr. voted in the majority in all but one of this Supreme Court term's 5-to-4 or 5-to-3 decisions. (PHOTOGRAPH BY T.J. KIRKPATRICK FOR THE NEW YORK TIMES)

Load-Date: September 9, 2020

End of Document

Philipp v. Fed. Republic of Germany

925 F.3d 1349 (D.C. Cir. 2019)
Decided Jun 18, 2019

No. 17-7064 C/w 17-7117

06-18-2019

Alan PHILIPP, et al., Appellees v. FEDERAL REPUBLIC OF GERMANY, a Foreign State and Stiftung Preussischer Kulturbesitz, Appellants

PER CURIAM.

ORDER

Per Curiam

Appellants' petition for rehearing en banc, the response thereto, and the amicus curiae brief in support of rehearing en banc were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Katsas, Circuit Judge, dissenting from the denial of rehearing en banc:

The panel decision in this case, together with *Simon v. Republic of Hungary*, [812 F.3d 127](#) (D.C. Cir. 2016) (*Simon I*), and ¹³⁵⁰ *Simon v. Republic of Hungary*, [911 F.3d 1172](#) (D.C. Cir. 2018) (*Simon II*), makes the district court sit as a war crimes tribunal to adjudicate claims of genocide arising in Europe during World War II. The basis for these decisions is not any federal statute authorizing a private right of action for victims of foreign genocide, nor even any statute punishing foreign genocide under United States law. Rather, these decisions rest on a statute abrogating the jurisdictional immunity of foreign sovereigns from claims for unlawful takings of property. As a result, the district court must hear genocide claims against foreign sovereigns, but only to determine whether it has subject-matter jurisdiction over common-law tort claims for conversion and the like. Moreover, the plaintiffs bringing these genocide-based takings claims may recover neither for killings nor even for personal injuries, but only for the loss of their property. And the district court must adjudicate these claims—and thus effectively determine the scope of a genocide—without first affording the foreign sovereign an opportunity to provide redress, whether for genocide or conversion.

Before allowing this remarkable scheme to proceed further, we should reconsider it en banc. In this case, *Philipp v. Federal Republic of Germany*, [894 F.3d 406](#) (D.C. Cir. 2018), and in *Simon II*, we rejected any defense of exhaustion or comity-based abstention for claims under the Foreign Sovereign Immunities Act (FSIA). These decisions create a clear split with the Seventh Circuit, are in tension with decisions from the Ninth and Eleventh Circuits, disregard the views of the Executive Branch on a matter of obvious foreign-policy sensitivity, and make the FSIA more amenable to human-rights litigation against foreign sovereigns than the

Alien Tort Statute (ATS) is to human-rights litigation against private defendants abetting the sovereigns. Moreover, they clear the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories. This includes claims not only for genocide, but also for the violation of most other norms of international human-rights law. The consequences of *Simon I* and its progeny are thus dramatic, while their foundations are shaky.

I

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in the FSIA itself. 28 U.S.C. § 1604. It then provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" when certain exceptions apply. *Id.* § 1605. The exception at issue here, commonly called the "expropriation exception," applies to any case

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id. § 1605(a)(3).

In *Simon I*, this Court held that the expropriation exception covers property taken as part of a genocide. We reasoned that genocide includes deliberately inflicting on a protected group "conditions of life calculated to bring about its physical destruction." 812 F.3d at 143 (quotation marks omitted). We held that the complaint at 1351 issue, which described the experience of Jews in Hungary between 1941 *1351 and 1944, adequately alleged "the requisite genocidal acts and intent," including a "systematic, 'wholesale plunder of Jewish property' " that "aimed to deprive Hungarian Jews of the resources needed to survive as a people." *Id.* at 143–44 (citation omitted). We recognized that the international law of expropriation applies only to takings by one sovereign of property owned by nationals of another. *Id.* at 144. But we distinguished the prohibition against genocide, which encompasses acts committed by a sovereign "against its own nationals." *Id.* at 145. We also acknowledged that, for genocide-based expropriation claims, the jurisdictional and merits inquiries diverge: Genocide must be established to create subject-matter jurisdiction, but the merits involve "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Id.* at 141. As to damages, we noted that another FSIA exception covers claims "for personal injury or death," but only for losses "occurring in the United States." 28 U.S.C. § 1605(a)(5). So, we construed the expropriation exception to permit plaintiffs claiming genocide to "seek compensation for taken property but not for taken lives." 812 F.3d at 146 (quotation marks omitted).

In *Philipp* and *Simon II*, this Court rejected exhaustion, abstention, and *forum non conveniens* defenses to the genocide-based expropriation claims recognized in *Simon I*. In *Philipp*, the panel held that the FSIA, by comprehensively codifying rules for foreign sovereign immunity, foreclosed any requirement that plaintiffs exhaust remedies available in the courts of the defendant sovereign. 894 F.3d at 414–16. *Simon II* reaffirmed that holding. There, we stated that, unlike other common-law defenses preserved by the FSIA, exhaustion "lacks any pedigree in domestic or international common law." 911 F.3d at 1181. We further reasoned that, if an exhaustion requirement would preclude the plaintiffs from returning to federal court (as would a comity-based abstention requirement), that would only make exhaustion more like immunity. *Id.* at 1180. Then, we held that

the district court abused its discretion in dismissing the claims on *forum non conveniens* grounds, even though they involved acts perpetrated by the Hungarian government against Hungarian nationals in Hungary. *Id.* at 1181–90.

II

A

The expropriation exception applies to claims for "property taken in violation of international law." 28 U.S.C. § 1605(a)(3). *Simon I* held that this provision encompasses property taken in violation of the international-law prohibition against genocide. In my judgment, it encompasses only property taken in violation of international takings law. The literal language could bear either meaning, but statutes must be construed in context. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007). Here, several contextual considerations support the narrower reading.

To begin, genocide is not about the taking of property. Rather, it involves the attempted extermination of a national, ethnic, racial, or religious group. A United Nations convention defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

1352*1352

Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. *Simon I* reasoned that takings may have a genocidal intent, and thus meet the last prong of this definition. 812 F.3d at 143–44. But they still must be intended to cause the "physical destruction" of a group—what matters is the attempted mass murder. And if genocide involves attempted mass murder, a provision keyed to "property taken" would be a remarkably elliptical way of addressing it. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

It would be even stranger for Congress to address genocide as exclusively a property offense. The FSIA's expropriation exception encompasses only claims for "property," 28 U.S.C. § 1605(a)(3), whereas its separate tort exception, which encompasses claims "for personal injury or death," covers only harms "occurring in the United States," *id.* § 1605(a)(5). So, *Simon I* approved an exceedingly odd type of genocide claim—one for property harms but *not* for personal injury or death. Moreover, the expropriation exception requires a connection between the property taken and commercial activity in the United States: the property or its proceeds must either be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or "owned or operated by an agency or instrumentality of the foreign state" that is itself "engaged in a commercial activity in the United States." *Id.* § 1605(a)(3). These requirements would make little sense in a provision addressed to human-rights abuses such as genocide, rather than to purely economic wrongdoing.

As strange is the mismatch between jurisdiction and merits. *Simon I* requires proof of genocide to abrogate sovereign immunity—which must be determined at the outset. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, — U.S. —, 137 S. Ct. 1312, 1318–24, 197 L.Ed.2d 663 (2017). But abrogating immunity does not create a private right of action, *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004), and there is no common-law right of action for genocide. Instead, the merits

here involve " 'garden-variety common-law' claims," such as "replevin, conversion, unjust enrichment, and bailment." *Philipp*, 894 F.3d at 410–11 (citation omitted); *see also Simon I*, 812 F.3d at 141. This scheme oddly matches the jurisdictional equivalent of a thermonuclear weapon (determining the scope of a genocide) to the merits equivalent of swatting a fly (determining whether there was a common-law conversion). And it is in marked contrast to the FSIA's terrorism exception, which applies to claims for various specified acts, 28 U.S.C. § 1605A(a)(1), and which creates a cause of action for those acts, *id.* § 1605A(c).

Broader statutory context creates further difficulties. The FSIA's other primary exceptions are narrow ones covering waiver, commercial activity in the United States, rights to property in the United States, torts causing injury in the United States, and arbitration. 28 U.S.C. § 1605(a)(1)–(6). The Supreme Court has described these exceptions as collectively codifying the pre-FSIA "restrictive" theory of foreign sovereign immunity, which covers a sovereign's "public acts" but not its commercial ones. *See Helmerich & Payne*, 137 S. Ct. at 1320–21; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–89, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). In a case specifically involving the expropriation exception, the Court "found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles." *Helmerich & Payne*, 137 S. Ct. at 1320. *1353 Abrogating immunity for public acts committed by a foreign sovereign against its own nationals within its own territory would be just such a radical departure.

The international law of foreign sovereign immunity cuts in the same direction. Here is its "Basic Rule": "Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons." Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987) (Third Restatement). Like the FSIA, international law provides narrow exceptions to immunity for claims arising out of commercial activity, *id.* § 453(1); torts causing injuries within the forum state, *id.* § 454(1); property claims involving commercial activities, gifts, or immovable property in the forum state, *id.* § 455(1); and waiver, *id.* § 456(1). None of these exceptions covers the genocide-based takings claims recognized in *Simon I*. So, *Simon I* construes the FSIA to conflict with international law—which is to be avoided if possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804). Of course, none of this suggests that genocide or other violations of international human-rights law should go unremedied; but such violations typically are addressed either through diplomacy or in international tribunals, rather than in the domestic tribunals of another sovereign. *See* Third Restatement § 906 & cmt. *b*.

Consistent with these principles, the courts have rejected attempts to shoehorn modern human-rights law into the FSIA exceptions. For example, in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), the Supreme Court held that the commercial-activity exception did not cover claims that Saudi Arabia illegally detained and tortured a United States citizen employed by a Saudi government hospital. The Court construed the exception to track the restrictive theory of sovereign immunity:

[T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.

Id. at 361, 113 S.Ct. 1471. In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), we likewise construed the FSIA's waiver exception, which includes waivers "by implication," 28 U.S.C. § 1605(a)(1), to track the restrictive theory. We held that Germany did not impliedly waive its foreign sovereign

immunity by using slave labor during the Nazi era. [26 F.3d at 1173](#). And we did so despite recognizing that slavery—like genocide—violates a *jus cogens* norm of international human-rights law, *i.e.*, "a norm from which no derogation is permitted." *Id.* (quotation marks omitted).

The only deviation from this pattern is the FSIA's terrorism exception, which covers a significant class of cases involving the public acts of a foreign sovereign. But the differences between the terrorism and expropriation exceptions are striking: The terrorism exception meticulously describes and limits the possible plaintiffs (United States nationals, members of the United States armed forces, and United States employees or ¹³⁵⁴contractors), [28 U.S.C. § 1605A\(a\)\(2\)\(A\)\(ii\)](#); the possible defendants (generally, foreign states formally ¹³⁵⁴designated as sponsors of terrorism), *id.* § 1605A(a)(2)(A)(i); the acts triggering the exception ("torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act"), *id.* § 1605A(a)(1); the associated private cause of action (covering the same parties and acts), *id.* § 1605A(c); and the damages available (for personal injury, death, or foreseeable property loss), *id.* § 1605A(a)(1), (d). This carefully reticulated framework is far different from a provision keyed only to "property taken in violation of international law." *Id.* § 1605(a)(3).

B

The grave consequences of *Simon I* bear not only on its correctness, but also on the appropriateness of en banc review.

Most obviously, *Simon I* requires federal courts to determine the scope of genocide committed by various foreign countries during World War II. We suggested that this determination may sometimes be straightforward—as in the case of Hungarian Jews in the early 1940s. *See* [812 F.3d at 142–44](#). Even so, each individual plaintiff must prove not only that there was a genocide, but also that he or she (or a decedent) was subjected to a genocidal taking. Sometimes, this will be far from clear. For example, the *Philipp* panel concluded that a coerced sale of art in 1935, for "barely 35% of its actual value," could be an act of genocide. [894 F.3d at 409, 413–14](#) (quotation marks omitted). Germany objected that the plaintiffs' theory would transform into genocide any " 'transaction from 1933–45 between' a Nazi-allied government and 'an individual from a group that suffered Nazi persecution.' " *Id.* at 414. The panel envisioned something only slightly less concerning—case-by-case adjudications of which commercial transactions were sufficiently coercive, unfair, and improperly motivated to be genocide. *Id.* Such claims could be made against a number of European nations. *See, e.g.*, *Republic of Austria v. Altmann*, [541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1](#) (2004); *Cassirer v. Kingdom of Spain*, [616 F.3d 1019](#) (9th Cir. 2010) (en banc); *Alperin v. Vatican Bank*, [410 F.3d 532](#) (9th Cir. 2005); *Freund v. Republic of France*, [592 F. Supp. 2d 540](#) (S.D.N.Y. 2008). And they would create massive exposure. For example, in a case that, like *Simon*, involved Jews who lost property in the Hungarian Holocaust, the damages sought were some \$ 75 billion—"nearly 40 percent of Hungary's annual gross domestic product in 2011." *Abelesz v. Magyar Nemzeti Bank*, [692 F.3d 661, 682](#) (7th Cir. 2012).

Moreover, the reasoning of *Simon I* cannot be limited to genocide. International law sharply distinguishes between the law of expropriation, which restricts only the takings by one sovereign of property belonging to the nationals of another, *see* Third Restatement § 712, and human-rights law, which now governs one sovereign's treatment of its own nationals within its own borders, *id.* § 701. Under the latter,

A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Id. § 702. The first six of these seven categories are *jus cogens* norms—the most serious ones, which are binding even in the face of an international agreement to the contrary. *Id.* cmt. *n*. Most of them—including 1355*1355 not only genocide, but also slavery, murder, degrading treatment, and systemic racial discrimination—can involve harms to property. Under the reasoning of *Simon I*, all of these could be the subject of litigation through the expropriation exception.

To appreciate the gravity of this, consider if the shoe were on the other foot. Imagine the United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination. Yet that is a precise mirror image of *Simon*. Given the stakes, what we once said about the waiver exception rings true here:

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Princz, 26 F.3d at 1175 n.1.

III

Philipp and *Simon II* magnify the concerns about *Simon I* and come with their own analytical difficulties.

A

On the merits, *Philipp* and *Simon II* held that the FSIA forecloses any exhaustion or comity-based abstention defense. 894 F.3d at 414–16 ; 911 F.3d at 1180–81. But far from foreclosing these defenses, the FSIA affirmatively accommodates them. It provides that, for any claim falling within an immunity exception, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. A "private individual" under "like circumstances" would be one facing claims for aiding and abetting violations of international human-rights law. Such claims would be brought under the ATS, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Another like circumstance might involve private individuals sued for wrongful death, battery, or conversion. In either instance, exhaustion and abstention defenses would likely be available.

The Supreme Court has at least hinted that an ATS plaintiff must exhaust local remedies before litigating an international-law tort claim in federal district court. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), the Court explained:

the European Commission argues ... that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

¹³⁵⁶*Id.* at 733 n.21, 124 S.Ct. 2739 (citations omitted). Four justices have embraced exhaustion ^{*1356}more definitively—without provoking any disagreement. *See Jesner v. Arab Bank, PLC*, — U.S. —, 138 S. Ct. 1386, 1430–31, 200 L.Ed.2d 612 (2018) (Sotomayor, J., dissenting); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013) (Breyer, J., concurring in the judgment). The Ninth Circuit has held that exhaustion is required in ATS cases if local remedies are adequate. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc) (plurality opinion); *id.* at 833–37 (Bea, J., concurring); *id.* at 840–41 (Kleinfeld, J., concurring).

Private defendants also may seek comity-based abstention. For example, *Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014), involved ATS and state-law claims against defendants alleged to have abetted the bombing of a Colombian village by the Colombian government. *See id.* at 584. After dismissing the ATS claims as impermissibly extraterritorial, the Ninth Circuit dismissed the state-law claims "based on the doctrine of international comity." *Id.* at 596–97. As the court explained, "[i]nternational comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Id.* at 598 (citation omitted). Likewise, in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), the Eleventh Circuit dismissed on comity-based abstention grounds a claim by an American citizen that two German banks, during the 1930s and early 1940s, had stolen her family property "through the Nazi Regime's program of 'Aryanization.'" *Id.* at 1229, 1237–40. Comity interests are heightened where, as here, the claims "arise from events of historical and political significance" to the foreign sovereign. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008). Like exhaustion, comity-based abstention presupposes an adequate forum in the offending country. *See, e.g., Mujica*, 771 F.3d at 603–04. But *Philipp* and *Simon II* rejected exhaustion and abstention defenses as categorically unavailable in FSIA cases, not on the narrower ground that fora in Germany and Hungary were inadequate.

The *Philipp* panel reasoned that because the FSIA comprehensively sets forth immunity defenses, *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141–42, 134 S.Ct. 2250, 189 L.Ed.2d 234 (2014), but does not expressly provide for exhaustion or abstention defenses, it must implicitly have foreclosed those defenses. 894 F.3d at 415–16. But foreign sovereign immunity—which eliminates subject-matter jurisdiction—is distinct from non-jurisdictional defenses such as exhaustion and abstention. As shown above, these defenses are available to private defendants no less than to foreign sovereigns. In that critical respect, the defenses are less akin to immunity than to generally applicable, judge-made defenses such as *forum non conveniens*, the act-of-state doctrine, and the political-question doctrine—none of which is mentioned in the text of the FSIA, but all of which survived its enactment. *See, e.g., Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005). Exhaustion and abstention are also different from arbitration. So, the inclusion of an arbitration requirement in the terrorism exception, 28 U.S.C. § 1605A(a)(2)(A)(iii); *see Philipp*, 894 F.3d at 415, says nothing about exhaustion or abstention.

Simon II further reasoned that exhaustion "lacks any pedigree in domestic or international common law." 911 ¹³⁵⁷F.3d at 1181. But international law requires an ^{*1357}individual "claiming to be a victim of a human rights violation" to "exhaust[] available remedies under the domestic law of the accused state" before another state

may espouse his claim. *See* Third Restatement § 703 cmt. *d*. Likewise, individual victims generally have international remedies only as provided by agreement, *see id.* cmt. *c*, and international agreements "also generally require that the individual first exhaust domestic remedies," *id.* cmt. *d*. To be sure, the Third Restatement does not expressly apply the same rule to instances where the victim seeks redress in the courts of a foreign sovereign. *See Philipp*, 894 F.3d at 416. But the drafters would have had no occasion to address exhaustion in that specific circumstance, given the overwhelming likelihood that, under international standards, sovereign immunity would have barred the claims. *See* Third Restatement §§ 451–56. Moreover, the logic for requiring exhaustion is even stronger in the context of actions filed in domestic courts; "if exhaustion is considered essential to the smooth operation of international tribunals whose jurisdiction is established only through explicit consent from other sovereigns, then it is all the more significant in the absence of such explicit consent to jurisdiction." *Sarei*, 550 F.3d at 830 (plurality opinion). As for domestic exhaustion rules, federal courts have crafted them for over a century, out of respect for other sovereigns such as states or Indian tribes. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *Ex parte Royall*, 117 U.S. 241, 251, 6 S.Ct. 734, 29 L.Ed. 868 (1886).

Finally, *Simon II* reasoned that exhaustion might, by operation of *res judicata*, bar plaintiffs from ever bringing claims in the United States. 911 F.3d at 1180. That is not necessarily true, at least if the plaintiff reserves the right to litigate international claims in the United States after pursuing domestic tort claims elsewhere. *Cf. England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 413–19, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). In any event, there is nothing anomalous with exhaustion triggering preclusion. *See, e.g., Iowa Mut.*, 480 U.S. at 19, 107 S.Ct. 971. Moreover, the same objection would apply to exhaustion under the ATS, yet the Ninth Circuit still adopted it. Comity-based abstention does prevent a plaintiff from litigating in a United States forum, yet the courts have applied it to cases involving private defendants facing foreign-centered human-rights claims. The FSIA makes the same defenses also available to foreign sovereigns.

B

Philipp and *Simon II* warrant rehearing en banc for several reasons. *First*, they create a circuit split on a sensitive foreign-policy question. The Seventh Circuit has required Hungarian Holocaust survivors to exhaust remedies in Hungary before seeking to litigate under the FSIA's expropriation exception. *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 856–66 (7th Cir. 2015); *Abelesz*, 692 F.3d at 678–85. After describing the nearly existential threat of a \$ 75 billion lawsuit, the Seventh Circuit held that "Hungary, a modern republic and member of the European Union, deserves a chance to address these claims." *Abelesz*, 692 F.3d at 682. The *Philipp* panel acknowledged creating a circuit split. 894 F.3d at 416.

Second, *Philipp* rejected the position advanced by the United States. *See* 894 F.3d at 416. In *Simon II*, the United States argued at length that "[d]ismissal on international comity grounds" was consistent with the FSIA and "can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the 1358*1358 foreign policy of the United States." Br. for Amicus Curiae United States at 14–15, *Simon v. Republic of Hungary* (No. 17-7146); *see also id.* at 14–24. The United States again took the same position in supporting rehearing en banc in *Philipp*. Br. for United States as Amicus Curiae in Support of Rehearing En Banc at 3–14. Given the Executive Branch's "vast share of responsibility for the conduct of our foreign relations," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (quotation marks omitted), we should consider its views on this issue with special care.

Third, by eliminating various defenses, these decisions heighten concern about *Simon I*. Two important defenses—exhaustion and abstention—are now foreclosed. And if it was an abuse of discretion to dismiss on *forum non conveniens* grounds the foreign-cubed claims in *Simon II*, see 911 F.3d at 1182, then few of these human-rights cases will qualify for that defense. Other possible doctrines for limiting the expropriation exception, see *Altmann*, 541 U.S. at 713, 124 S.Ct. 2240 (Breyer, J., concurring), are also unlikely to have much effect: Personal jurisdiction requirements do not apply to foreign sovereigns. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). Venue is always proper in the District of Columbia for actions "brought against a foreign state or political subdivision thereof." 28 U.S.C. § 1391(f)(4). The act-of-state doctrine may not apply to Nazi-era claims, see *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (plurality opinion); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (per curiam), and generally does not apply to expropriation claims arising after January 1, 1959, see 22 U.S.C. § 2370(e)(2). Statutes of limitation may bar some claims arising from World War II, despite inevitable tolling or concealment arguments, but they will have no effect on claims arising from recent alleged human-rights abuses. Finally, *Simon I* itself held that the political-question doctrine does not bar the claims that it approved. See 812 F.3d at 149–51.

Fourth, these decisions make the FSIA more receptive to human-rights litigation than is the ATS. Under *Simon I*'s broad interpretation of the expropriation exception, most modern ATS claims could be recast as FSIA ones. And after *Philipp*, recasting has significant advantages. For example, ATS claims that a defendant had abetted crimes against humanity by Papua New Guinea must be exhausted. See *Sarei*, 550 F.3d at 824 (plurality opinion). Yet under *Philipp*, the same lawsuit would face no exhaustion requirement if filed directly against Papua New Guinea. ATS claims of abetting atrocities committed by a foreign sovereign within its own territory are impermissibly extraterritorial. See *Kiobel*, 569 U.S. at 111–12, 124–25, 133 S.Ct. 1659. Yet under *Philipp*, the same lawsuits, if filed directly against the foreign sovereigns, might survive on the theory that common-law tort claims have no territorial limit. Compare *Mujica*, 771 F.3d at 591–96 (dismissing ATS claims as extraterritorial), with *id.* at 596–615 (dismissing state-law claims only on comity grounds). Such results are perverse, for FSIA actions against foreign sovereigns raise even greater foreign-policy concerns than do ATS actions against private parties who may abet them.

Finally, the mismatch noted above between jurisdictional and merits issues under *Simon I* makes exhaustion even more important. If the federal courts must resolve the scope of a genocide in order to decide garden-variety conversion claims,^{*1359} then so much the better if the foreign sovereign can perhaps resolve the claims by addressing only the merits.

* * * *

For these reasons, I would grant rehearing en banc to reconsider the approach to the FSIA's expropriation exception set forth in *Simon I*, *Philipp*, and *Simon II*.

Justices grant new cases, send Indiana abortion cases back for a new look - SCOTUSblog

Amy Howe Independent Contractor and Reporter

This morning the Supreme Court issued [orders](#) from the justices' private conference yesterday. The justices granted five new cases, for a total of four additional hours of argument. The biggest news from the order list was the announcement (which I covered in a [separate post](#)) that the court will weigh in on whether the Department of Justice must disclose secret materials from Special Counsel Robert Mueller's investigation to the House Judiciary Committee. The remaining new cases, which are likely to be argued in the fall, all involve issues relating to international law and foreign relations.

Two of the cases involve immunity for foreign governments and foreign officials from lawsuits in U.S. courts, arising from claims that date back to Nazi-era Germany and World War II. As a general rule, foreign countries cannot be sued in U.S. courts. But there are several narrow exceptions to that rule, outlined in the Foreign Sovereign Immunities Act, including the "expropriation exception," which allows lawsuits against foreign countries involving rights in "property taken in violation of international law," as long as there is a commercial link to the United States. In [Federal Republic of Germany v. Philipp](#), the justices will weigh in on the scope of this exception.

The plaintiffs in the case are the heirs of Jewish art dealers who lived in Germany in the 1930s. They are seeking to recover a collection of valuable medieval relics that, they contend, the art dealers had been obliged to sell to the Nazis at well below market price. The U.S. Court of Appeals for the District of Columbia Circuit agreed that the expropriation exception applied and allowed the lawsuit to go forward. In the D.C. Circuit's view, the plaintiffs had alleged that their property had been taken "in violation of international law" because they argued that the sale of the relics was part of the Nazi genocide. The court of appeals dismissed Germany from the lawsuit, however, finding that the commercial nexus to the United States required by the expropriation exception did not exist; SPK, the German government institution that runs the Berlin museum where the relics are on display, remains in the case. The court of appeals also rejected Germany and SPK's argument that, even if the U.S. courts have the power under the FSIA to take up the plaintiffs' suit, they should still dismiss the case out of courtesy – a doctrine known as international comity – because the plaintiffs should have first pursued all the remedies available to them in German courts. Germany and SPK then went to the Supreme Court, which asked the federal government to weigh in earlier this year.

In [a brief filed in late May](#), the federal government urged the justices to grant review. Although it stressed that the "United States deplores the atrocities committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered," the government argued that the D.C. Circuit's ruling was wrong because the taking of property by a citizen's own government does not violate international law. Moreover, the government continued, the D.C. Circuit should not have ruled that the FSIA "leaves no room" for U.S. courts to decline to exercise their jurisdiction over a case out of deference to the interests of another country. The justices granted review today, but it denied a cross-petition filed by the plaintiffs, who asked the court to weigh in on whether the expropriation exception applies to Germany when the relics are not in the United States.

The issue of international comity is also at the heart of [Republic of Hungary v. Simon](#), a lawsuit filed in a federal court in the U.S. by Jewish survivors of the Hungarian Holocaust against Hungary and its state-owned railway, MAV. The plaintiffs claimed that Hungary had worked with the Nazis to exterminate Hungarian Jews and seize their property, while MAV aided in that effort by transporting Hungarian Jews to death camps and taking their possessions from them before they boarded the trains. The government agreed with the Hungarian government that the international comity question warrants the Supreme Court's attention, but it told the justices that they should take up the issue in [Philipp](#), rather than [Simon](#). Despite that recommendation, the justices granted review in [Simon](#) today.

The Alien Tort Statute is an 18th-century law that allows foreigners to bring lawsuits in U.S. courts for serious violations of international human rights laws. The justices agreed today to weigh in on whether the law can be used to sue U.S. corporations. The justices granted two petitions involving that question – one filed by U.S. agricultural behemoth Cargill, the other by Nestle USA, a U.S. subsidiary of the Swiss food and beverage giant. The companies were sued in federal court in California by plaintiffs who allege that they are former child slaves from Mali who were forced to work on farms in Cote d'Ivoire that grow cocoa beans, in violation of international law. Cargill and Nestle USA, the plaintiffs contended, knew that child slave labor was (as the lower court described it) a "pervasive problem in the Ivory Coast" but aided and abetted the violations of international law by buying cocoa beans from those farms and by providing technical assistance to the farms.

The U.S. Court of Appeals for the 9th Circuit allowed the lawsuit to go forward. The court of appeals first concluded that the court's 2018 decision in [Jesner v. Arab Bank](#), barring ATS lawsuits against foreign corporations, did not rule out lawsuits against U.S. corporations. The lower court also determined that the lawsuit had a sufficient U.S. connection to the kind of violations of international law that the ATS targets because the plaintiffs' "allegations paint a picture of overseas slave labor" that the companies "perpetuated from headquarters in the United States."

The Supreme Court asked the federal government for its views last year, and in May the federal government [recommended](#) that the justices take up the case. The government made clear that the "United States unequivocally condemns child slavery and those who aid and abet it, and is committed to fostering respect for human rights." But, the government continued, the Supreme Court's review of the 9th Circuit's ruling is warranted because the court of appeals was wrong to hold that U.S. corporations can be sued under the ATS and to recognize that defendants can be sued under the ATS for aiding and abetting violations of international law; both of those questions, the government argued, are better left for Congress, rather than the courts, to decide. The government suggested that the justices grant Cargill's petition and hold Nestle's petition, but the justices opted instead to grant both petitions; the cases will be argued together sometime in the fall.

The court sent two different challenges to Indiana laws regulating abortion, both of which went by the name [Box v. Planned](#)

Parenthood of Indiana and Kentucky, back to the lower courts for another look after the justices' ruling on Monday in [June Medical Services v. Russo](#), which struck down a Louisiana law that requires doctors who perform abortions in that state to have the right to admit patients at a nearby hospital. [One petition](#) stemmed from a challenge to a law that would require pregnant women to have an ultrasound at least 18 hours before obtaining an abortion. The federal court concluded that the ultrasound requirement would place an "undue burden" – the standard established in the Supreme Court's abortion cases – on a woman's right to choose to terminate her pregnancy because only four of Planned Parenthood's clinics have ultrasound machines; by contrast, the court reasoned, the requirement does not necessarily advance the state's interest in protecting fetal life and dignity because women are not required to look at the ultrasound pictures. The U.S. Court of Appeals for the 7th Circuit upheld that ruling, but now it will take another look. Today's order did not specify exactly what the lower court should do when (like the Supreme Court in *June Medical*) it has already struck down the law. However, the decision to send the case back for another look rather than simply deny review suggests that the Supreme Court wants the 7th Circuit to apply the more lenient test outlined in the concurring opinion filed by Chief Justice John Roberts in *June Medical*, which would not include a balancing of the benefits of the law against the burden it places on pregnant women.

The [second petition](#) arises from a challenge to a law requiring young women to notify their parents before obtaining an abortion. The 7th Circuit ruled that this law was also unconstitutional, prompting the state to ask the justices to weigh in on both the law itself and whether abortion providers have a legal right to challenge the law on behalf of their patients. Following today's order, the court of appeals will now reconsider this case in light of *June Medical*.

The justices declined to wade into two other cases related to abortion – specifically, the right to protest near abortion clinics. They denied review in [Reilly v. City of Harrisburg](#) and [Price v. City of Chicago](#), both of which involved challenges to "buffer zones" around abortion clinics. Justice Clarence Thomas indicated that he would have granted the petition in *Price*.

The justices will not fast-track a dispute over mail-in voting in Texas. Last week the justices [denied a request](#) from the Texas Democratic Party and Texas voters to temporarily reinstate a ruling by a federal trial court that would have allowed all eligible voters in the state to vote by mail in the 2020 election cycle. Today the justices turned down a request by the same plaintiffs to expedite consideration of their petition for review. The Democratic Party and voters had asked the court to set a briefing schedule that would allow the justices, if review were granted, to hear oral argument and issue a decision ahead of the election in November. But the justices refused to speed up their review process; instead, the court will apparently consider the petition at its conference in late September, which means it will not announce whether it will hear oral argument until a little more than a month before the election.

The justices did not act on a group of petitions (discussed [here](#)) asking them to weigh in on the authority of the Federal Trade Commission to get a court order requiring defendants to return money obtained through illegal activities. The justices do not currently have any more conferences scheduled before their summer recess. However, they traditionally hold a conference and release orders shortly after issuing their final decisions of the term to dispose of any petitions that they may have been holding until they decided related cases on the merits, and those orders sometimes also act on new cases.

Disclosure: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is among counsel to the respondent in *Republic of Hungary v. Simon*. The author of this post is not affiliated with the firm.

This post was originally published at [Howe on the Court](#).

Posted in [Box v. Planned Parenthood of Indiana and Kentucky Inc.](#), [Federal Republic of Germany v. Philipp](#), [Cargill v. Doe I](#), [Nestlé USA v. Doe I](#), [Republic of Hungary v. Simon](#), [Box v. Planned Parenthood of Indiana and Kentucky Inc.](#), [Featured](#), [Cases in the Pipeline](#)

Recommended Citation: Amy Howe, *Justices grant new cases, send Indiana abortion cases back for a new look*, SCOTUSblog (Jul. 2, 2020, 12:48 PM), <https://www.scotusblog.com/2020/07/justices-grant-new-cases-send-indiana-abortion-cases-back-for-a-new-look/>

Majority Opinion > Dissenting Opinion >

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROSALIE SIMON, ET AL., APPELLANTS v. REPUBLIC OF HUNGARY AND MAGYAR ALLAMVASUTAK ZRT.,
APPELLEES

No. 17-7146

April 20, 2018, Argued December 28, 2018, Decided

Appeal from the United States District Court for the District of Columbia. (No. 1:10-cv-01770).

Paul G. Gaston argued the cause for appellants. With him on the briefs were Charles S. Fax, Liesel J. Schopler, L. Marc Zell, and David H. Weinstein.

Samuel J. Dubbin was on the brief for amici curiae Holocaust Survivors Foundation USA, Inc., et al. in support of plaintiffs-appellants.

Geoffrey M. Klineberg and Daniel S. Severson were on the brief for amicus curiae Professor William S. Dodge in support of plaintiffs-appellants.

Gregory S. Silbert argued the cause for appellees. With him on the brief was Konrad L. Cailteux.

Before: MILLETT, PILLARD, and KATSAS, Circuit Judges. Opinion for the Court filed by Circuit Judge MILLETT. Dissenting opinion filed by Circuit Judge KATSAS.

MILLETT

[*1175] Millett, *Circuit Judge*: "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." *Simon v. Republic of Hungary*, 812 F.3d 127 , 133 , 421 U.S. App. D.C. 67 (D.C. Cir. 2016) (internal quotation marks and citation omitted). More than 560,000 Hungarian Jews—68% of Hungary's pre-war Jewish population—were killed in one year. *Id.* at 134 . In 1944 alone, a concentrated campaign by the Hungarian government marched nearly half a million Jews into Hungarian railroad stations, stripped them of all their personal property and possessions, forced them onto trains, and transported them to death camps like Auschwitz, where 90% of them were murdered upon arrival. *Id.* at 133-134 .

Fourteen of the very few survivors of the Hungarian government's pogrom (collectively, "Survivors"), including four United States citizens, filed suit against the Republic of Hungary and Magyar Államvasutak Zrt. ("MÁV"), Hungary's state-owned railway company. As relevant here, the litigation seeks compensation for the seizure and expropriation of the Survivors' property as part of the Hungarian government's genocidal campaign. *See Simon*, 812 F.3d at 134 .

In a prior appeal in this case, we held that Hungary's and MÁV's seizure of the Survivors' property was an act of genocide, and that the Survivors had adequately alleged jurisdiction over MÁV's acts of genocidal expropriation in violation of international law. *See Simon*, 812 F.3d at 142 , 147-148 . Although the Survivors' first complaint had not sufficiently alleged that jurisdiction existed over Hungary, we noted that they might yet be able to make that showing. *See id.* at 148 .

On remand, the district court dismissed the case on two alternative grounds, both of which are at issue here. First, the court held that, regardless of whether the Survivors' claims against Hungary amounted to expropriation, principles of international comity required that the Survivors first try to adjudicate their claims in Hungary. Second, the court held that, under the doctrine of *forum non conveniens*, a Hungarian forum would be so much more convenient for resolution of the claims as to clearly override the Survivors' choice to litigate the case **[**2]** in the United States.

[*1176] The district court erred on both fronts. Our recent decision in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), which post-dated the district court's ruling, squarely rejected the asserted comity-based ground for declining statutorily assigned jurisdiction. With respect to the dismissal on *forum non conveniens* grounds, the district court committed material legal errors at each step of its analysis. A proper application of the relevant factors leaves no basis for designating Hungary the strongly preferred location for this litigation because Hungary is not home to any identified plaintiff, has not been shown to be the source of governing law, lacks a process for remediation recognized by the United States government, and is not the only location of material amounts of evidence. There is, in short, far too little in this record to designate Hungary a more convenient forum than the one chosen by the Survivors. For those reasons, we reverse and remand for further proceedings consistent with this opinion.

I

A

The terrible facts giving rise to this litigation are recounted at length in our first opinion in this case. *See Simon*, 812 F.3d at 132-134 . In brief, Hungary "began a systematic campaign of [official] discrimination" against its Jewish population "as early as 1941." *Id.* at 133 . At that time, Hungary began rounding up tens of thousands of Jewish citizens and refugees who had fled from surrounding countries, and sending them to internment camps near the Polish border. *Id.* ; Second Amended Class Action Complaint ¶ 105, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. June 13, 2016), ECF No. 118 ("Second Am. Compl.").

Then, in 1944, the Nazis occupied Hungary and installed a "fanatically anti-Semitic" regime. *Simon*, 812 F.3d at 133 . Over the Summer of 1944, Hungary rounded up more than 430,000 Jews for deportation to Nazi death camps, primarily Auschwitz. Second Am. Compl. ¶ 120. With tragic efficiency, Hungarian government officials, including MÁV employees, created a schedule of deportations, along with planned routes and destinations, with four trains running daily. *Id.* ¶ 117. Seventy to ninety people were packed into an individual freight car, so that each train transported 3,000 to 3,500 Hungarian Jews to almost certain death. *Id.* Before the Jews were crammed into the trains, MÁV officials robbed them of all their possessions. *Id.* ¶ 112. According to the Survivors, "[w]ithout the mass transportation provided by the Defendant [MÁV], the scale of the Final Solution in Hungary would never have been possible." *Id.* ¶ 133.

B

The United States traditionally afforded foreign sovereign nations immunity from suit in domestic courts as a matter of "grace and comity." *Republic of Austria v. Altmann*, 541 U.S. 677 , 689 , 124 S. Ct. 2240 , 159 L. Ed. 2d 1 (2004). Given the Political Branches' constitutional expertise in foreign affairs, courts would historically "defer[] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over particular actions against foreign sovereigns and their instrumentalities." *Id.* (internal quotation marks omitted); *see also United States v. [**3] Curtiss-Wright Export Corp.*, 299 U.S. 304 , 319-320 , 57 S. Ct. 216 , 81 L. Ed. 255 (1936). But over time, conflicting theories on when immunity should apply created "disarray" in the State Department's immunity decisions. *Altmann*, 541 U.S. at 690 .

[*1177] Congress responded in 1976 by enacting the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* The FSIA is a "comprehensive statute containing a set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Altmann*, 541 U.S. at 691 (internal quotation marks omitted); *see also id.* ("Congress sought to remedy these problems by enacting the FSIA."). Congress enacted guiding "principles" so that the "courts of the United States" could decide "the claims of foreign states to immunity" on the terms prescribed by Congress. 28 U.S.C. § 1602 ; *see Altmann*, 541 U.S. at 691 ("The Act * * * transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch.").

The FSIA enumerates specific exceptions to foreign sovereign immunity and confers federal-court jurisdiction over foreign sovereigns in qualifying cases. 28 U.S.C. §§ 1605-1605A . Courts may hear a case only if "one of the exceptions applies" because "subject-matter jurisdiction in any such action depends on that application." *Altmann*, 541 U.S. at 691 (internal quotation marks omitted). Congress was also explicit that, if an exception applies, "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States." 28 U.S.C. § 1605(a) .

This case involves the FSIA's expropriation exception to foreign sovereign immunity. Section 1605(a)(3) waives foreign sovereign immunity in cases asserting that "rights in property [were] taken in violation of international law" if "that property or any property exchanged for such property" either (i) "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (ii) "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]" 28 U.S.C. § 1605(a)(3) .

Application of that exception hinges on a three-part inquiry:

- [1] the claim must be one in which "rights in property" are "in issue";
- [2] the property in question must have been "taken in violation of international law"; and
- [3] one of two commercial-activity nexuses with the United States must be satisfied.

Simon, 812 F.3d at 140 .

C

1

The Survivors are four United States citizens—Rosalie Simon, Charlotte Weiss, Rose Miller, and Ella Feuerstein Schlanger—as well as Helen Herman and Helena Weksberg from Canada; Tzvi Zelikovitch, Magda Kopolovich Bar-Or, Zehava Friedman, Yitzhak Pressburger, Alexander Speiser, Ze-ev Tibi Ram, and Moshe Perel from Israel; and Vera Deutsch Danos from Australia. Second Am. Compl. ¶¶ 5-9, 14, 22, 27, 28, 39, 41, 49, 65, 73, 81.1 Seeking some measure of compensation for their injuries, the Survivors filed suit against the Republic of Hungary, MÁV, and Rail Cargo Hungaria Zrt., a private railway company that is the successor-in-interest to the former cargo division of MÁV. *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 , 385 **[*1178]** (D.D.C. 2014). The Survivors claim that "their possessions and those **[**4]** of their families were taken from them" by the defendants as they boarded trains destined for concentration camps. *Id.* at 386 (internal quotation marks omitted).²

There is no dispute that Hungary and MÁV are, respectively, a foreign sovereign and an instrumentality of a foreign sovereign whose claims of immunity are governed by the FSIA. *See Simon*, 812 F.3d at 135 (citing 28 U.S.C. § 1603). Earlier in this litigation, the United States government filed a Statement of Interest recommending that Rail Cargo Hungaria Zrt., now nearly 100% owned by an Austrian company, be dismissed from the case because of the United States' "strong support for international agreements with Austria involving Holocaust claims against Austrian companies—agreements that have provided nearly one billion dollars to Nazi victims." Statement of Interest of the United States of America at 1, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. July 15, 2011), ECF No. 42. Given

the United States' longstanding collaboration with Austria to "develop funds to compensate victims of the Holocaust," including the Austrian General Settlement Fund, the United States maintained that a "suit against [Rail Cargo Hungaria Zrt.] runs contrary * * * to enduring United States foreign policy interests." *Simon*, 37 F. Supp. 3d at 393-394 (internal quotation marks omitted).

The United States government said nothing about any United States policy interest that would support dismissal of the claims against the Republic of Hungary or MÁV. *See generally* United States Statement of Interest.

The district court subsequently dismissed Rail Cargo Hungaria Zrt. as a defendant for lack of personal jurisdiction. *Simon*, 37 F. Supp. 3d at 444 . The district court separately dismissed the case against Hungary and MÁV for lack of subject matter jurisdiction. The court reasoned that the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065 , 41 U.N.T.S. 135 ("1947 Treaty"), "provide[d] for an exclusive, extrajudicial mechanism to resolve" the Survivors' claims, and so the court was "constrained by the FSIA to recognize [their] sovereign immunity." *Simon*, 37 F. Supp. 3d at 420 .

This court reversed. We held that the 1947 Treaty did not preempt the Survivors' suit because there was no express conflict between the Treaty and the Survivors' common-law claims. *Simon*, 812 F.3d at 140 . The Treaty established only a "minimum obligation by Hungary" to compensate victims; it did not provide the "exclusive means" by which victims could obtain relief, leaving the Survivors free to pursue other available remedies. *Id.* at 137 (emphasis omitted).

This court also ruled that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3) , encompassed the types of common-law claims of conversion, unjust enrichment, and restitution asserted by the Survivors. *Simon*, 812 F.3d at 141 ("We make FSIA immunity determinations on a claim-by-claim basis[.]"). More specifically, we held that the expropriation exception "squarely" applied, *id.* at 146 , because Hungary's and MÁV's expropriations of the Survivors' property were "*themselves genocide*," in violation of fundamental tenets **[*1179]** of international law, *id.* at 142 . "The Holocaust's pattern of expropriation and ghettoization" in Hungary was a "wholesale plunder of Jewish property * * * **[**5]** aimed to deprive Hungarian Jews of the resources needed to survive as a people." *Id.* at 143 (internal quotation marks omitted). Systematically stripping "a protected group" of life's necessities in order to "physical[ly] destr[oy]" them is "genocide." *Id.*

Looking to the complaint, this court held that the Survivors had satisfactorily pled a commercial nexus with respect to MÁV because MÁV engaged in commercial activity in the United States by "maintain[ing] an agency for selling tickets, booking reservations, and conducting similar business" here. *Simon*, 812 F.3d at 147 (internal quotation marks omitted). The complaint's pleadings, however, needed more specificity to show the type of commercial nexus that would support exercising jurisdiction over Hungary. We remanded for the district court to address that issue. *Id.* at 148 . This court also left it to the district court to decide on remand "whether, as a matter of international comity, it should refrain from exercising jurisdiction over [the remaining] claims until the plaintiffs exhaust domestic remedies in Hungary," and whether the doctrine of *forum non conveniens* warranted dismissal. *Id.* at 151 .

2

Upon their return to district court, the Survivors amended their complaint to allege specific facts regarding Hungary's ongoing commercial activity in the United States, including, among other things, "[t]he promotion of Hungarian businesses through trading houses," the promotion of Hungary as a destination for United States tourists, "[t]he promotion of American investment in Hungarian business[.]" "[t]he acquisition by Hungary of military equipment," Hungary's use of the United States' capital and debt markets to secure financing, and Hungary's acceptance of federal grants and loans from the United States. Second Am. Compl. ¶ 101.

The district court again dismissed the case. The court chose not to address whether the Survivors had adequately pled facts supporting application of the FSIA's expropriation exception. Instead, the district court held that, notwithstanding the jurisdiction expressly granted by the FSIA over properly pled expropriation claims, "principles of international comity" required the Survivors "to exhaust [Hungarian] remedies, except where those remedies are futile

or imaginary." *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42 , 54 (D.D.C. 2017) (internal quotation marks omitted) (citing *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847 , 852 , 858 (7th Cir. 2015)). The district court further ruled that, notwithstanding the Survivors' arguments about the rise of anti-Semitism in Hungary, a "lack of meaningful remedies," and restrictions on the independence of Hungary's judiciary, the Survivors' "pursuit of their claims in Hungary would not be futile." *Simon*, 277 F. Supp. 3d at 57-63 .

The district court further decided that dismissal was warranted under the doctrine of *forum non conveniens*. The court reasoned that the Survivors' choice of forum merited "minimal" deference, and that Hungary would be more convenient because of the evidence and many witnesses located there. *Simon*, 277 F. Supp. 3d at 63 , 64-65 . In applying the *forum non conveniens* doctrine, the court placed particular **[**6]** emphasis on Hungary's interest in resolving the dispute itself. *Id.* at 66 .

The Survivors appeal both grounds for dismissal and request that the case be reassigned to a new district court judge. **[*1180]** We agree that the district court erred in requiring the exhaustion of Hungarian remedies and in its *forum non conveniens* analysis, but see no basis for assigning a new district court judge to hear the case.

II

Because this appeal arises from a dismissal at the threshold of the case, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *Philipp*, 894 F.3d at 409 (internal quotation marks omitted). "[T]he court may [also] consider the complaint supplemented by undisputed facts" of record. *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193 , 198 , 357 U.S. App. D.C. 72 (D.C. Cir. 2003). We review *de novo* the statutory question of whether the FSIA allows a federal court, on grounds of international comity, to dismiss a case over which it has jurisdiction (at a minimum as to MÁV) in favor of the defendant's home forum. *Philipp*, 894 F.3d at 410 . A district court's *forum non conveniens* determination is reviewed for a clear abuse of discretion. *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 528 F.3d 934 , 950 , 381 U.S. App. D.C. 316 (D.C. Cir. 2008).

III

A

Hungary and MÁV (collectively, "Hungary") argue first that, even if the FSIA provides jurisdiction, the Survivors were required as a matter of international comity to first "exhaust" or "prudential[ly] exhaust[]" their claims in the Hungarian courts. Hungary Br. 34. According to Hungary, FSIA jurisdiction would attach, if at all, only if Hungary closed its doors to their claims or the Survivors "show[ed] that exhaustion would be futile." *Id.* at 28.

Before addressing that argument, some clarification of language is in order. Exhaustion involves pressing claims through a decisional forum—often an administrative agency or specialized body—whose decision is then subject to the review of a federal court. *See Woodford v. Ngo*, 548 U.S. 81 , 90 , 92, 126 S. Ct. 2378 , 165 L. Ed. 2d 368 (2006) (describing exhaustion as requiring a plaintiff to "us[e] all steps that the agency holds out, and do[] so properly (so that the agency addresses the issues on the merits)," or "requir[ing] a state prisoner to exhaust state remedies before filing a habeas petition in federal court") (internal quotation marks omitted). When exhaustion applies, parties retain the legal right to direct judicial review of the underlying decision.

The doctrine that Hungary invokes omits a crucial element of traditional "exhaustion"—the Survivors' right to subsequent judicial review here of the Hungarian forum's decision. Indeed, while we need not definitively resolve the question, there is a substantial risk that the Survivors' exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States. *See* Professor William S. Dodge Amicus Br. 15; *de Csepel v. Republic of Hungary*, 714 F.3d 591 , 606-608 , 404 U.S. App. D.C. 358 (D.C. Cir. 2013).

So understood, enforcing what Hungary calls "prudential exhaustion" would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts. But the **[**7]** FSIA admits of no such bar. As this court recently held in *Philipp v. Federal Republic of Germany*, *supra* , nothing in the FSIA or federal law empowers the courts to grant a

foreign sovereign an immunity from suit that Congress, in the FSIA, has withheld. 894 F.3d at 414-415 . To the contrary, the whole point of the FSIA was to "abate[] the bedlam" of [*1181] case-by-case immunity decisions, and put in its place a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." Id. at 415 (additional internal quotation marks and citation omitted) (quoting *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 , 134 S. Ct. 2250 , 2255 , 189 L. Ed. 2d 234 (2014)). There is no room in those "comprehensive" standards governing "every civil action," *id.* , for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew. As we explained in *Philipp*—echoing the Supreme Court—the whole point of the FSIA is that, "[g]oing forward, 'any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.'" Id. at 415 (quoting *NML Capital*, 134 S. Ct. at 2256).

Turning then to statutory text, Hungary's exhaustion-cum-immunity argument has no anchor in the FSIA. In fact, as *Philipp* explains, the text points against it. When Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly. *Philipp*, 894 F.3d at 415 (citing 28 U.S.C. § 1605A(a)(2)(A)(iii)); *see also* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note § 2(b) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). More to the point, the FSIA is explicit that, if a statutory exception to immunity applies—as we have squarely held it does at least as to MÁV, *Simon*, 812 F.3d at 147 —"[a] foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States." 28 U.S.C. § 1605(a) (emphasis added). Courts cannot end run that congressional command by just relabeling an immunity claim as "prudential exhaustion."

Nor is Hungary's form of judicially granted immunity among those historical legal doctrines, like *forum non conveniens*, that Congress chose to preserve when it enacted the FSIA. *Philipp*, 894 F.3d at 416 (citing 28 U.S.C. § 1606). *Forum non conveniens* predates the FSIA by centuries, and it was an embedded principle of the common-law jurisprudential backdrop against which the FSIA was written. *Altmann*, 541 U.S. at 713 (Breyer, J., concurring); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235 , 248 n.13, 102 S. Ct. 252 , 70 L. Ed. 2d 419 (1981) (tracing the history of the doctrine). Hungary's theory, by contrast, lacks any pedigree in domestic or international common law. *See Philipp*, 894 F.3d at 416 (citing *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 466 F. Supp. 2d 6 , 21 (D.D.C. 2006) ("[T]his court is not willing to make new law by relying on a misapplied, non-binding international legal concept.")).

In short, controlling circuit and Supreme Court precedent give no quarter to Hungary's theory of judicial immunity wrapped in exhaustion clothing. Under the FSIA, courts are duty-bound to enforce the standards outlined in the statute's text, and when jurisdiction exists (as it does at least over MÁV), courts " **[**8]** have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 , 409 , 110 S. Ct. 701 , 107 L. Ed. 2d 816 (1990).

B

Unlike Hungary's prudential immunity/exhaustion theory, the ancient doctrine of *forum non conveniens* is not displaced by the FSIA. *See Verlinden B.V. [*1182] v. Central Bank of Nigeria*, 461 U.S. 480 , 490 n.15, 103 S. Ct. 1962 , 76 L. Ed. 2d 81 (1983); *see also Altmann*, 541 U.S. at 713 (Breyer, J., concurring). The doctrine applies when both the United States and a foreign forum could exercise jurisdiction over a case, but the United States proves to be "an inconvenient forum," or the plaintiff is "'vex[ing], 'harass[ing], 'or 'oppress[ing]' the defendant by inflicting upon him expense or trouble not necessary" to the plaintiff's pursuit of a remedy. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 , 508 , 67 S. Ct. 839 , 91 L. Ed. 1055 (1947).

The *forum non conveniens* doctrine comes with ground rules. The starting point is "a strong presumption in favor" of the plaintiff's choice of the forum in which to press her suit. *Piper*, 454 U.S. at 255-256 ; *see also Atlantic Marine Constr. Co. v. United States Dist. Court for the W. Dist. of Texas*, 571 U.S. 49 , 66 n.8, 134 S. Ct. 568 , 187 L. Ed. 2d 487 (2013) (plaintiffs' chosen forum is hard to overcome "because of the 'harsh result' of [the *forum non conveniens*] doctrine," which "requires dismissal of the case * * * and inconveniences plaintiffs in several respects and even makes it possible for plaintiffs to lose out completely") (internal quotation marks and alternations omitted). The plaintiff's choice of forum merits still "greater deference when the plaintiff has chosen [her] home forum." *Piper*, 454 U.S. at 255

. For it is reasonable to assume that "this choice is convenient," and convenience is the lodestar of the *forum non conveniens* doctrine. *Id.* at 256 . By the same token, a foreign plaintiff's choice to litigate in the United States "deserves less deference." *Id.*

Because Hungary seeks to strip the Survivors of their chosen forum and to force them to sue on Hungary's home turf, Hungary bears the burden of showing both that an "adequate alternative forum for the dispute" exists, *Chabad*, 528 F.3d at 950 , and that it is "the *strongly preferred* location for the litigation," *MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568 , 571 , 392 U.S. App. D.C. 387 (D.C. Cir. 2010) (emphasis added). The court must likewise "ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice." *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390 , 392-393 , 354 U.S. App. D.C. 309 (D.C. Cir. 2003) (citation omitted).

In deciding whether to deny a plaintiff her chosen forum, courts weigh a number of private and public interests. *Piper*, 454 U.S. at 241 . At bottom, the "strong presumption in favor of the plaintiff's choice" can be "overcome only when the private and public interest factors *clearly point*" to a foreign forum. *Id.* at 255 (emphasis added).

The district court committed a number of legal errors that so materially distorted its analysis as to amount to a clear abuse of discretion. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 , 677 , 316 U.S. App. D.C. 86 (D.C. Cir. 1996) ("[T]he district court abuses its discretion when it fails to consider a material factor or clearly errs in evaluating the factors before it, or does not hold the defendants to their burden of persuasion on all elements of the *forum non conveniens* analysis.") (**[**9]** formatting edited), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 , 314-315 , 130 S. Ct. 2278 , 176 L. Ed. 2d 1047 (2010); *see also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 , 134 S. Ct. 1744 , 1748 n.2, 188 L. Ed. 2d 829 (2014) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.") (internal quotation marks omitted).

[*1183] 1

The district court committed legal error at the first step by affording the Survivors' choice of forum only "minimal deference." *Simon*, 277 F. Supp. 3d at 63 . The starting point is that the Survivors' choice of forum controls, and "unless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should *rarely* be disturbed." *Gulf Oil*, 330 U.S. at 508 (emphases added). So it is Hungary that "bears a heavy burden in opposing [the Survivors'] chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 , 430 , 127 S. Ct. 1184 , 167 L. Ed. 2d 15 (2007). Deference to the plaintiffs' choice is magnified when, as here, United States citizens have chosen their home forum. *See Piper*, 454 U.S. at 255 .

The district court set the scales wrong from the outset. It held that only "minimal deference" was due in this case because, although four of the plaintiffs were United States citizens, the other plaintiffs—from Canada (2), Israel (7), and Australia (1)—"will be required to travel internationally regardless of whether the litigation is in the United States or Hungary." *Simon*, 277 F. Supp. 3d at 63 . That analysis misstepped in three respects.

First, the addition of foreign plaintiffs does not render for naught the weighty interest of Americans seeking justice in their own courts. Here, nearly a third of the plaintiffs are from the United States. And there is no claim or evidence that the United States plaintiffs are in the case only as jurisdictional makeweights seeking to manipulate the forum choice. Under these circumstances, the United States' plaintiffs' preference for their home forum continues to carry important weight in the *forum non conveniens* analysis.

Second, the fact that other plaintiffs must travel does nothing to show that it is more convenient for *all* plaintiffs to travel to Hungary rather than for *some* to travel to the United States. The presence of foreign plaintiffs certainly does not justify the preference for a forum—Hungary—in which *no* plaintiff resides. The question, after all, centers on convenience, and forcing every single one of the many elderly plaintiffs to travel internationally is in no way convenient. *See Piper*, 454 U.S. at 256 n.24 ("[C]itizenship and residence are proxies for convenience[.]") (citation omitted); *cf. Iragorri v. United Techs. Corp.*, 274 F.3d 65 , 71 (2d Cir. 2001) ("[T]he degree of deference given to a

plaintiff's forum choice varies with the circumstances."). Nor is it in any way convenient for every one of the Survivors to return to the country that committed the mass murder of their families and the genocidal theft of their every belonging.

Hungary bears the heavy burden of persuasion here. Yet it made no effort to show how—as a matter of geographic proximity, available transportation options, cost of travel, ease of travel access, or any other relevant consideration—the United States is a less **[**10]** convenient forum than Hungary for the United States and Canadian plaintiffs, or even for the Israeli and Australian plaintiffs, to access and conduct their litigation. To be sure, Hungary need not have engaged in "extensive investigation" to demonstrate that it is the more convenient forum. *Piper*, 454 U.S. at 258. But given its burden of proof, Hungary had to do something to show that its home turf was the more convenient location for the *litigation*, and not just more convenient for the *defendant*. See *id.* at 256 ("[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient[.]").

Third, it is indisputably inconvenient to further delay the elderly Survivors' **[*1184]** almost decade-long pursuit of justice. See *Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 396, 399 n.5 (D.C. Cir. 2018) (plaintiff waited "nineteen years" for a decision on her restitution application from a foreign nation). That is important because, if a remedy ultimately proves unavailable in Hungary, there is an open question whether that lost time might render the Survivors ineligible for FSIA jurisdiction were they to once again attempt to press their claims here. See *id.* at 399 n.5 (noting, without resolving, the question of whether the foreign nation's or instrumentality's commercial activity must be "contemporaneous to the filing of suit in th[e] [United States], rather than contemporaneous with the alleged expropriation"). District courts must ensure that a decision to dismiss on *forum non conveniens* grounds will not lead to a foreign sovereign "delaying exhaustion of a plaintiff's remedies under its own laws" in a way that could end up foreclosing the claims altogether. *Id.*

In supplemental briefing before this court, Hungary raises, for the first time in this litigation, an argument that the Survivors seek to represent a class with more Hungarian members than American members. That is too little too late. For starters, that factual argument is forfeited because it has been fully available to Hungary from the onset of this litigation, yet it was not presented to the district court. See *Potter v. District of Columbia*, 558 F.3d 542, 547, 385 U.S. App. D.C. 26 (D.C. Cir. 2009).

In any event, the argument does not hold water. No class has been certified in this case. Hungary's argument rests instead on information derived from a different case in the Southern District of Florida, see Settlement Agreement, *Rosner v. United States*, No. 01-01859 (S.D. Fla. April 29, 2005), ECF No. 209. Yet Hungary offers no evidence that the two groups of plaintiffs would be the same or would have significant overlap. Unadorned and tardy speculation carries no weight in the *forum non conveniens* calculus.

In sum, the misplacement of the burden of proof and the resulting material gaps in the district court's legal analysis of Hungary's arguments in favor of a Hungarian forum pull the legs out from under much of the district court's *forum non conveniens* analysis.

2

The district court misallocated the burden of proof in a second consequential respect. The court tasked the Survivors with proving that Hungary was not a proper forum. Specifically, **[**11]** the district court ruled that its prior finding, for purposes of "prudential exhaustion," that the Survivors' "pursuit of their claims in Hungary would not be futile" equally "satisfie[d]" the requirement "that Hungary [be] both an available and adequate alternative forum." *Simon*, 277 F. Supp. 3d at 63. More specifically, the court earlier found that the Survivors failed to "show convincingly" that Hungarian remedies are "clearly a sham or inadequate or that their application is unreasonably prolonged" in a manner that would render Hungarian remedies "futile." *Id.* at 54 (internal quotation marks omitted). In so ruling, the court noted the Survivors' "heavy burden" to come forward with a "legally compelling reason" why resort to a Hungarian forum would be futile. *Id.* at 57 (internal quotation marks omitted). The court also considered and rejected piece by piece the Survivors' evidence of futility, ultimately deeming their arguments against so-called prudential exhaustion "[un]persuasive." *Id.* at 59-62.

That chain of reasoning does not carry over to the *forum non conveniens* doctrine, where the job of proving the availability and adequacy of a Hungarian forum [*1185] was Hungary's, not the Survivors'. See *Chabad*, 528 F.3d at 950 . On top of that, the question is not whether the alternative forum is a sham, inadequate, or unreasonably slow. Hungary had to affirmatively prove both that an adequate remedy exists and that the comparative convenience of its home forum was so "strong[]" as to clearly warrant displacing the Survivors' chosen forum. *Gulf Oil*, 330 U.S. at 508 .

Hungary dismisses the court's error as an "innocuous" statement, Hungary Br. 15, pointing to the court's later reference to the correct standard in a parenthetical, *id.* (quoting *Simon*, 277 F. Supp. 3d at 62); see also Dissenting Op. at 5 (characterizing the misallocation of the burden of proof as "at worst, an obviously harmless error"). But applying the correct burden of proof is not a box-checking exercise. What matters is whether the court's analysis fit those later words. It did not. The district court instead equated its earlier finding of non-futility with proof that "Hungary is both an available and adequate alternative forum." *Simon*, 277 F. Supp. 3d at 63 . Those are two very different inquiries. See *Fischer*, 777 F.3d at 867 ("To be sure, the burden of proof differs between the [prudential exhaustion and *forum non conveniens*] inquiries" because, in the latter inquiry, defendants must "establish that the remedies are adequate.") (emphasis omitted).

The proof is in the pudding. Under its inverted analysis, the district court never analyzed the critical question of the availability and adequacy of the Hungarian forum. Bypassing that question was anything but harmless in this case, where even the United States government lacks "a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims." Brief for *Amicus Curiae* the United States at 11. It is hard to understand how a foreign forum can be so clearly more convenient when the United States government itself does not have a clear understanding of its nature or operation.³

In other words, the district court [**12] let Hungary off the burden-of-proof hook by transforming the Survivors' failure to prove futility in the "prudential exhaustion" inquiry into proof of Hungary's clear superiority as a forum in the *forum non conveniens* analysis. On this record, that was a consequential legal error. See *El-Fadl*, 75 F.3d at 677 ("[T]he district court abuses its discretion when it * * * does not hold the defendants to their burden of persuasion on all elements of the *forum non conveniens* analysis.") (emphasis added and internal quotation marks omitted).

3

The consequences of the district court's burden-allocation errors snowballed as the court balanced the competing private and public interests in the two fora. The ultimate inquiry, again, puts the onus on Hungary. The law's "strong presumption in favor of the plaintiff's choice of forum," *Piper*, 454 U.S. at 255 , can be overridden only if the "private and public interest factors *strongly* favor[] dismissal," *Chabad*, 528 F.3d at 950 (emphasis added). Given the record in this case, the district court's failure to hold Hungary to that task makes this among "the rare case[s]" in which a district court's balancing of factors amounts to an abuse of discretion. *Morley v. CIA*, 894 F.3d 389 , 391 (D.C. Cir. 2018).

[*1186] a

As relevant here, the private-interest factors include the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses;] * * * and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Piper*, 454 U.S. at 241 n.6 (internal quotation marks omitted). It is the defendants' obligation to "provide enough information to enable the District Court to balance" the factors. *Piper*, 454 U.S. at 258 . The court's analysis of the relevant record material in this case was too quick to credit Hungary's claims and too slow to value the Survivors' evidence.

In weighing the private-interest factors, the district court reasoned that (i) extensive records are located in Hungary that would require translation into English, (ii) "many witnesses with personal knowledge will be located in Hungary" and unable to travel, and (iii) the Survivors might later choose to bring an action against Rail Cargo Hungaria Zrt., a previously dismissed defendant. *Simon*, 277 F. Supp. 3d at 64-65 . None of those reasons stands up to scrutiny.

At best, the location-of-relevant-evidence factor is in equipoise. While there are some records in Hungary, the Survivors showed that an extensive collection of relevant records has been amassed by the United States Holocaust Memorial Museum in Washington, D.C. See Memorandum in Opposition to Hungary's Motion to Dismiss 21, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. Oct. 31, 2016), ECF No. 122.4

The issue of translation points both ways as well. Given that many of the Survivors speak English, the documents will in all likelihood have to be translated and "digitized" for the parties regardless of which forum hears the case. See *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 85 (D.D.C. 2017), *aff'd*, 894 F.3d 406 (D.C. Cir. 2018). Digitization, moreover, has eased the burden of transcontinental document production and has increasingly become the norm in global litigation. See, e.g., *id.* at 85; *Itoba [**13] Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996).

The district court placed heavy emphasis on the presence of "many witnesses" in Hungary who cannot or were unwilling to travel. *Simon*, 277 F. Supp. 3d at 65. But that finding resulted from failing to hold Hungary to its burden of proof. Hungary failed to identify a single witness in Hungary that would need to testify at trial. In actuality, the evidence in this case will be largely documentary. See Oral Argument Tr. 4:17-4:21 ("[Survivors' Attorney]: No, I don't believe any people from Hungary will be called to prove our case. * * * [I]t'll also be proven by reference to some documents[.]"); *id.* at 19:1-19:4 (defendants' listing "bank records," "business records," and "tax records" as the type of evidence the court would evaluate). That makes sense. Because the relevant events occurred more than seventy years ago, the likelihood is low that "many witnesses with personal knowledge" still exist and are able to testify. *Simon*, 277 F. Supp. 3d at 65 (internal quotation marks omitted). Someone [**1187] who was barely an adult during the war would now be in their mid-90s. To be sure, the Survivors wished to depose *one* elderly witness in Hungary. But that is far too little to tip the balance at all, let alone strongly, in Hungary's favor. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426-429, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (when evidence is "in equipoise," the burden of proof has not been met).

The district court also emphasized that the Survivors might wish to join Rail Cargo Hungaria Zrt. as a defendant. But the ability to implead third-party defendants becomes relevant when the missing defendant is "crucial to the presentation of [the appellee's] defense." *Piper*, 454 U.S. at 259 (explaining that the ability to implead another defendant was significant because the other parties could be relieved of liability). Neither Hungary nor MÁV has argued that Rail Cargo Hungaria Zrt. is crucial to its defense. And the Survivors do not claim that Rail Cargo Hungaria Zrt. is necessary to the presentation of their case. In the absence of a more substantial showing of relevance or necessity, the district court erred in relying on speculation about the Survivors' possible future litigation strategy as a ground for overriding their chosen forum.

b

As relevant to this case, the public-interest factors include:

[T]he administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; [and] the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law[.]

Piper, 454 U.S. at 241 n.6 (quoting *Gulf Oil*, 330 U.S. at 509). The district court concluded that those factors weighed in favor of a Hungarian forum because of Hungary's "stronger" moral interest in resolving the dispute, the likelihood that Hungarian law would apply to the Survivors' claims, and the administrative burden the litigation could impose on the court. *Simon*, 277 F. Supp. 3d at 66-67. That analysis failed to hold Hungary to its burden of proof, misanalyzed the record evidence, and overlooked material omissions in Hungary's [**14] claims.

First, the district court erred in assigning such significant weight to Hungary's asserted interest in addressing the Survivors' claims. See *Simon*, 277 F. Supp. 3d at 66. Hungary has had over seventy years to vindicate its interests in addressing its role in the Holocaust. Yet the scheme Hungary currently has in place has not been recognized by the

United States government. See United States Statement of Interest at 1 (expressing "the United States' strong support for international agreements with Austria involving Holocaust claims against Austrian companies," without mentioning any of Hungary's laws to compensate victims); United States Br. 11 (United States does not "have a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims").

Beyond that, the district court erred in putting Hungary's and the four American citizens' and other Survivors' interests at cross-purposes. Allowing these claims to go forward and the evidence to be shown in a United States court will in no way impair Hungary's ability to use that same evidence to provide reparations and remediation to the Survivors of its own accord.

[*1188] The district court relied on *Republic of the Philippines v. Pimentel*, 553 U.S. 851 , 866 , 128 S. Ct. 2180 , 171 L. Ed. 2d 131 (2008), for the proposition that United States courts should respect a foreign sovereign's interest in addressing its own past wrongs. *Simon*, 277 F. Supp. 3d at 66 . That mixes apples and oranges. At issue in *Pimentel* was whether a suit that involved the Republic's assets and in which the FSIA did *not* authorize jurisdiction could still proceed *without* including the Republic as a party. *Pimentel*, 553 U.S. at 865 . More specifically, the case focused on whether, under Federal Rule of Civil Procedure 19(b) , the Republic was an indispensable party whose absence would bar the lawsuit from going forward. *Id.* at 862 . All parties agreed that the Republic was a necessary party, but they disagreed over whether the Rule 19(b) factors permitted the action to proceed without it. *Id.* at 863-864 .

The Supreme Court held that, when considering the intersection of joinder rules and sovereign immunity, "[a] case may not proceed when a required-entity sovereign is not amenable to suit." 533 U.S. at 867 . To hold otherwise, the Court added, would fail to "giv[e] full effect to sovereign immunity" and would offend the very interests that gave rise to the foreign sovereign immunity doctrine and the FSIA in the first place. *Id.* at 866 . *Pimentel* , in other words, enforces the immunity lines that the FSIA draws.

That bears no resemblance to this case. This case does not involve necessary-party status under Rule 19 ; Hungary and MÁV are already parties; and the FSIA's expropriation exception grants jurisdiction over at least one (and perhaps both) of the Hungarian defendants. See *Simon*, 812 F.3d at 147 ; 28 U.S.C. § 1605(a)(3) . It also bears noting that the already certified class in *Pimentel* consisted primarily of Philippine nationals, including "[a]ll *current* civilian citizens of the Republic of the Philippines." *Hilao v. Estate of Marcos*, 103 F.3d 767 , 774 (9th Cir. 1996) (emphasis added). By contrast, not one of the named Survivors in this case resides in or is a citizen of Hungary, and Hungary submitted **[**15]** no evidence to the district court identifying a single potential Hungarian class member or even a Hungarian witness.

Hungary additionally argues that other cases have acknowledged a foreign sovereign's interest in resolving disputes internally. But the cases that Hungary cites involved questions of personal jurisdiction and the extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350 . See Hungary Supp. Br. 8-9 (citing *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 , 133 S. Ct. 1659 , 185 L. Ed. 2d 671 (2013), and *Daimler AG v. Bauman*, 571 U.S. 117 , 134 S. Ct. 746 , 187 L. Ed. 2d 624 (2014)). Those cases do not speak to whether a court should, on *forum non conveniens* grounds, refuse to exercise jurisdiction that does exist. Nor do they implicate the heavy burden a defendant carries in overcoming a plaintiff's choice of forum.

The district court's second legal error was brushing off the United States' own interests in the litigation. The district court concluded that the Survivors' claims have no connection to the United States. *Simon*, 277 F. Supp. 3d at 66 . That is not correct. For starters, there are four United States citizen plaintiffs in the suit. The United States has an obvious interest in supporting their efforts to obtain justice in a timely manner and, to that end, in ensuring that a United States forum is open to those whose claims fall within the courts' lawful jurisdiction.

Beyond that, the United States government has announced that it has a "moral **[*1189]** imperative * * * to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes." United States Br. at 9-10. That interest is part of a larger United States policy to support compensation for Holocaust victims, especially its own citizens. "The policy of the United States Government with regard to claims for restitution or compensation by

Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency." United States Statement of Interest at 2. For the four citizen plaintiffs in this case, that interest is so compelling that Congress enacted it into law. See Justice for Uncompensated Survivors Today Act of 2017, Pub. L. No. 115-171, 132 Stat. 1288, 1289 (2018) (requiring the Secretary of State to compile a report that evaluates other countries' "progress toward the resolution of claims for United States citizen Holocaust survivors and United States citizen family members of Holocaust victims").

The United States has also been actively involved in obtaining justice for Nazi-era victims with countries that have shown themselves willing to provide such redress. See United States Statement of Interest at 2, 4-5 (The United States has "assist[ed] in several international settlements which have provided approximately \$8 billion dollars for the benefit of victims of the Holocaust"; signed Executive Agreements with countries that had collaborated with the Nazis; and "committed to take certain steps to assist Austria and Austrian companies in achieving 'legal peace' in the United States with respect to Nazi-era forced and slave labor claims[.]"). The United States' strong and longstanding interest in ensuring the *timely* **[**16]** remediation of the claims of Holocaust survivors, especially for its own citizens, carries important weight in the *forum non conveniens* analysis.

Third, Hungary failed to show that the choice-of-law factor favors its forum. The district court reasoned that "Hungarian law would likely apply to the plaintiffs' claims," making a Hungarian forum a better fit. *Simon*, 277 F. Supp. 3d at 66. But neither party argues that current Hungarian law should apply. The Survivors assert that international common law governs their claims. Survivors' Reply Br. 25. If so, United States courts are every bit as adept at applying that law as a Hungarian forum would be.

Hungary argues that historical Hungarian law from the time the property was seized should govern the claims. Oral Argument Tr. 21:22-21:23. That cannot be right. Hungarian law at that time made the genocidal seizures lawful and deprived Jews of all legal rights and status. See *id.* 22:6-22:9. That is the same law that authorized the deportation of Hungarian Jews to death camps. Consigning the Survivors to that legal regime would be the plainest of errors.

Finally, the United States has advised this court that it has no specific foreign policy or international comity concerns that warrant dismissal of this case in favor of a Hungarian (or any other) forum. United States Br. at 11 ("[T]he United States does not express a view as to whether it would be in the foreign policy interests of the United States for plaintiffs to have sought or now seek compensation in Hungary."). Quite the opposite, the United States' brief here emphasized its governmental interest in the timely resolution of the Survivors' claims during their lifetimes. *Id.* at 9-11. Likewise, its statement of interest filed in the district court gave no reason why this case should be dismissed and sent to Hungary. See *generally* United States Statement of Interest. That silence speaks volumes when contrasted **[*1190]** with the federal government's first unprompted Statement of Interest in this case in which it strongly recommended that the third defendant, a privately owned Austrian company, be dismissed because of Austria's ongoing, collaborative efforts to provide reparations to victims of the Holocaust. See *id.* at 1. That defendant has since been dismissed from the case. *Simon*, 277 F. Supp. 3d at 47 n.1.

At bottom, the relevant private and public interests in this case, strengthened by the United States government's views, point strongly in favor of the Survivors' forum choice. They certainly do not tilt decisively in favor of the Hungarian forum. While we accord respectful deference to district courts' *forum non conveniens* determinations, we do not rubber stamp them. Our task is to ensure that district courts' decisions hew to the burdens of proof and enforce the applicable legal presumptions. In this case and on this record, the nature and importance of the district court's legal and analytical errors render its judgment that Hungary met its weighty burden of proof a clear abuse of discretion.

C

Lastly, the Survivors request that their case be assigned to a different **[**17]** district court judge. "[W]e will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is 'so extreme as to display clear inability to render fair judgment.'" *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763, 410 U.S. App. D.C. 382 (D.C. Cir. 2014) (citation omitted); see also *Cobell v. Kempthorne*, 455 F.3d 317, 331, 372 U.S. App. D.C. 232 (D.C. Cir. 2006)

("[W]e exercise this authority only in extraordinary cases."). That standard has not remotely been met here. There is no evidence that the district court judge acted with anything but impartiality in this case, and "we have no reason to doubt that the District Court will render fair judgment in further proceedings." *In re Kellogg*, 756 F.3d at 763-764 .

* * * *

Winston Churchill described the brutal genocidal expropriations, deportations, and mass extermination of Hungarian Jews at Nazi death camps as "'probably the greatest and most horrible crime ever committed in the history of the world.'" *Simon*, 812 F.3d at 132 . The district court erred in declining to exercise statutorily conferred jurisdiction over the Survivors' effort to obtain some measure of reparation for those injuries both by wrongly requiring them to adjudicate their claims in Hungary first, and by misapplying the law governing the *forum non conveniens* analysis. We deny the Survivors' request that the case be reassigned, and remand for further proceedings consistent with this opinion.

So ordered.

KATSAS

Katsas, Circuit Judge, dissenting: The district court concluded that this foreign-cubed case—involving wrongs committed by Hungarians against Hungarians in Hungary—should be litigated in Hungary. In so doing, the court permissibly applied the settled law of *forum non conveniens*.

Our standard of review is narrow. As the Supreme Court has instructed: "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 , 257 , 102 S. Ct. 252 , 70 L. Ed. 2d 419 (1981). Thus, a reviewing court may not "substitute[] its own judgment for that of the District Court." *Id.* [***1191**] Under this narrow standard, reversal here is unwarranted.

The district court correctly stated the relevant legal principles. First, it acknowledged "the 'substantial presumption in favor of a plaintiff's choice of forum.'" *Simon v. Republic of Hungary (Simon III)*, 277 F. Supp. 3d 42 , 62 (D.D.C. 2017) (quoting *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934 , 950 , 381 U.S. App. D.C. 316 (D.C. Cir. 2008)). Then, the court correctly stated the governing rule—"a court 'may nonetheless dismiss a suit for *forum non conveniens* if the defendant shows (1) there is an alternative forum that is both available and adequate and, (2) upon a weighing of public and private interests,' that the alternative forum is 'the strongly preferred location for the litigation.'" *Id.* (alterations adopted) (quoting *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568 , 571 , 392 U.S. App. D.C. 387 (D.C. Cir. 2010)). Finally, the court correctly identified nine relevant private-and public-interest factors to be considered. *Id.*

My colleagues conclude [****18**] that the district court gave insufficient weight to the plaintiffs' choice of forum, relieved the defendants of their burden of proof, and unreasonably balanced the relevant factors. Respectfully, I disagree.

A

The district court permissibly assessed the weight owed to the plaintiffs' choice of a United States forum. At the outset, the court repeatedly recognized the "substantial presumption" or "substantial deference" generally due to such a choice. 277 F. Supp. 3d at 62 , 63 . Then, the court reasoned that the degree of deference was "lessened" in this case because only four of the fourteen named plaintiffs are United States residents, because "none of the underlying facts in this case relate to the United States in any way," and because the named plaintiffs and the putative class that they seek to represent come "from all over the globe," whereas the defendants are based entirely in Hungary. *Id.* at 63 .

This analysis is consistent with governing law. As the Supreme Court has explained: "When the home forum has been chosen, it is reasonable to assume that this choice is convenient," but "[w]hen the plaintiff is foreign, ... this

assumption is much less reasonable." *Piper Aircraft*, 454 U.S. at 255-56 . And, in either case, the plaintiffs' choice is significant only insofar as it bears on "the central purpose of any *forum non conveniens* inquiry," namely "to ensure that the trial is convenient." *Id.* at 256 . Thus, the district court was amply justified in considering the residencies of all parties as well as the disconnect between the plaintiffs' chosen forum and the relevant facts—matters that bear directly on the convenience of litigating this case in a United States court.

My colleagues highlight the district court's single usage of the phrase "minimal deference," which they read as a threshold legal error of "set[ting] the scales wrong from the outset." *Ante* at 11, 17. What the court actually said, *after* flagging the various considerations noted above, was that "[i]n these circumstances, the plaintiffs' choice of forum is entitled to minimal deference." 277 F. Supp. 3d at 63 . In context, the statement reflects not a failure to recognize the presumption, but the court's considered conclusion that the "defendants had overcome the presumption" in this case. *Id.* at 64 (quoting *Moscovits v. Magyar Cukor Rt.*, 34 F. App'x 24 , 26 (2d Cir. 2002)). That was neither legal error nor an abuse of discretion. *See, e.g., Iragorri v. United Techs. Corp.*, 274 F.3d 65 , 71 (2d Cir. 2001) (en banc) ("the degree of deference given to a plaintiff's forum choice varies with the circumstances").

[*1192] My colleagues object that Hungary made no detailed presentation regarding the plaintiffs' travel options. *Ante* at 18-19. But the Supreme Court has warned that "[r]equiring extensive investigation would defeat the purpose" of the *forum non conveniens* motion. *Piper Aircraft*, 454 U.S. at 258 . The defendants were not required to conduct travel surveys to make the commonsense point that less deference is due to the plaintiffs' choice when most plaintiffs would need to travel internationally regardless of the forum. Nor was evidence necessary to establish that all of the defendants are based, and all of the relevant facts arose, **[**19]** in Hungary. On its face, the complaint makes that clear. *See* J.A. 104-23.

My colleagues also fault the district court for failing to consider whether any litigation delays in Hungary might prevent the plaintiffs from later re-filing in the United States. *Ante* at 19. But the plaintiffs did not raise this argument either below or in their opening brief, so it is twice forfeited. *See, e.g., Am. Wildlands v. Kempthorne*, 530 F.3d 991 , 1001 , 382 U.S. App. D.C. 78 (D.C. Cir. 2008). Nor did the plaintiffs ask the district court, as a fallback remedy, to attach conditions to any dismissal. And in any event, the whole point of *forum non conveniens* law is to dismiss cases that can more conveniently be adjudicated elsewhere, not to defer adjudications while plaintiffs exhaust claims or remedies in other fora.

B

My colleagues next contend that the district court improperly required the plaintiffs to prove that Hungary was not an available and adequate forum for their claims, rather than requiring the defendants to prove that it was. *Ante* at 20. But, in laying out the "applicable legal principles" of *forum non conveniens*, the district court explicitly stated that dismissal is appropriate only if "the defendant shows" that "there is an alternative forum that is both available and adequate." 277 F. Supp. 3d at 62 . The court did not improperly shift that burden.

My colleagues note that the district court, in addressing whether Hungary was an adequate alternative forum, rested on its conclusion that pursuing claims in Hungary would not be futile for purposes of exhaustion. In the court's own words, "the finding that the plaintiffs' pursuit of their claims in Hungary would not be futile satisfies the first prong of the test for application of the *forum non conveniens* doctrine that Hungary is both an available and adequate alternative forum." 277 F. Supp. 3d at 63 .

The district court's statement made good sense in the context of its overall analysis. After all, in setting forth the governing principles on futility, the district court exclusively invoked the adequacy standards of *forum non conveniens* law. *See* 277 F. Supp. 3d at 57-58 . My colleagues correctly note that exhaustion and *forum non conveniens* law assign the opposite burden of proof on the question of futility or adequacy. *Ante* at 21-22. But here, both sides presented detailed affidavits regarding Hungarian law and practice, so the burden of production did not matter. Likewise, the district court assessed futility as a matter of law, based on undisputed assertions in both affidavits, so the burden of persuasion did not matter. Nor did the district court even conclude that the competing legal arguments were at or near the point of equipoise. In context, the district court's cross-reference to its analysis of futility was an

appropriate shorthand or, at worst, an obviously harmless error.

The court's analysis makes all of this clear. Among other things, the court explained that the Hungarian constitution "requires that parties be treated fairly and [*1193] equally in court, prohibits discrimination on the basis of, among other things, race or religion, and creates rights of appeal to various appellate [**20] courts." 277 F. Supp. 3d at 58 . The court noted that Hungary recognizes and enforces international law and provides damages for the types of property losses alleged here. *Id.* And it stated that these and other considerations, as set forth by the defendants and their experts, "strongly support the conclusion that Hungary is an adequate alternative forum for the plaintiffs' claims." *Id.* The court then considered a "variety" of the plaintiffs' competing arguments and concluded that "[n]one is persuasive." *Id.* at 59-62 . Apart from their mistaken argument about a misplaced burden of proof, neither the plaintiffs nor my colleagues challenge any relevant particulars of this analysis.

My colleagues note that the United States declined to take a position on the availability and adequacy of a Hungarian forum. *Ante* at 22. But the government's failure to address that question hardly suggests that the district court, in assessing the detailed submissions made to it on that very point, committed legal error or otherwise abused its discretion.

C

The district court reasonably balanced the private and public interests involved. On these points, my colleagues do not argue that the district court committed any discrete legal error, but only that the court abused its discretion in weighing the relevant factors.

1

With regard to private interests, the district court reasonably concluded that much of the evidence in this case will involve paper records written in Hungarian and located in Hungary. The court cited declarations noting "the extensive documents in the Hungarian Archives related to property taken from Hungarian nationals during World War II." 277 F. Supp. 3d at 64 . The court also cited the plaintiffs' own complaint, which repeatedly references "vital" evidence "kept by the defendants in Hungary." *Id.* And the court cited declarations attesting that any pertinent documents were likely written in Hungarian, which would require translation into English if this case were heard in the United States. *Id.* at 64-65.

My colleagues conclude that, "[a]t best, the location-of-relevant-evidence factor is in equipoise," because "some" records are in Hungary, while an "extensive" collection is at the Holocaust Museum in Washington. *Ante* at 23-24. But the defendants' evidence showed that the Hungarian National Archives "have a substantial amount of documentation" regarding the Hungarian Holocaust, J.A. 184, and the plaintiffs' own legal expert confirmed "an abundance of records of these confiscations in Hungarian archives," J.A. 244. Moreover, while the plaintiffs' expert noted that "[c]opies" of the documents "may be found" at the Holocaust Museum, he did not assert that the museum had somehow managed to compile records as complete or more complete than those of the Hungarian government. J.A. 244-45. Furthermore, the plaintiffs themselves have found no records relevant to their individual cases in the museum, so there is no case-specific reason to discount the defendants' overall submissions on this point. *See Simon v. Republic of Hungary*, No. 10-cv-1770 (D.D.C.), ECF Doc. 122 at 21 n.12. Finally, the examples [**21] addressed by the plaintiffs' expert confirm that the pertinent original records are in paper form and written in Hungarian. *See id.*, ECF Doc. 122-1, Exs. 2-6. The district court reasonably assessed the nature and location of the documentary evidence.

[*1194] The court also reasonably found that there would be "many witnesses" in Hungary who could not or would not travel to the United States. 277 F. Supp. 3d at 65 . The plaintiffs had "already sought to depose at least one witness located in Hungary who was unable to travel out of the country," *id.*—an alleged war criminal recently arrested in Budapest, J.A. 79. Given the number and scope of the war crimes alleged in the complaint, and the need for each individual plaintiff to show that any taking of his or her property was done as part of a genocide, *see Simon v. Republic of Hungary (Simon II)*, 812 F.3d 127 , 143-46 , 421 U.S. App. D.C. 67 (D.C. Cir. 2016), the district court reasonably treated this consideration as significant.

The district court also reasonably considered the appropriateness of a Hungarian forum in the event of further litigation against Rail Cargo Hungaria Zrt. The plaintiffs had sued RCH in this case, but RCH was dismissed for lack of personal jurisdiction in the United States. *See* 277 F. Supp. 3d at 65 . In contrast, RCH might be joined to any future litigation in Hungary, producing one case involving all of the original defendants, rather than parallel lawsuits across two continents.

Finally, the district court noted one important competing consideration—the "emotional burden" to the plaintiffs of returning to Hungary. 277 F. Supp. 3d at 65 . The court reasoned: "While acknowledging the profound nature of the emotional weight of bringing this case in Hungary, the Court is hesitant to find that this factor outweighs virtually every other factor weighing in favor of dismissing under *forum non conveniens*." *Id* . I can find no abuse of discretion in the court's recognition and balancing of the competing considerations. For where "factors point in different directions, assuming no abuse of discretion in the district court's analysis of the individual factors, it will be the rare case when we can reverse a district court's balancing of the ... factors" as itself an abuse of discretion. *Morley v. CIA*, 894 F.3d 389 , 391 (D.C. Cir. 2018).

2

With regard to public interests, the district court reasonably concluded that Hungary's interest in resolving this controversy was greater than that of the United States. The Supreme Court has long recognized the "local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 , 509 , 67 S. Ct. 839 , 91 L. Ed. 1055 (1947); *see, e.g., Piper Aircraft*, 454 U.S. at 260 ; *MBI*, 616 F.3d at 576 . Moreover, this interest is heightened when the claims "arise from events of historical and political significance" to the home forum. *Republic of Philippines v. Pimentel*, 553 U.S. 851 , 866 , 128 S. Ct. 2180 , 171 L. Ed. 2d 131 (2008). This case is "localized" in Hungary; it involves the taking of Hungarians' property by other Hungarians in Hungary. In addition, claims arising out of the Hungarian Holocaust are plainly a matter of historical and political significance to Hungary.

My colleagues object that neither *Pimentel* nor the extraterritoriality and personal-jurisdiction **[**22]** decisions stressing the importance of "a foreign sovereign's interest in resolving disputes internally" were *forum non conveniens* cases. *Ante* at 27-28. But the repeated acknowledgment of this interest—in many different contexts—only reinforces the district court's conclusion. In any event, *Gulf Oil* and its *forum non conveniens* progeny, such as *Piper Aircraft* and *MBI*, amply support the district court's judgment.

My colleagues counter that the United States has recognized a "moral imperative" to provide compensation to Holocaust victims. **[*1195]** *Ante* at 29. True enough, but the government seeks to further that interest by encouraging parties "to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation," not by sweeping foreign-centered cases into United States courts. U.S. Br. at 10. Moreover, consistent with *Gulf Oil* and its progeny, the United States reminds us that "a court should give less weight to U.S. interests where the activity at issue occurred in a foreign country and involved harms to foreign nationals." *Id.* at 16. Likewise, it reminds us that "[a]pplication of the *forum non conveniens* doctrine can assist in identifying cases in which an alternative foreign forum has a closer connection to the underlying parties and/or dispute." *Id.* at 26. These considerations strongly support the district court's assessment of the public-interest factors.

Finally, the district court reasonably concluded that choice-of-law considerations favor a Hungarian forum. Of course, Hungarian law is the obvious source of law to govern acts committed by Hungarians against Hungarians in Hungary. My colleagues express concern that Hungarian law may have affirmatively authorized the discrimination and genocide committed during the Holocaust. *Ante* at 30. But Hungarian law now outlaws both, 277 F. Supp. 3d at 58 , and the defendants affirmatively disavow any defense that genocidal expropriations were lawful in the early 1940s, Oral Arg. Tr. at 22-23, 38. In sum, there is no bar to Hungarian law governing the merits of this case, which will involve "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Simon II*, 812 F.3d at 141 .

* * * *

The district court correctly stated the governing law and reasonably weighed the competing considerations in this case. Because the court did not abuse its discretion by dismissing on *forum non conveniens* grounds, I would affirm its decision.

fn 1

Plaintiff Tzvi Zelikovitch passed away while the case was pending, but his three children, who are all Israeli citizens, "have succeeded to his rights, interests and entitlements." Second Am. Compl. at 3 n.1.

fn 2

The Survivors also seek to certify a class composed of Holocaust survivors similarly wronged by the Hungarian government. The district court has not yet addressed the request for class certification. See Order, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. Nov. 15, 2010), ECF No. 9.

fn 3

To be fair to the district court, it did not have the benefit of this brief from the United States at the time of its decision.

fn 4

The Dissenting Opinion faults the Survivors for not having yet—at this pre-discovery stage—locked down the specific location of documents regarding their "individual cases" of seizure and expropriation. Dissenting Op. at 7. But the Dissenting Opinion offers no justification for visiting upon the Survivors the very duty of "extensive investigation" that it rejects for Hungary at this procedural stage. Compare Dissenting Op. at 7, with Dissenting Op. at 3.

Texas v. United States

Decided Dec 18, 2019

No. 19-10011

12-18-2019

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ, Plaintiffs - Appellees, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH; HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue, Defendants - Appellants, STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA, Intervenor-Defendants - Appellants.

JENNIFER WALKER ELROD, Circuit Judge

Appeals from the United States District Court for the Northern District of Texas Before KING, ELROD, and ENGELHARDT, Circuit Judges. JENNIFER WALKER ELROD, Circuit Judge:

The Patient Protection and Affordable Care Act (the Act or ACA) is a monumental piece of healthcare legislation that regulates a huge swath of the nation's economy and affects the healthcare decisions of millions of Americans. The law has been a focal point of our country's political debate since it was passed nearly a decade ago. Some say that the Act is a much-needed solution to the problem of increasing healthcare costs and lack of healthcare availability. Many of the amici in this case, for example, argue that the law has extensively benefitted everyone from children to senior citizens to local governments to small businesses. Others say that the Act is a costly exercise in burdensome governmental regulation that deprives people of economic liberty. Amici of this perspective argue, for example, that the Act "has deprived patients nationwide of a competitive market for affordable high-deductible health insurance," leaving "patients with no alternative to . . . skyrocketing premiums." Association of American Physicians & Surgeons Amicus Br. at 15.

None of these policy issues are before the court. And for good reason—the courts are not institutionally equipped to address them. These issues are far better left to the other two branches of government. The questions before the court are far narrower: questions of law, not of policy. Those questions are: First, is there a live case or controversy before us even though the federal defendants have conceded many aspects of the

dispute; and, relatedly, do the intervenor-defendant states and the U.S. House of Representatives have standing to appeal? Second, do the plaintiffs have standing? Third, if they do, ^{*2} is the individual mandate unconstitutional? Fourth, if it is, how much of the rest of the Act is inseverable from the individual mandate?

We answer those questions as follows: First, there is a live case or controversy because the intervenor-defendant states have standing to appeal and, even if they did not, there remains a live case or controversy between the plaintiffs and the federal defendants. Second, the plaintiffs have Article III standing to bring this challenge to the ACA; the individual mandate injures both the individual plaintiffs, by requiring them to buy insurance that they do not want, and the state plaintiffs, by increasing their costs of complying with the reporting requirements that accompany the individual mandate. Third, the individual mandate is unconstitutional because it can no longer be read as a tax, and there is no other constitutional provision that justifies this exercise of congressional power. Fourth, on the severability question, we remand to the district court to provide additional analysis of the provisions of the ACA as they currently exist.

I.

On March 23, 2010, President Barack Obama signed the ACA into law. *See Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Act sought to "increase the number of Americans covered by health insurance and decrease the cost of health care" through several key reforms. *See Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 538 (2012).

Some of those reforms implemented new consumer protections, aiming primarily to protect people with preexisting conditions. For example, the law prohibits insurers from refusing to cover preexisting conditions. 42 U.S.C. § 300gg-3. The "guaranteed-issue requirement" forbids insurers from turning customers away because of their health. *See* 42 U.S.C. §§ 300gg, 300gg-1. The "community-rating requirement" keeps insurers from charging people more ^{*3} because of their preexisting health issues. 42 U.S.C. § 300gg-4.¹ The law also requires insurers to provide coverage for certain types of care, including women's and children's preventative care. 42 U.S.C. § 300gg-13(a)(3)-(4).²

¹ The ACA features a few other consumer-protection reforms of note. For example, the Act requires insurance companies to allow young adults to stay on their parents' health insurance plans until they turn 26; prohibits insurers from imposing caps on the value of benefits provided; and mandates that the insurance plans cover at least ten "essential health benefits," including emergency services, prescription drugs, and maternity and newborn care. *See* 42 U.S.C. §§ 300gg-14 (young adults), 300gg-11 (restriction on benefit caps), 18022 (essential health benefits). The ACA also requires employers with at least fifty full-time employees to pay the federal government a penalty if they fail to provide their employees with ACA-compliant coverage. 26 U.S.C. § 4980H.

² The women's preventative care provision was at issue in a trio of recent Supreme Court cases. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Wheaton College v. Burwell*, 573 U.S. 958 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *see also California v. U.S. Dep't of Health & Human Servs.*, No. 19-15072, 2019 WL 5382250 (9th Cir. Oct. 22, 2019); *Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019); *DeOtte v. Azar*, 393 F. Supp. 3d 490, 495 (N.D. Tex. 2019).

Other reforms sought to lower the cost of health insurance by using both policy "carrots" and "sticks."³ On the stick side, the individual mandate—which plaintiffs challenge in the instant case—requires individuals to "maintain [health insurance] coverage." 26 U.S.C. § 5000A(a). If individuals do not maintain this coverage, they must make a payment to the IRS called a "shared responsibility payment."⁴ *Id.*; *see also King v. Burwell*, 135 S. Ct. 2480, 2486 (2015). ^{*4}

³ Some opponents of the ACA assert that the goal was not to lower health insurance costs, but that the entire law was enacted as part of a fraud on the American people, designed to ultimately lead to a federal, single-payer healthcare system. In a hearing before the House Committee on Oversight and Government Reform, for example, Representative Kerry Bentivolio suggested that Jonathan Gruber, who assisted in crafting the legislation, had "help[ed] the administration deceive the American people on this healthcare act or [told] the truth in [a] video . . . about how [the Act] was a fraud upon the American people." *Examining Obamacare Transparency Failures: Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 83 (2014) (statement of Rep. Kerry Bentivolio).

⁴ The Act exempts several groups of people from the shared responsibility payment. Specifically, the Act provides that "[n]o penalty shall be imposed" on those "who cannot afford [insurance] coverage," on "[t]axpayers with income below [the] filing threshold," on "[m]embers of Indian tribes," on those who had only "short coverage gaps," or on anyone who, in the Secretary of Health and Human Services' determination, has "suffered a hardship." 26 U.S.C. § 5000A(e).

The individual mandate was designed to lower insurance premiums by broadening the insurance pool. *See* 42 U.S.C. § 18091(2)(J) ("By significantly increasing . . . the size of purchasing pools, . . . the [individual mandate] will significantly . . . lower health insurance premiums."). When the young and healthy must buy insurance, the insurance pool faces less risk, which, at least in theory, leads to lower premiums for everyone. *See* 42 U.S.C. § 18091(2)(I) (positing that the individual mandate will "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums"). The individual mandate thus serves as a counterweight to the ACA's protections for preexisting conditions, which push riskier, costlier individuals into the insurance pool. Under the protections for consumers with preexisting conditions, if there were no individual mandate, there would arguably be an "adverse selection" problem: "many individuals would," in theory, "wait to purchase health insurance until they needed care." *Id.*⁵

⁵ Opponents of the ACA, however, argue that the Act goes too far in limiting individuals' freedom to choose healthcare coverage. For example, at a House committee hearing, Representative Darrell Issa argued that one of the "false claims" that the Obama administration made in passing the Act was that "[i]f you like your doctor, you will be able to keep your doctor, period. . . . [And i]f you like your [insurance] plan, you can keep your plan." *Examining Obamacare Transparency Failures: Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 2 (2014) (statement of Rep. Darrell Issa, Chairman, H. Comm. on Oversight and Government Reform).

The Act also sought to lower insurance costs for some consumers through policy "carrots," providing tax credits to offset the cost of insurance to those with incomes under 400 percent of the federal poverty line. *See* 26 U.S.C. § 36B; 42 U.S.C. §§ 18081, 18082. The Act also created government-run, taxpayer-funded health insurance marketplaces—known as "Exchanges"—which allow customers "to compare and purchase insurance plans." *King*, 135 *5 S. Ct. at 2485; *see also* 42 U.S.C. § 18031. Opponents of the law argue that the law has led to unintended subsidies to keep plans afloat and insurance companies in the black. Texas points in its brief, for example, to a Congressional Budget Office study estimating that federal outlays for health insurance subsidies and related spending will rise by about 60 percent over the next ten years, from \$58 billion in 2018 to \$91 billion by 2028. CBO, *The Budget and Economic Outlook: 2018 to 2028* at 51 (April 2018), available at <https://tinyurl.com/CBOBudgetEconOutlook-2018-2028>; State Plaintiffs' Br. at 13-14.

The ACA also enlarged the class of people eligible for Medicaid to include childless adults with incomes up to 133 percent of the federal poverty line. 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VII), 1396a(e)(14)(I)(i); *NFIB*, 567 U.S. at 541-42. The ACA originally required each state to expand its Medicaid program or risk losing "all of its federal Medicaid funds." *NFIB*, 567 U.S. at 542. In *NFIB*, however, the Supreme Court held that this exceeded Congress' powers under the Spending Clause. *Id.* at 585 (plurality opinion). But the Court allowed those states that wanted to accept Medicaid expansion funds to do so. *See id.* at 585-86 (plurality opinion); *id.* at 645-46

(Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). As a result, the states that have not participated in the expansion now subsidize, through their general tax dollars, the states that have participated in expansion.

Since the Act was passed, its opponents have attempted to attack it both through congressional amendment and through litigation. Between 2010 and 2016, Congress considered several bills to repeal, defund, delay, or amend the ACA. *See* Intervenor-Defendant States' Br. at 10. Except for a few modest changes, these efforts were closely fought but ultimately failed. Intervenor-Defendant States' Br. at 10-11. In 2017, the shift in presidential administrations reinvigorated opposition to the law, but many of these later ⁶ legislative efforts failed as well. In March 2017, House leaders pulled a bill that would have repealed many of the ACA's essential provisions. In July 2017, the Senate voted on three separate bills that similarly would have repealed major provisions of the Act, but each vote failed.⁶ Finally, in September 2017, several Senators introduced another bill that would have repealed some of the ACA's most significant provisions, but Senate leaders ultimately chose not to bring it to the floor for a vote. Intervenor-Defendant States' Br. at 11.

⁶ One of these bills failed by a razor-thin vote of fifty-one against, forty-nine in favor. *See* 163 Cong. Rec. S4415 (daily ed. July 27, 2017).

The ACA's opponents also took their cause to the courts in a series of lawsuits, some of which reached the Supreme Court. Particularly relevant here, the Court, in *NFIB*, upheld the law's individual mandate. [567 U.S. at 574](#). Through fractured voting and shifting majorities—explained in more detail in Part V of this opinion—the Court decided that the ACA's individual mandate could be read as a tax on an individual's decision not to purchase insurance, which was a constitutional exercise of Congress' taxing powers under Article I of the U.S. Constitution. *Id.*; U.S. Const. art. I, § 8, cl. 1. The Court favored this tax interpretation to save the provision from unconstitutionality. Reading the provision as a standalone command to purchase insurance would have rendered it unconstitutional. This reading could not have been justified under the Commerce Clause because it would have done more than "regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. It would have *compelled* individuals to enter commerce in the first place.⁷ *NFIB*, [567 U.S. at 557-58](#). The Court also held that the ⁷ provision could not be justified under the Constitution's Necessary and Proper Clause. *Id.* at 561 (Roberts, C.J.); *id.* at 654-55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

⁷ Chief Justice Roberts cautioned that concluding otherwise would empower the government to compel Americans into all kinds of behavior that the government thinks is beneficial for them, including, for example, compelling them to purchase broccoli. *See NFIB*, [567 U.S. at 558](#) (Roberts, C.J.).

In December 2017, the ACA's opponents achieved some legislative success. As part of the Tax Cuts and Jobs Act, Congress set the "shared responsibility payment" amount—the amount a person must pay for failing to comply with the individual mandate—to the "lesser" of "zero percent" of an individual's household income or "\$0," effective January 2019. Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017); *see also* [26 U.S.C. § 5000A\(c\)](#). The individual mandate is still "on the books" of the U.S. Code and still consists of the three fundamental components it always featured. Subsection (a) prescribes that certain individuals "shall . . . ensure" that they and their dependents are "covered under minimum essential coverage." [26 U.S.C. § 5000A\(a\)](#). Subsection (b) "impose[s] . . . a penalty" called a "[s]hared responsibility payment" on those who fail to ensure they have minimum essential coverage. [26 U.S.C. § 5000A\(b\)](#). Subsection (c) sets the amount of that payment. All Congress did in 2017 was change the amount in subsection (c) to zero dollars. [26 U.S.C. § 5000A\(c\)](#).

Two months after the shared responsibility payment was set at zero dollars, the plaintiffs here—two private citizens⁸ and eighteen states⁹—filed this lawsuit against several federal defendants: the United States of

8 America, *8 the Department of Health and Human Services and its Secretary, Alex Azar, as well as the Internal Revenue Service and its Acting Commissioner, David J. Kautter. The plaintiffs argued that the individual mandate was no longer constitutional because: (1) *NFIB* rested the individual mandate's constitutionality exclusively on reading the provision as a tax; and (2) the 2017 amendment undermined any ability to characterize the individual mandate as a tax because the provision no longer generates revenue, a requirement for a tax. The plaintiffs argued further that, because the individual mandate was essential to and inseverable from the rest of the ACA, the entire ACA must be enjoined. On this theory, the plaintiffs sought declaratory relief that the individual mandate is unconstitutional and the rest of the ACA is inseverable. The plaintiffs also sought an injunction prohibiting the federal defendants from enforcing any provision of the ACA or its regulations.

⁸ Namely, Neill Hurley and John Nantz.

⁹ Namely, Texas, Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Arkansas. Wisconsin, which was originally a plaintiff state, sought and was granted dismissal from the appeal.

The federal defendants agreed with the plaintiffs that once the shared responsibility payment was reduced to zero dollars, the individual mandate was no longer constitutional. They also agreed that the individual mandate could not be severed from the ACA's guaranteed-issue and community-rating requirements. Unlike the plaintiffs, however, the federal defendants contended in the district court that those three provisions could be severed from the rest of the Act. Driven by the federal defendants' decision not to fully defend against the lawsuit, sixteen states¹⁰ and the District of Columbia intervened to defend the ACA.

¹⁰ Namely, California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Minnesota.

9 The district court agreed with the plaintiffs' arguments on the merits. Specifically, the court held that: (1) the individual plaintiffs had standing *9 because the individual mandate compelled them to purchase insurance; (2) setting the shared responsibility payment to zero rendered the individual mandate unconstitutional; and (3) the unconstitutional provision could not be severed from any other part of the ACA. The district court granted the plaintiffs' claim for declaratory relief. Specifically, the district court's order "declares the Individual Mandate, [26 U.S.C. § 5000A\(a\)](#), UNCONSTITUTIONAL," and the order further declares that "the remaining provisions of the ACA, Pub L. 111-148, are INSEVERABLE and therefore INVALID." The district court, however, denied the plaintiffs' application for a preliminary injunction. The district court entered partial final judgment¹¹ as to the grant of summary judgment for declaratory relief, but stayed judgment pending appeal. This appeal followed.

¹¹ The final judgment is only partial because it addresses only Count One of the plaintiffs' amended complaint. Count One requests a declaratory judgment that the individual mandate exceeds Congress' constitutional powers. The district court has not yet ruled on the other counts in the amended complaint. In Count Two, the plaintiffs request a declaratory judgment that the ACA violates the Due Process Clause of the Fifth Amendment. In Count Three, the plaintiffs request a declaratory judgment that the ACA violates the Tenth Amendment. In Count Four, the plaintiffs request a declaratory judgment that agency rules promulgated pursuant to the ACA are unlawful. In Count Five, the plaintiffs request an injunction prohibiting federal officials from "implementing, regulating, or otherwise enforcing any part of the ACA."

On appeal, the U.S. House of Representatives intervened to join the intervenor-defendant states in defending the ACA.¹² Also on appeal, the federal defendants changed their litigation position. After contending in the district court that only a few provisions of the ACA were inseverable from the individual mandate, the federal defendants contend in their opening brief for the first time that all of the ACA is inseverable. *See* Fed.

10 Defendants' Br. at 43-49. Moreover, the federal defendants contend for the first time on appeal *10 that—even though the entire ACA is inseverable—the court should not enjoin the enforcement of the entire ACA. The federal defendants now argue that the district court's judgment should be affirmed "except insofar as it purports to extend relief to ACA provisions that are unnecessary to remedy plaintiffs' injuries."¹³ Fed. Defendants' Br. at 49. They also now argue that the district court's judgment "cannot be understood as extending beyond the plaintiff states to invalidate the ACA in the intervenor states." Fed. Defendants' Supp. Br. at 10. Simply put, the federal defendants have shifted their position on appeal more than once.

¹² In addition to the U.S. House, four other states intervened on appeal to join the original group that defended the Act in the district court: Colorado, Iowa, Michigan, and Nevada.

¹³ The federal defendants do not specify which precise provisions, in their view, injure the plaintiffs and which do not.

II.

We review a district court's grant of summary judgment *de novo*. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 250 (5th Cir. 2019). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Amerisure Ins. v. Navigators Ins.*, 611 F.3d 299, 304 (5th Cir. 2010) (quoting *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 417 (5th Cir. 2008)). When ruling on a motion for
11 summary judgment, the court views all inferences drawn from the *11 factual record "in the light most favorable to the non-moving parties below." *Trent v. Wade*, 776 F.3d 368, 373 n.1 (5th Cir. 2015).

III.

We first must consider whether there is a live "[c]ase" or "[c]ontroversy" before us on appeal, as Article III of the U.S. Constitution requires. U.S. Const. art. III, § 1. A case or controversy does not exist unless the person asking the court for a decision—in this case, asking us to decide whether the district court's judgment was correct—has standing, which requires a showing of "injury, causation, and redressability." *Sierra Club v. Babbitt*, 995 F.2d 571, 574 (5th Cir. 1993). When "standing to appeal is at issue, appellants must demonstrate some injury from the judgment below." *Id.* at 575 (emphasis omitted).

We conclude, as all parties agree, that there is a case or controversy before us on appeal. Two groups of parties appealed from the district court's judgment: the federal defendants, and the intervenor-defendant states.¹⁴ There is a case or controversy before us because both of these groups have their own independent standing to appeal.¹⁵

¹⁴ The U.S. House of Representatives, also a party in this case, intervened in our court after the intervenor-defendant states and the federal government had filed notices of appeal.

¹⁵ Even if only one of these parties had standing to appeal, that would be enough to sustain the court's jurisdiction. An intervenor needs standing only "in the absence of the party on whose side the intervenor intervened." *Sierra Club*, 995 F.2d at 574 (alteration omitted) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)); *see also Vill. of Arlington*

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977) (exercising jurisdiction because "at least one" plaintiff had standing to sue).

The federal defendants have standing to appeal. The instant case is on all fours with the Supreme Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013). In that case, the executive branch of the federal government declined to defend a federal statute that did not allow the surviving spouse of *12 a same-sex couple to receive a spousal tax deduction. *Id.* at 749-53. The district court ruled that the statute was unconstitutional and ordered the executive branch to issue a tax refund to the surviving spouse. *Id.* at 754-55. The executive branch agreed with the district court's legal conclusion, but it appealed the judgment and continued to enforce the statute by withholding the tax refund until a final judicial resolution. *Id.* at 757-58.

The Supreme Court ruled that "the United States retain[ed] a stake sufficient to support Article III jurisdiction." *Id.* at 757. That stake was the tax refund, which the federal government refused to pay. This threat of payment of money from the Treasury constituted "a real and immediate economic injury" to the federal government, which was sufficient for standing purposes. *Id.* at 757-58 (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (plurality opinion)). As the Court explained, "the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III." *Windsor*, 570 U.S. at 759; see also *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (concluding that there was a justiciable controversy because the government "represented unequivocally" that it would not voluntarily moot the controversy absent a final judicial order, and "[t]hat is enough to satisfy Article III"); *INS v. Chadha*, 462 U.S. 919, 939 (1983) (holding that there was "adequate Art. III adverseness" because the executive branch determined that a federal statute was unconstitutional and refused to defend it but simultaneously continued to abide by it).

The instant case is similar. Though the plaintiffs and the federal defendants are in almost complete agreement on the merits of the case, the government continues to enforce the entire Act. The federal government has made no indication that it will begin dismantling any part of the ACA in the absence of a final court order. Just as in *Windsor*, then, effectuating the *13 district court's order would require the federal government to take actions that it would not take "but for the court's order." *Windsor*, 570 U.S. at 758. And just as in *Windsor*, the federal defendants stand to suffer financially if the district court's judgment is affirmed.¹⁶ As just one example, the district court's judgment declares the Act's Medicare reimbursement schedules unlawful, which, if given effect, would require Medicare to reimburse healthcare providers at higher rates. See, e.g., 42 U.S.C. § 1395ww(b)(3)(B)(xi)-(xii). Therefore, just as in *Windsor*, an appellate decision here will "have real meaning." 570 U.S. at 758 (quoting *Chadha*, 462 U.S. at 939).¹⁷

¹⁶ The dissenting Justices in *Windsor* objected to the *Windsor* majority's approach to standing. Justice Scalia, for example, said that this approach to standing "would have been unrecognizable to those who wrote and ratified our national charter." *Windsor*, 570 U.S. at 779 (Scalia, J., dissenting). We are bound by the *Windsor* majority opinion.

¹⁷ Just as in *Windsor*, moreover, principles of prudential standing weigh in favor of exercising jurisdiction despite the government's alignment with the plaintiffs. Just like the intervenors in *Windsor*, the intervenor-defendant states and the U.S. House both put on a "sharp adversarial presentation of the issues." *Id.* at 761.

The intervenor-defendant states also have standing to appeal. While a party's mere "status as an intervenor below . . . does not confer standing," *Diamond v. Charles*, 476 U.S. 54, 68 (1986), intervenors may appeal if they can demonstrate injury from the district court's judgment. *Sierra Club*, 995 F.2d at 574; see also *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016). The intervenor-defendant states have made this showing because the district

court's judgment, if ultimately given effect, would: (1) strip these states of funding that they receive under the ACA; and (2) threaten to hamstring these states in possible future litigation because of the district court judgment's potentially preclusive effect.¹⁸ *14

¹⁸ At first glance, it may not be entirely clear how a mere partial summary judgment on the issuance of a declaratory judgment would aggrieve anyone. But at oral argument, all parties agreed that the district court's partial summary judgment would have binding effect. Indeed, this is partly why the district court issued a stay. The district court acknowledged that the intervenor-defendant states would be prejudiced by the judgment, which means that the district court understood it to be binding.

First, the intervenor-defendant states receive significant funding from the ACA, which would be discontinued if we affirmed the district court's judgment declaring the entire Act unconstitutional. "[F]inancial loss as a result of" a district court's judgment is an injury sufficient to support standing to appeal. *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015). In their supplemental briefing, the intervenor-defendant states identify a few examples of the funding sources they would lose under the district court's judgment. Evidence in the record shows that eliminating the Act's Medicaid expansion provisions alone would cost the original sixteen intervening state defendants and the District of Columbia a total of more than \$418 billion in the next decade. See 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), (e)(14)(I)(i), 1396d(y)(1). Moreover, the Act's Community First Choice Option program gives states funding to care for the disabled and elderly at home or in their communities instead of in institutions. See 42 U.S.C. § 1396n(k). Record evidence shows that eliminating this program would cost California \$400 million in 2020, and that Oregon and Connecticut have already received \$432.1 million under this program. This evidence is more than enough to show that the intervenor-defendant states would suffer financially if the district court's judgment is given effect, an injury sufficient to confer standing to appeal. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

The district court's judgment, if given effect, also threatens to injure the intervenor-defendant states with the judgment's potentially preclusive effect in future litigation. We have held that "[a] party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants." *Leonard v. Nationwide Mut. Ins.*, 499 F.3d 419, 428 (5th Cir. 2007) (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996)). If the federal defendants began unwinding the ACA, either in reliance on the district court's judgment or on their own, the district court's judgment would potentially estop the intervenor-defendant states from challenging that action in court. This case thus stands in contrast to the cases in which there was no chance whatsoever of a preclusive effect. See *Klamath Strategic Inv. Fund ex rel. St. Croix Ventures v. United States*, 568 F.3d 537, 546 (5th Cir. 2009) (holding that there was no threatened injury from potential estoppel from the appealed-from judgment because that judgment was interlocutory, not final, and therefore could not estop the appealing party).

Finally, we examine the standing of the U.S. House of Representatives, which intervened after the case had been appealed. The Supreme Court's recent decision in *Virginia House of Delegates v. Bethune-Hill* calls the House's standing to intervene into doubt. 139 S. Ct. at 1953 ("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."). However, we need not resolve the question of the House's standing. "Article III does not require intervenors to independently possess standing" when a party already in the lawsuit has standing and seeks the same "ultimate relief" as the intervenor. *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). That is the case here: the intervenor-defendant states have standing to appeal, and the House seeks the same relief as those states. We accordingly pretermitted the issue of whether the House has standing to intervene.

IV.

We now turn to the issue of whether any of the plaintiffs had Article III standing to bring this case at the time they brought the lawsuit. To be a case *16 or controversy under Article III, the plaintiffs must satisfy the same three requirements listed above. First, a plaintiff must have suffered an "injury in fact"—a violation of a legally protected interest that is "concrete and particularized," as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Second, that injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Third, it must be "likely"—not merely "speculative"—that the injury will be "redressed by a favorable decision." *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

The instant case has two groups of plaintiffs: the individual plaintiffs and the state plaintiffs. Only one plaintiff need succeed because "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."¹⁹ *Texas v. United States (DAPA)*, 809 F.3d 134, 151 (5th Cir. 2015) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).²⁰ The individual plaintiffs and the state plaintiffs allege different injuries. We evaluate each in turn and conclude that both the individual plaintiffs and the state plaintiffs have standing.

¹⁹ For an academic critique of this approach, see Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L. J. 481 (2017).

²⁰ We refer to this 2015 case as "*DAPA*"—after Deferred Action for Parents of Americans, the policy at issue there—to prevent confusion with the present case of the same name.

A.

The standing issues presented by the individual plaintiffs are not novel. The Supreme Court faced a similar situation when it decided *NFIB* in 2012. *17 At oral argument in that case, Justice Kagan asked Gregory Katsas, representing NFIB, whether he thought "a person who is subject to the [individual] mandate but not subject to the [shared responsibility payment] would have standing." Transcript of Oral Argument at 68, *Dep't of Health and Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398). Mr. Katsas replied, "Yes, I think that person would, because that person is injured by compliance with the mandate." *Id.* Mr. Katsas explained, "the injury—when that person is subject to the mandate, that person is required to purchase health insurance. That's a forced acquisition of an unwanted good. It's a classic pocketbook injury." *Id.* at 68-69.

In 2012, this questioning made sense because neither the individual mandate nor the shared responsibility payment would be assessed for another two years. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (2012) (requiring insurance coverage "for each month beginning after 2013" and applying the shared responsibility payment for any failure to purchase insurance "during any calendar year beginning after 2013"). It was thus certainly imminent that the private plaintiffs would be subject to the individual mandate, which applies to everyone, but not certain that they would be subject to the shared responsibility payment, which exempts certain people. 26 U.S.C. § 5000A(e) (prescribing that "[n]o penalty shall be imposed" on certain groups of people).²¹ The distinction was important because a plaintiff "must demonstrate standing for each claim he seeks to press." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). To bring a claim *18 against the individual mandate, therefore, the plaintiffs needed to show injury *from the individual mandate*—not from the shared responsibility payment.

21 For the full list of exemptions, *see supra* note 4.

Accordingly, the district court in *NFIB* ruled that the private plaintiffs were injured by the ACA "because of the financial expense [they would] definitively incur under the Act in 2014," and the private plaintiffs' need "to take investigatory steps and make financial arrangements now to ensure compliance then." *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1271 (N.D. Fla. 2011), *aff'd in part and rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part and rev'd in part*, 567 U.S. 519 (2012). The record evidence in that case supported this conclusion. Mary Brown, one of the private plaintiffs in that case, for example, had declared that "to comply with the individual insurance mandate, and well in advance of 2014, I must now investigate whether and how to rearrange my personal finance affairs." Appendix of Exhibits in Support of Plaintiffs' Motion for Summary Judgment, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Nov. 10, 2010), ECF No. 80-6. At the Eleventh Circuit, all parties agreed that Mary Brown had standing. *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part and rev'd in part*, 567 U.S. 519 (2012) ("Defendants do not dispute that plaintiff Brown's challenge to the minimum coverage provision is justiciable."). Congress could have reasonably contemplated people like Mary Brown. As Mr. Katsas explained at oral argument in the Supreme Court, "Congress reasonably could think that at least some people will follow the law *19 precisely because it is the law." Transcript of Oral Argument at 67, *Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398).

The district court in the instant case followed a similar approach with regard to the individual plaintiffs' standing.²² It concluded that because the individual plaintiffs are the object of the individual mandate, which requires them to purchase health insurance that they do not want, those plaintiffs have demonstrated two types of "injury in fact": (1) the financial injury of buying that insurance; and (2) the "increased regulatory burden" that the individual mandate imposes. In concluding that these injuries were caused by the individual mandate, the court made specific fact findings that both Nantz and Hurley purchased insurance solely because they are "obligated to comply with the . . . individual mandate." The district court made these findings based on Nantz's and Hurley's declarations, which the intervenor-defendant states never challenged. Because the undisputed evidence showed that the individual mandate caused these injuries, the district court reasoned that a favorable judgment would redress both injuries, allowing the individual plaintiffs to forgo purchasing health insurance and freeing them "from what they essentially allege to be arbitrary governance."

²² No party initially questioned the plaintiffs' standing in the district court. An amicus brief raised the issue, and the intervenor-defendant states addressed it at oral argument.

We agree with the district court. The Supreme Court has held that when a lawsuit challenges "the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether" the plaintiffs are themselves the "object[s] of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561; *see also Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019). "Whether someone is in fact an object of a *20 regulation is a flexible inquiry rooted in common sense." *EEOC*, 933 F.3d at 446 (quoting *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015)). If a plaintiff is indeed the object of a regulation, "there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62.

It is undisputed that Hurley and Nantz are the objects of the individual mandate and that they have purchased insurance in order to comply with that mandate. Record evidence supports these conclusions. In his declaration in the district court, Nantz stated, "I continue to maintain minimum essential health coverage because I am obligated." Similarly, Hurley averred in his declaration that he is "obligated to comply with the ACA's individual mandate." They both explain in their declarations that they "value compliance with [their] legal obligations" and bought insurance because they "believe that following the law is the right thing to do." Accordingly, the district court expressly found that Hurley and Nantz bought health insurance because they are obligated to, and we must defer to that factual finding. The evidentiary basis for this injury is even stronger than it was in *NFIB*. In the instant case, the individual mandate has already gone into effect, compelling Nantz and Hurley to purchase insurance *now* as opposed to two years in the future.

The intervenor-defendant states fail to point to any evidence contradicting these declarations, and they did not challenge this evidence in the district court. In fact, some of the evidence these parties rely on actually supports the conclusion that Nantz and Hurley purchased insurance to comply with the individual mandate. The intervenor-defendant states acknowledge a 2017 report from the Congressional Budget Office indicating that "a small number of people" would continue to buy insurance without a penalty "solely because" of a desire to comply with the law. Cong. Budget Office, *Repealing *21 the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017). This report is at least somewhat consistent with a 2008 Congressional Budget Office report, relied on by the state plaintiffs, that "[m]any individuals" subject to the mandate, but not the shared responsibility payment, will obtain coverage to comply with the mandate "because they believe in abiding by the nation's laws." Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 53 (Dec. 2008). Whether this group of law-abiding citizens includes "many individuals" or "a small number of people," Nantz and Hurley have undisputed evidence showing that they are a part of this group.

In this context, being required to buy something that you otherwise would not want is clearly within the scope of what counts as a "legally cognizable injury." "Economic injury" of this sort is "a quintessential injury upon which to base standing." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *see also* *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 772-77 (1998) (finding Article III injury from financial harm); *Clinton v. New York*, 524 U.S. 417, 432 (1998) (same); *Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972) (same); *DAPA*, 809 F.3d at 155 (same). In *Benkiser*, for example, we held that a political party would suffer an injury in fact because it would need to "expend additional funds" in order to comply with the challenged regulation. 459 F.3d at 586. In the instant case, the undisputed record evidence shows that the individual plaintiffs have spent "additional funds" to comply with the statutory provision that they challenge on constitutional grounds.

This injury, moreover, is "actual," not merely a speculative fear about future harm that may or may not happen. *Lujan*, 504 U.S. at 560. The record shows that, at the time of the complaint, Hurley and Nantz held health insurance, spending money every month that they did not want to spend. Nantz reports that his monthly premium is \$266.56, and Hurley says his is *22 \$1,081.70. The injury is also "concrete" because it involves the real expenditure of those funds. *See Barlow v. Collins*, 397 U.S. 159, 162-63, 164 (1970) (finding a concrete injury when a regulation caused economic harm from lost profit).

Causation and redressability "flow naturally" from this concrete, particularized injury. *Contender Farms*, 779 F.3d at 266. The evidence in the record from Hurley's and Nantz's declarations show that they would not have purchased health insurance but for the individual mandate, and the intervenor-defendant states have no evidence to the contrary. A judgment declaring that the individual mandate exceeds Congress' powers under the

Constitution would allow Hurley and Nantz to forgo the purchase of health insurance that they do not want or need. They could purchase health insurance below the "minimum essential coverage" threshold, or even decide not to purchase any health insurance at all.

The intervenor-defendant states make several arguments against this straightforward injury, and all of them come up short. They first argue that there is no legally cognizable injury because there is no longer any penalty for failing to comply. In one sense, this argument misses the point. The threat of a penalty that Hurley and Nantz would face under the pre-2017 version of the statute is one potential form of injury, but it is far from the only one. We have held that the costs of compliance can constitute an injury just as much as the injuries from failing to comply. *See, e.g., Benkiser*, 459 F.3d at 586. Thus, in this instance, it is this injury—the time and money spent complying with the statute, not the penalty for failing to do so—that constitutes the plaintiffs' injury.

23 But the intervenor-defendant states also argue that even the costs of compliance cannot count as an injury in fact if there is no consequence for failing to comply. The individual mandate's compulsion cannot inflict a *23 cognizable injury, they say, because it is not a compulsion at all. Because the enforcement mechanism has been removed, the U.S. House contends, it is now merely a suggestion, at most. We recently rejected this argument in *Texas v. EEOC*, when the Equal Employment Opportunity Commission tried to argue that Texas could not challenge its allegedly non-final administrative guidance because "the Guidance does not compel Texas to do anything." 933 F.3d at 448. We concluded that it would "strain credulity to find that an agency action targeting current 'unlawful' discrimination among state employers—and declaring presumptively unlawful the very hiring practices employed by state agencies—does not require action immediately enough to constitute an injury-in-fact."²³ *Id.* The individual mandate is no different. Just like the agency guidance, the individual mandate targets as "unlawful" the decision to go without health insurance.

²³ The dissenting opinion states that Texas had standing in *Texas v. EEOC* because of the "consequences for disobeying the [challenged] guidance—including the possibility that the Attorney General would enforce Title VII against it." This depiction of *Texas v. EEOC* ignores that opinion's emphasis on the fact that Texas was "the object of the Guidance." 933 F.3d at 446; *see also id.* ("If, in a suit 'challenging the legality of government action,' 'the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury . . .'" (quoting *Lujan*, 504 U.S. at 561-62)). As explained above, the individual plaintiffs in this case are the objects of the individual mandate.

The dissenting opinion grounds its discussion of the issue in the Supreme Court's decision in *Poe v. Ullman*, 367 U.S. 497 (1961). There, the Supreme Court rejected a challenge to Connecticut's criminal prohibition on contraception. The dissenting opinion states that if there was no standing in *Ullman*, then there cannot be standing here. The dissenting opinion seems to treat *Ullman* as part of the "pre-enforcement challenge" line of cases in which the Supreme Court analyzed claims of injury based on future enforcement to determine whether the future enforcement was sufficiently imminent. *Ullman*, however, is not cited in the seminal Supreme Court cases of that line. *24 *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). More importantly, as we have explained, this case is not a pre-enforcement challenge because the plaintiffs have already incurred a financial injury.²⁴

²⁴ The dissenting opinion also relies on *City of Austin v. Paxton*, No. 18-50646, ___ F.3d ___, 2019 WL 6520769 (5th Cir. Dec. 4, 2019). That reliance is confusing because *City of Austin* is an *Ex parte Young* case, not a standing case. For the *Ex parte Young* exception to Eleventh Amendment sovereign immunity to apply, the state official sued "must have

'some connection with enforcement of the challenged act.'" *Id.* at *2 (alteration omitted) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). In *City of Austin*, the City's claims against the Texas Attorney General failed because the City failed to show the requisite connection to enforcement under *Ex parte Young*. Of course, because this is a lawsuit against the federal government, neither the Eleventh Amendment nor *Ex parte Young* applies. Moreover, even if *City of Austin* had been a pre-enforcement challenge standing case, it would still be irrelevant because this case is not a pre-enforcement challenge.

The plurality opinion in *Ullman* said there was insufficient adversity between the parties because there was overwhelming evidence—eighty years' worth of no enforcement of the statute—of "tacit agreement" between prosecutors and the public not to enforce the anti-contraceptive laws that the plaintiffs challenged. 367 U.S. at 507-08. As a result, the Court held that the lawsuit before it was "not such an adversary case as will be reviewed here." *Id.* The fifth, controlling vote in that case—Justice Brennan, who concurred in the judgment—emphasized that this adverseness was lacking because of the case's "skimpy record," devoid of evidence that the "individuals [were] truly caught in an inescapable dilemma." *Id.* at 509 (Brennan, J., concurring).

By contrast, as documented above, the record in the instant case contains undisputed evidence that Nantz and Hurley feel compelled by the individual mandate to buy insurance and that they bought insurance solely for that *25 reason. Especially in light of the fact that the individual mandate lacks a similar eighty-year history of nonenforcement, Nantz and Hurley have gone much further in demonstrating that they are caught in the "inescapable dilemma" that the *Ullman* plaintiffs were not.

The intervenor-defendant states also argue that there is no causation between the individual mandate and Hurley and Nantz's purchase of insurance because Hurley and Nantz exercised a voluntary "choice" to purchase insurance. Because Nantz and Hurley would face no consequence if they went without insurance, the intervenor-defendant states argue that their purchase of insurance is not fairly traceable to the federal defendants. Instead, they claim that Nantz and Hurley impermissibly attempt to "manufacture standing merely by inflicting harm on themselves." *Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2018) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)).

This argument fails, however, because it conflates the merits of the case with the threshold inquiry of standing. The argument assumes that 26 U.S.C. § 5000A presents not a legal command to purchase insurance, but an option between purchasing insurance and doing nothing. Because this option exists, the argument goes, any injury arising from Hurley's and Nantz's decisions to buy insurance instead of doing nothing (the other putative option) is entirely self-inflicted. This, however, is a merits question that can be reached only after determining the threshold issue of whether plaintiffs have standing.

Texas v. EEOC makes clear that courts cannot fuse the standing inquiry into the merits in this way. There, in addition to the injury described above from the Guidance's rebuke of Texas's employment practices as "unlawful," Texas claimed it was injured by the EEOC's curtailing of Texas's procedural right to notice and comment before being subject to a regulation. *EEOC*, 933 F.3d at 447. In rejecting the suggestion that Texas was not truly injured *26 because the EEOC had not in fact violated the Administrative Procedure Act's notice-and-comment rules, we held that "[w]e assume, for purposes of the standing analysis, that Texas is correct on the merits of its claim that the Guidance was promulgated in violation of the APA." *Id.* (citing *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012)); see also *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (treating constitutional standing and finality as distinct inquiries).

Indeed, allowing a consideration of the merits as part of a jurisdictional inquiry would conflict with the Supreme Court's express decision in *Steel Co v. Citizens for a Better Environment* to not abandon "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." 523 U.S. 83, 98 (1998). That case presented both the question of Article III standing and the merits question of whether the relevant statute authorized lawsuits for purely past violations. *Id.* at 86. The Court rejected any "attempt to convert the merits issue . . . into a jurisdictional one." *Id.* at 93. The Court further rejected the "doctrine of hypothetical jurisdiction," under which certain courts of appeals had "proceed[ed] immediately to the merits question, despite jurisdictional objections" in certain circumstances. *Id.* at 93-94. As the district court correctly noted, that is exactly what the appellants ask this court to do. They urge us to "skip ahead to the merits to determine § 5000A(a) is non-binding and therefore constitutional and then revert to the standing analysis to use its merits determination to conclude there was no standing to reach the merits in the first place."

Moreover, even if we were to consider the merits as part of our jurisdictional inquiry, it would not make a difference in this case. Because we conclude in Part IV of this opinion that the individual mandate is best read
 27 as a command to purchase insurance (and an unconstitutional one at that), rather *27 than as an option between buying insurance or doing nothing, the individual plaintiffs would have standing even if we considered the merits.²⁵

²⁵ Even if the individual plaintiffs did not have standing, this case could still proceed because the state plaintiffs have standing. *DAPA*, 809 F.3d at 151 (holding that only one plaintiff needs standing for the court to exercise jurisdiction). "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Id.* at 178 n.158 (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)).

B.

We next consider whether the eighteen state plaintiffs have standing, and we conclude that they do.²⁶ The state plaintiffs allege that the ACA causes them both a fiscal injury as employers and a sovereign injury "because it prevents them from applying their own laws and policies governing their own healthcare markets." State Plaintiffs' Br. at 25. In *DAPA*, we determined that the state of Texas was entitled to special solicitude because it was "exercising a procedural right created by Congress and protecting a 'quasi-sovereign' interest." *DAPA*, 809 F.3d at 162 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)); see also *id.* at 154-55. Because the state plaintiffs in this case have suffered fiscal injuries as employers, we need not address special solicitude or the alleged sovereign injuries.

²⁶ Likewise, even if the state plaintiffs did not have standing, this case could still proceed because the individual plaintiffs have standing. *DAPA*, 809 F.3d at 151 (holding that only one plaintiff needs standing for the court to exercise jurisdiction).

Employers, including the state plaintiffs, are required by the ACA to issue forms verifying which employees are covered by minimum essential coverage and therefore do not need to pay the shared responsibility payment. See 26 U.S.C. § 6055(a) ("Every person who provides minimum essential coverage to an individual during a calendar year shall, at such time as the Secretary may prescribe, make a return described in subsection (b).");
 28 26 U.S.C. § 6056(a) ("Every applicable large employer [that meets certain *28 statutory requirements] shall . . . make a return described in subsection (b)."). These provisions have led to Form 1095-B and 1095-C statements that employees receive from their employers around tax time, which include a series of check boxes indicating the months that employees had health coverage that complies with the ACA. State Plaintiffs' Br. at 23. These legally required reporting practices exist on top of state employers' own in-house administrative systems for managing and tracking their employees' health insurance coverage.

The record is replete with evidence that the individual mandate itself has increased the cost of printing and processing these forms and of updating the state employers' in-house management systems. For example, Thomas Steckel, the director of the Division of Employee Benefits within the South Dakota Bureau of Human Resources, submitted a declaration documenting the administrative costs that the individual mandate has imposed by way of these reporting requirements. He said, "[t]he individual mandate caused significant administrative burdens and expenses to program our IT system to track and report ACA eligible employees and complete mandatory IRS Form 1095 annual reports." Steckel noted specifically that "the individual mandate caused . . . \$100,000.00 [in] ongoing costs" for Form 1095-C administration alone. The dissenting opinion discards this evidence as conclusory. But as even counsel for the intervenor-defendant states admitted at oral argument, nobody challenged this evidence as conclusory in the district court or in the appellate court.²⁷ Oral Argument at 5:12.

²⁷ The reason why is obvious: the evidence is not conclusory. This is bread-and-butter summary judgment practice, not, as the dissenting opinion contends, any "new summary-judgment rule." Of course, a properly-included affidavit must be based on personal knowledge, and conclusory facts and statements on information and belief cannot be utilized. See Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2738 (4th ed. 2019). The Steckel affidavit easily satisfies this standard: it is a detailed 8-page declaration. Steckel attested, under penalty of perjury, that he is "responsible for developing and implementing the State's health plan for state employees" and that he is "particularly familiar with changes in costs, plans, and policies related to the enactment of the ACA because of my role as the Director of the Division [of Employee Benefits]." He estimates the financial costs the individual mandate has caused in nine different categories, including ongoing costs of \$10,400 for review of denied appeals, ongoing costs of \$100,000 for Form 1095-C administration, and a one-time cost of \$3,302,942 as a Transitional Reinsurance Program fee. For other costs, such as the pre-existing conditions prohibition and the expanded eligibility for adult dependent children to age 26, he conceded that he was "unable to accurately estimate the ongoing costs of this mandate." A determination of standing is supported by the administration of Form 1095-C, the CBO's prediction that some individuals will continue to purchase insurance in the absence of a shared responsibility payment, the fact that two such individuals are before this court, and the Supreme Court's observation that "third parties will likely react in predictable ways." *Department of Commerce*, 139 S. Ct. at 2566.

South Dakota is far from the only state that has been harmed from the financial cost of the reporting requirements that the individual mandate ²⁹ aggravates. Judith Muck, the Executive Director of the Missouri Consolidated Health Care Plan, reported that Missouri's costs for preparing 1095-B forms, along with 1094-B forms, are projected to be \$47,300 in fiscal year 2019 and \$49,200 in fiscal year 2020. Similarly, Teresa MacCartney, the Chief Financial Officer of the State of Georgia and the Director of the Georgia Governor's Office of Planning and Budget, reported that Georgia's overall cost of compliance with the ACA's reporting requirements "is an estimated net \$3.6 million to date." MacCartney also reported that after the ACA's implementation, Georgia's Department of Community Health "experienced increased enrollment of individuals already eligible for Medicaid benefits under pre-ACA eligibility standards." This enrollment increase required the Department to enhance its management systems, which was "very costly." Blaise Duran, who is the Manager for Underwriting, Data Analysis and Reporting for the Employees Retirement System of Texas, further documented Texas' costs of the reporting requirements. He declared that the Texas Employees Group Benefits Program "has made administrative process changes in connection with its ACA ³⁰ compliance, such as those related to the provision of Form 1095-Bs to plan participants and the Internal Revenue Service."²⁸

²⁸ This list is not exhaustive. For instance, Arlene Larson, Manager of Federal Health Programs and Policy for Wisconsin Employee Trust Funds, declared that the state expended funds by "hir[ing] a vendor to issue 343 Form 1095-Cs" in 2017. And Mike Michael, Director of the Kansas State Employee Health Plan, averred that reporting for Form 1094 and 1095 cost the state \$43,138 in 2017 and \$38,048 in 2018. No record evidence indicates that these reporting

requirements have been eliminated. Moreover, the "standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

The intervenor-defendant states and the U.S. House have not challenged the state plaintiffs' evidence or presented any evidence to the contrary. Instead, they argue that the reporting requirements set forth in Sections 6055(a) and 6056(a) "are separate from the mandate and serve independent purposes." U.S. House Reply Br. at 19. Therefore, they claim, "any resulting injury is thus neither traceable to [Section 5000A](#) nor redressable by its invalidation." U.S. House Reply Br. at 19. But this misreads the undisputed evidence in the record. The individual mandate commands individuals to get insurance. Every time an individual gets that insurance through a state employer, the state employer must send the individual a form certifying that he or she is covered and otherwise process that information through in-house management systems.²⁹ Thus, the reporting requirements in Sections 6055(a) and 6056(a) flow from the individual mandate set forth in Section 5000A(a).

31 *31

²⁹ Relying on this injury, therefore, does not run afoul of *Nat'l Fed. of the Blind of Texas v. Abbott*, 647 F.3d 202 (5th Cir. 2011). That case prevents plaintiffs from claiming injury based on provisions whose enforcement would be enjoined only if they are inseverable from an unconstitutional provision that does not harm the plaintiff. *Id.* at 210-11. The state plaintiffs' injuries stem from the increased administrative costs created by the individual mandate itself, not from other provisions. To be sure, those costs are created in part by the individual mandate's practical *interaction* with other ACA provisions, like the reporting requirements. But this is no different from the injuries in *DAPA*, where the challenged action interacted with Texas's driver's license regulations. It is also no different from *Department of Commerce*, where the challenged census question interacted with constitutional rules tying political representation to a state's population.

These costs to the state plaintiffs are well-established.³⁰ Moreover, the continuing nature of these fiscal injuries is consistent with Fifth Circuit and Supreme Court precedent.

³⁰ The dissenting opinion, citing no authority, contends that the state plaintiffs need evidence that at least one specific "employee enrolled in one of state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement." We have already explained why the uncontested affidavits suffice. We note, moreover, that the *DAPA* court found that Texas had standing because "it would incur significant costs in issuing driver's licenses to *DAPA* beneficiaries"—without requiring that Texas first show that it had issued a specific license to a specific illegal alien because of *DAPA*. Finally, the dissenting opinion's rule would create a split with our sister circuits. See *Massachusetts v. United States Dep't of Health & Human Servs.*, 923 F.3d 209, 225 (1st Cir. 2019) ("[Massachusetts] need not point to a specific person who will be harmed in order to establish standing in situations like this."); *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019) ("Appellants fault the states for failing to identify a specific woman likely to lose coverage. Such identification is not necessary to establish standing."); *Pennsylvania v. President United States*, 930 F.3d 543, 564 (3d Cir. 2019), *as amended* (July 18, 2019) ("The Government faults the States for failing to identify a specific woman who will be affected by the Final Rules, but the States need not define injury with such a demanding level of particularity to establish standing.").

In *DAPA*, we held that the state of Texas had standing to challenge the federal government's *DAPA* program because it stood to "have a major effect on the states' fisc." *Id.* at 152. This was because, if *DAPA* were permitted to go into effect, it would have "enable[d] at least 500,000 illegal aliens in Texas" to satisfy Texas's requirements that the Department of Public Safety "'shall issue' a license to a qualified applicant," including noncitizens who present "documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." *Id.* at 155 (quoting [Tex. Transp. Code §§ 521.142\(a\), 521.181](#)). Evidence

in the record showed that Texas, which subsidizes its licenses, would "lose a minimum of \$130.89 on each one it issued to a DAPA beneficiary." *Id.* Even a "modest estimate" of ³² predictable third-party behavior would rack up costs of "several million dollars." *Id.*

The Supreme Court recently applied a similar analysis in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In that case, a group of state and local governments sued to prevent the federal government from including a question about citizenship status on the 2020 census. *Id.* at 2563. The Supreme Court held that these plaintiffs had standing because they met their burden "of showing that third parties will likely react in predictable ways to the citizenship question." *Id.* at 2566. The census question would likely lead to "noncitizen households responding . . . at lower rates than other groups, which in turn would cause them to be undercounted." *Id.* at 2565. This undercounting of third parties would injure the state and local governments by "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." *Id.*

In both *DAPA* and *Department of Commerce*, the state plaintiffs demonstrated injury by showing that the challenged law would cause third parties to behave in predictable ways, which would inflict a financial injury on the states. The instant case is no different. The individual mandate commands people to ensure that they have minimum health insurance coverage. That predictably causes more people to buy insurance, which increases the administrative costs of the states to report, manage, and track the insurance coverage of their employees and Medicaid recipients.³¹

³¹ The dissenting opinion contends that our opinion is inconsistent because we rely on *Department of Commerce*, in which the Court found that some individuals will predictably violate the law, in explaining why some individuals will predictably "follow the law regardless of the incentives." In a large group, there will predictably be some individuals in each category. Even the dissenting opinion accepts the Congressional Budget Office's projection that some people will buy insurance solely because of a desire to comply with the law. See Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate 1* (Nov. 2017).

V.

Having concluded that both groups of plaintiffs have standing to bring this lawsuit, we must next determine whether the individual mandate is a ³³ constitutional exercise of congressional power. We conclude that it is not. We first discuss the Supreme Court's holding in *NFIB*, and then we explain why, under that holding, the individual mandate is no longer constitutional.

A.

The *NFIB* opinion was extremely fractured. In that case, Chief Justice Roberts wrote an opinion addressing several issues. Parts of that opinion garnered a majority of votes and served as the opinion of the Court.³² In relevant part, Part III-A of the Chief Justice's opinion, joined by no other Justice, observed that "[t]he most straightforward reading of the [individual] mandate is that it commands individuals to purchase insurance," and that, using that reading of the statute, the individual mandate is not a valid exercise of Congress' power under the Interstate Commerce Clause. *NFIB*, 567 U.S. at 562, 546-61 (Roberts, C.J.). The Constitution, he explained, "gave Congress the power to *regulate* commerce, not to *compel* it." *Id.* at 555 (Roberts, C.J.). For similar reasons, the Chief Justice concluded that this command to ³⁴ purchase insurance could not be sustained under the Constitution's Necessary and Proper Clause. *Id.* The individual mandate was not "proper" because it expanded federal power, "vest[ing] Congress with the extraordinary ability to create the necessary predicate to the exercise of" its Interstate Commerce Clause powers. *Id.* at 560.

32 As a general overview, Chief Justice Roberts's opinion functioned in the following way. In Part III-A, Chief Justice Roberts said that the individual mandate was most naturally read as a command to buy insurance, which could not be sustained under either the Interstate Commerce Clause or the Necessary and Proper Clause. Though no Justice joined this part of the opinion, the four dissenting Justices—Justices Scalia, Kennedy, Thomas, and Alito—agreed with Part III-A in a separate opinion. In Part III-B, the Chief Justice wrote that even though the most natural reading of the individual mandate was unconstitutional, the Court still needed to determine whether it was "fairly possible" to read the provision in a way that saved it from being unconstitutional. In Part III-C, the Chief Justice—joined by Justices Ginsburg, Breyer, Kagan, and Sotomayor—concluded that the provision could be construed as constitutional by reading the individual mandate, in conjunction with the shared responsibility payment, as a legitimate exercise of Congress' taxing power. This last part of the opinion supported the Court's ultimate judgment: that the individual mandate was constitutional as saved.

Though no other Justices joined this part of the Chief Justice's opinion, the "joint dissent"—joined by Justices Scalia, Kennedy, Thomas, and Alito—reached the same conclusions on the Interstate Commerce Clause and Necessary and Proper Clause questions. *Id.* at 650-60 (joint dissent). A majority of the court, therefore, concluded that the individual mandate is not constitutional under either the Interstate Commerce Clause or the Necessary and Proper Clause.

This limited reading of the Interstate Commerce Clause—and, by extension, of the Necessary and Proper Clause—was necessary to preserving "the country [that] the Framers of our Constitution envisioned." *Id.* at 554 (Roberts, C.J.). As Chief Justice Roberts observed, if the individual mandate were a proper use of the power to regulate interstate commerce, that power would "justify a mandatory purchase to solve almost any problem." *Id.* at 553 (Roberts, C.J.). If Congress can compel the purchase of health insurance today, it can, for example, micromanage Americans' day-to-day nutrition choices tomorrow. *Id.* (Roberts, C.J.); *see also id.* at 558 (Roberts, C.J.) (reasoning that, under an expansive view of the Commerce Clause, nothing would stop the federal government from compelling the purchase of broccoli).

An expansive reading of the Interstate Commerce Clause would be foreign to the Framers, who saw the clause as "an addition which few oppose[d] and from which no apprehensions [were] entertained." *Id.* at 554 (Roberts, C.J.) (quoting *The Federalist* No. 45, at 293 (J. Madison) (C. Rossiter ed., 1961)). Elevating Congress' power to
 35 "regulate commerce . . . among the *35 several states," U.S. Const. art. I, § 8, cl. 3, to a power to *create* commerce among the several states would make a Leviathan of the federal government, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *NFIB*, 567 U.S. at 554 (Roberts, C.J.) (quoting *The Federalist* No. 48, at 309 (J. Madison) (C. Rossiter ed., 1961)). Justice Scalia, writing for the joint dissenters, similarly noted that the more expansive reading of the Interstate Commerce Clause would render that provision a "font of unlimited power," *id.* at 653 (joint dissent), or, in the words of Alexander Hamilton, a "hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane," *id.* (quoting *The Federalist* No. 33, at 202 (C. Rossiter ed., 1961)).

In Part III-B, again joined by no other Justice, Chief Justice Roberts concluded that because the individual mandate found no constitutional footing in the Interstate Commerce or Necessary and Proper Clauses, the Supreme Court was obligated to consider the federal government's argument that, as an exercise in constitutional avoidance, the mandate could be read not as a command but as an *option* to purchase insurance or pay a tax. This "option" interpretation of the statute could save the statute from being unconstitutional, as it would be justified under Congress' taxing power. *Id.* at 561-63 (Roberts, C.J.); *see also id.* at 562 (Roberts, C.J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.") (quoting *Parsons v. Bedford*, 28 U.S.

(3 Pet.) 433, 448-49 (1830)); *see also id.* at 563 (Roberts, C.J.) ("The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

In Part III-C, the Chief Justice—writing for a majority of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan—undertook that ³⁶ inquiry of determining whether it was "fairly possible" to read the individual mandate as an option and thereby save its constitutionality. *See id.* at 563-74 (majority opinion). Chief Justice Roberts reasoned that the individual mandate could be read in conjunction with the shared responsibility payment in order to save the individual mandate from unconstitutionality. Read together with the shared responsibility payment, the entire statutory provision could be read as a legitimate exercise of Congress' taxing power for four reasons.

First and most fundamentally, the shared-responsibility payment "yield[ed] the essential feature of any tax: It produce[d] at least some revenue for the Government." *Id.* at 564. Second, the shared-responsibility payment was "paid into the Treasury by taxpayers when they file their tax returns." *Id.* at 563 (alternations and internal quotation marks omitted). Third, the amount owed under the ACA was "determined by such familiar factors as taxable income, number of dependents, and joint filing status." *Id.* Fourth and finally, "[t]he requirement to pay [was] found in the Internal Revenue Code and enforced by the IRS, which . . . collect[ed] it in the same manner as taxes." *Id.* at 563-64 (internal quotation marks omitted).

Because of these four attributes of the shared responsibility payment, the Court reasoned that "[t]he Federal Government does have the power to impose a tax on those without health insurance." *Id.* at 575. The Court concluded that "[s]ection 5000A is therefore constitutional, because it can reasonably be read as a tax."³³ *Id.*

³⁷ We agree with the dissenting opinion that "this case begins and ought to end" with *NFIB*. ³⁷

³³ Seven Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan—agreed that the Act's Medicaid-expansion provisions unconstitutionally coerced states into compliance. *NFIB*, 567 U.S. at 575-85 (plurality opinion); *id.* at 671-89 (joint dissent). But, in light of a severability clause, Part IV-B of the Chief Justice's opinion concluded that the unconstitutional portion of the Medicaid provisions could be severed. *Id.* at 585-88 (plurality opinion). Meanwhile, Justice Ginsburg, joined by Justice Sotomayor, disagreed that the Act's mandatory Medicaid expansion was unconstitutional. *Id.* at 633 (Ginsburg, J., concurring in the judgment in part, and dissenting in part). Those two Justices concurred in the judgment with respect to the Chief Justice's conclusion that the unconstitutional provisions could be severed from the remainder of the Act. *Id.* at 645-46 (Ginsburg, J., concurring in the judgment in part, and dissenting in part). The four dissenting Justices concluded that the Act's Medicaid-expansion provisions were unconstitutionally coercive and rejected the relief of allowing states to opt into Medicaid expansion. *Id.* at 671-90 (joint dissent).

B.

Now that the shared responsibility payment amount is set at zero,³⁴ the provision's saving construction is no longer available. The four central attributes that once saved the statute because it could be read as a tax no longer exist. Most fundamentally, the provision no longer yields the "essential feature of any tax" because it does not produce "at least some revenue for the Government." *Id.* at 564. Because the provision no longer produces revenue, it necessarily lacks the three other characteristics that once rendered the provision a tax. The shared-responsibility payment is no longer "paid into the Treasury by taxpayer[s] when they file their tax returns" because the payment is no longer paid by anyone. *Id.* at 563 (alteration in original and internal quotation marks omitted). The payment amount is no longer "determined by such familiar factors as taxable

income, number of dependents, and joint filing status." *Id.* The amount is zero for everyone, without regard to any of these factors. The IRS no longer collects the payment "in the same manner as taxes" because the IRS cannot collect it at all. *Id.* at 563-64 (internal quotation marks omitted).

³⁴ 26 U.S.C. §§ 5000A(c)(2)(B)(iii), (c)(3)(A).

Because these four critical attributes are now missing from the shared responsibility payment, it is, in the words of the state plaintiffs, "no longer 'fairly possible' to save the mandate's constitutionality under Congress' taxing
38 *38 power." State Plaintiffs' Br. at 32. The proper application of *NFIB* to the new version of the statute is to interpret it according to what Chief Justice Roberts—and four other Justices of the Court—said was the "most straightforward" reading of that provision: a command to purchase insurance. *Id.* at 562 (Roberts, C.J.). As the district court properly observed, "the only reading available is the most natural one." Under that reading, the individual mandate is unconstitutional because, under *NFIB*, it finds no constitutional footing in either the Interstate Commerce Clause or the Necessary and Proper Clause. *Id.* at 546-61 (Roberts, C.J.); *id.* at 650-60 (joint dissent).

The intervenor-defendant states have several arguments against this conclusion, all of which fail. They first argue that the saving construction of the individual mandate, interpreting the provision as an option to buy insurance or pay a tax, is still "fairly possible." As the individual plaintiffs point out, the Court interpreted the individual mandate as an option only because doing so would save it from being unconstitutional. Accordingly, the intervenor-defendant states must show that the "option" would still be a constitutional exercise of Congress' taxing power. To make that showing, the intervenor-defendant states reject the plaintiffs' attempt to read a "some revenue" requirement into the Constitution's Taxing and Spending Clause, arguing instead for a potential-to-produce-revenue requirement. The individual mandate, they say, is still set out in the Internal Revenue Code. It still provides a "statutory structure through which" Congress could eventually tax people for failing to buy insurance. It still includes references to taxable income, number of dependents, and joint filing status. 26 U.S.C. §§ 5000A(b)(3), (c)(2), (c)(4). Further, it still does not apply to individuals who pay no federal income taxes. 26 U.S.C. § 5000A(e)(2).

The intervenor-defendant states have little support for this reading of the Taxing and Spending Clause. For
39 starters, *NFIB* could not be clearer that *39 the "produc[ti]on" of "at least some revenue for the Government"—not the potential to produce that revenue—is "the *essential* feature of any tax." 567 U.S. at 564 (majority opinion) (emphasis added). As the district court observed, when determining whether a statute is a tax, the actual production of revenue is "not indicative, not common—[but] essential."

The intervenor-defendant states also find no support in *United States v. Ardoin*, 19 F.3d 177, 179-80 (5th Cir. 1994). In that unusual case, Congress had imposed a tax on machine guns, but subsequently outlawed machine guns altogether, which prompted the relevant agency to stop collecting the tax. *Id.* at 179-80. The defendant was convicted not only for possessing a machine gun but also for failing to pay the tax, which remained on the books. *Id.* at 178. The court upheld the conviction on the basis that the tax law at issue could "be upheld on the preserved, but unused, power to tax or on the power to regulate interstate commerce." *Id.* at 180. But the taxing power was "preserved" in *Ardoin* because it was non-revenue-producing only in practice whereas the "tax" here is actually \$0.00 as written on the books.³⁵ See Fed. Defendants' Br. at 32. Expanding *Ardoin* to apply here would, as the federal defendants point out, puzzlingly allow Congress to "prohibit conduct that exceeds its commerce power through a two-step process of first taxing it and then eliminating the tax while retaining the prohibition." Fed. Defendants' Br. at 32.

35 This distinction also disposes of the intervenor-defendant states' concern about "cast[ing] constitutional doubt on taxes with delayed start dates or that Congress has temporarily suspended for periods of time." Intervenor-Defendant States' Br. at 43. In none of the examples the intervenor-defendant states cite did the statute purport to levy a "tax" of \$0.00.

The intervenor-defendant states argue further that the individual mandate does not even need constitutional justification because it is merely a suggestion, not binding legislative action. The individual mandate, they
 40 contend, is no different from the Flag Code, which, though entered into the *40 pages of the U.S. Code, "was not intended to proscribe conduct." *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1573 (11th Cir. 1993) (analyzing 36 U.S.C. §§ 174-76). This argument is just a repackaged version of their argument that the individual mandate can still be read as an option. But, as the state plaintiffs, the individual plaintiffs, and the federal defendants point out, the Supreme Court has already held that the "most straightforward" reading of the individual mandate—which emphatically demands that individuals "shall" buy insurance, 26 U.S.C. § 5000A(a)—is as a command to purchase health insurance. The Court then concluded that that command lacked constitutional justification. The zeroing out of the shared responsibility payment does not render the provision any less of a command. Quite the opposite: Chief Justice Roberts concluded that the greater-than-zero shared responsibility payment actually converted the individual mandate into an option. *NFIB*, 567 U.S. at 563-64 (majority opinion). Now that the shared responsibility payment has been zeroed out, the only logical conclusion under *NFIB* is to read the individual mandate as a command, quite unlike the Flag Code. It is an individual *mandate*, not an individual suggestion.

Moreover, it is not true that when the Court adopts a limiting construction to avoid constitutional questions, that construction controls as to all applications of the statute, regardless of whether the original constitutional implications are present. The case on which the U.S. House relies involved different applications of an identical statute to different facts. *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (rejecting the argument that "the constitutional concerns that influenced" a previous interpretation of a provision of the Immigration and Nationality Act were "not present for" the aliens at issue in that case). This case is readily distinguishable because the four characteristics that made the previous interpretation possible—the production of revenue and
 41 other tax-like features—have now been legislatively *41 removed. The limiting construction is no longer available as a matter of statutory interpretation. The interpretation must accordingly change to comport with what five Justices of the Supreme Court have said is the "most straightforward reading" of that interpretation.³⁶

³⁶ Contrary to the dissenting opinion's suggestion, a saving construction is no longer available. The canon of constitutional avoidance applies only "when statutory language is susceptible of multiple interpretations." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). In *NFIB*, § 5000A was amenable to two possible interpretations. It was either "a command to buy insurance" or "a tax." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). After Congress zeroed out the shared responsibility payment, one of those possible interpretations fell away. What was then the "most straightforward reading" is now the only available reading: it is a "command to buy insurance" and "the Commerce Clause does not authorize such a command." *Id.*

The dissenting opinion justifies its continued reliance on the saving construction—even though it is no longer applicable—by citing *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015). This approach fares no better. The dissenting opinion quotes *Kimble* to say that "in whatever way reasoned," the Court's interpretation "effectively become[s] part of the statutory scheme, subject . . . to congressional change." *Id.* at 2409. The dissenting opinion correctly acknowledges that the individual mandate was never changed. But what did change was the provision that actually mattered: the shared responsibility payment. When it was set above zero,

it could be saved as a tax, even though five justices agreed this was an unnatural reading. It would be puzzling if Congress could change a statute at will, entirely insulated from constitutional infirmity, just because the Court had previously used constitutional avoidance to save a previous version of the statute.

The intervenor-defendant states argue furthermore that the individual mandate can now be constitutional under the Interstate Commerce Clause because it does not *compel* anyone into commerce. This is again a repackaged
 42 version of their argument that the individual mandate is an option even *42 without a revenue-generating shared responsibility payment, an argument that, as the state plaintiffs point out, the Supreme Court has already rejected. This argument, as the district court observed, is also logically inconsistent. If the individual mandate no longer truly compels anything, then it can hardly be said to be a "regulat[ion]" of interstate commerce. In the words of the district court, the intervenor-defendant states "hope to have their cake and eat it too."³⁷

³⁷ Any argument that the individual mandate can now be sustained under the Necessary and Proper Clause fails for the same reasons. The individual mandate now must be read as a command, and five Justices in *NFIB* already rejected the argument that such a command could be sustained under the Necessary and Proper Clause. *NFIB*, 567 U.S. at 561 (Roberts, C.J.); *id.* at 654-55 (joint dissent).

Finally, we would be remiss if we did not engage with the dissenting opinion's contention that § 5000A is not an exercise of legislative power. This would likely come as a shock to the legislature that drafted it, the president who signed it, and the voters who celebrated or lamented it. It is not surprising that the dissenting opinion can cite no case in which a federal court deems a duly enacted statute *not* an exercise of legislative power, much less a statute that clearly commands that an individual "shall" do something.³⁸ The dissenting opinion is inconsistent on this point: it argues that the provision's status as an exercise of legislative power fluctuates according to the amount of the shared responsibility payment while simultaneously contending that
 43 "if the text of the coverage requirement has not changed, its meaning could not *43 have changed either." Our decision breaks no new ground. We simply observe that § 5000A was originally cognizable as either a command or a tax. Today, it is only cognizable as a command. It has always been an exercise of legislative power.

³⁸ The dissenting opinion's theory of the "law that does nothing" results in some bizarre metaphysical conclusions. The ACA was signed into law in 2010. No one questions that when it was signed, § 5000A was an exercise of legislative power. Yet today, the dissenting opinion asserts, § 5000A is not an exercise of legislative power. So did Congress exercise legislative power in 2010, as seen from 2015? As seen from 2018? Does § 5000A ontologically re-emerge should a future Congress restore the shared responsibility payment? Perhaps, like Schrödinger's cat, § 5000A exists in both states simultaneously. The dissenting opinion does not say. Our approach requires no such quantum musings.

* * *

In *NFIB*, the individual mandate—most naturally read as a command to purchase insurance—was saved from unconstitutionality because it could be read together with the shared responsibility payment as an option to purchase insurance or pay a tax. It could be read this way because the shared responsibility payment produced revenue. It no longer does so. Therefore, the most straightforward reading applies: the mandate is a command. Using that meaning, the individual mandate is unconstitutional.

VI.

Having concluded that the individual mandate is unconstitutional, we must next determine whether, or how much of, the rest of the ACA is severable from that constitutional defect. On this question, we remand to the district court to undertake two tasks: to explain with more precision what provisions of the post-2017 ACA are

indeed inseverable from the individual mandate; and to consider the federal defendants' newly-suggested relief of enjoining the enforcement only of those provisions that injure the plaintiffs or declaring the Act unconstitutional only as to the plaintiff states and the two individual plaintiffs. We address each issue in turn.

A.

The Supreme Court has said that the "standard for determining the severability of an unconstitutional provision is well established." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Unless it is "evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is
44 not, the invalid part may be dropped if *44 what is left is fully operative as a law." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

This inquiry into counterfactual Congressional intent has been crystallized into a "two-part . . . framework." *NFIB*, 567 U.S. at 692 (joint dissent). First, if a court holds a statutory provision unconstitutional, it then determines whether the now-truncated statute will operate in "a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted). This first step asks whether the constitutional provisions—standing on their own, without the unconstitutional provisions—are "fully operative as a law," not whether they would simply "operate in some coherent way" not designed by Congress. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)); *NFIB*, 567 U.S. at 692 (joint dissent). Second, even if the remaining provisions can operate as Congress designed them to, the court must determine if Congress would have enacted the remaining provisions without the unconstitutional portion. If Congress would not have done so, then those provisions must be deemed inseverable. *Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."); *Free Enter. Fund*, 561 U.S. at 509 ("[N]othing in the statute's text or historical context makes it evident that Congress, faced with the
45 limitations imposed by the Constitution, would have preferred no Board at all *45 to a Board whose members are removable at will." (internal quotation marks omitted)).

Severability doctrine places courts between a rock and a hard place. On the one hand, courts strive to be faithful agents of Congress,³⁹ which often means refusing to create a hole in a statute in a way that creates legislation Congress never would have agreed to or passed. *See Murphy*, 138 S. Ct. at 1482 ("[Courts] cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." (quoting *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935))). On the other hand, courts often try to abide by the medical practitioner's maxim of "first, do no harm," aiming "to limit the solution to the problem" by "refrain[ing] from invalidating more of the statute than is necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *Collins v. Mnuchin*, 938 F.3d 553, 592 (5th Cir. 2019) (en banc) (Haynes, J.) (severing unconstitutional removal restriction from remainder of Federal Housing Finance Agency's enabling statute).⁴⁰ In fact, courts have a "duty" to "maintain the act in so far as it is valid" if it "contains unobjectionable provisions separable from those found to be unconstitutional." *Alaska Airlines*, 480 U.S. at 684 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

³⁹ See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & Pub. Pol'y 61, 63 (1994) ("[Courts] are supposed to be faithful agents, not independent principals.").

⁴⁰ Judge Haynes wrote the opinion of the court as to the question of remedy. *See Collins*, 938 F.3d at 591.

The Supreme Court emphasizes this duty so strongly that commentators have identified "a presumption [of severability] implicit in the Court's" severability jurisprudence. Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1950 n.28 (1997); see also Brian Charles Lea, *Situational* ⁴⁶ *Severability*, 103 Va. L. Rev. 735, 744 (2017) ("[C]ourts assume that a legislature intends for any unlawful part of its handiwork to be severable from all lawful parts in the absence of indicia of a contrary intention."). This presumption is strongest when Congress includes a severability clause in the statutory text; however, "[i]n the absence of a severability clause . . . Congress's silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686.

Nevertheless, the meticulous analysis required by severability doctrine defies reliance on presumptions or generalities. The Supreme Court's latest venture into severability territory, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), provides an example. There, the Court held that the entirety of the Professional and Amateur Sports Protection Act was unconstitutional because one of its provisions—authorizing private sports gambling—violated the anti-commandeering doctrine. *Id.* at 1484. Justice Alito's majority opinion separately explored each of the other operative provisions in the act, reasoning that all of the act's provisions were "obviously meant to work together" and be "deployed in tandem." *Id.* at 1483. Because Congress would not have wanted the otherwise-valid provisions "to stand alone," the Court declined to sever them. *Id.* This conclusion prompted a dissent from Justice Ginsburg, who characterized the majority as "wield[ing] an ax . . . instead of using a scalpel to trim the statute" and reiterated that "the Court ordinarily engages in a salvage rather than a demolition operation." *Id.* at 1489-90 (Ginsburg, J., dissenting).

These *Murphy* opinions draw attention to one difficulty inherent in severability analysis: selecting the right tool for the job. Justice Thomas' concurring opinion goes further, providing two reasons why navigating between the Scylla of poking small but critical holes in complex, carefully crafted legislative bargains and the Charybdis of invalidating more duly enacted legislation than necessary stands "in tension with traditional limits on" ⁴⁷ judicial authority." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). "[T]he judicial power is, fundamentally, the power to render judgments in individual cases," and severability doctrine threatens to violate that vital separation-of-powers principle in more than one way. *Id.* (Thomas, J., concurring).

First, severability doctrine requires "a nebulous inquiry into hypothetical congressional intent," as opposed to the usual judicial bread-and-butter of "determin[ing] what a statute means." *Id.* at 1486 (Thomas, J., concurring) (quoting *United States v. Booker*, 543 U.S. 220 at 321 n.7 (2005) (Thomas, J., dissenting in part)). Because "Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional," *id.* at 1487, this requirement often leaves courts to exercise their imagination or "intuitions regarding what the legislature would have desired had it considered the severability issue." Lea, *supra*, at 747. This, in turn, "enmeshes the judiciary in making policy choices" the Constitution reserves for the legislature, David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 663 (2008), providing unelected judicial officers with cover to simply implement their own policy preferences.

Second, severability doctrine forces courts to "weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring); see also Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018) ("The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] ⁴⁸ decline to enforce a statute in a particular case or controversy."⁴¹). As Justice Thomas ⁴⁸ points out, when Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is," he justified that assertion by explaining that "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch)

137, 177 (1803). Yet severability doctrine directs courts to go beyond the necessary—that is, the application of a particular statutory provision to a particular case—to consider the viability of other provisions without even "ask[ing] whether the plaintiff has standing to challenge those other provisions." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). "[S]everability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect." *Id.*

⁴¹ If that is true, then courts are speaking loosely when they state that they are "invalidating" or "striking down" a law.

Severability analysis is at its most demanding in the context of sprawling (and amended) statutory schemes like the one at issue here. The ACA's framework of economic regulations and incentives spans over 900 pages of legislative text and is divided into ten titles. Most of the provisions directly regulating health insurance, including the one challenged in this case, are found in Titles I and II. *See, e.g.*, 26 U.S.C. § 5000A(a) (individual mandate); 42 U.S.C. § 300gg-14(a) (requiring insurers offering family plans to cover adult children until age 26), §§ 18031-18044 (creating health insurance exchanges). The other titles generally amend Medicare (Title III), fund preventative healthcare programs (Title IV), seek to expand the supply of healthcare workers (Title V), enact anti-fraud requirements for Medicare/Medicaid facilities (Title VI), establish or expand
⁴⁹ drug regulations (Title VII), create a ^{*49} voluntary long-term care insurance program (Title VIII), address taxation (Title IX), and improve health care for Native Americans (Title X⁴²).

⁴² Title X also includes a number of miscellaneous provisions relating to the other titles.

The plaintiffs group this host of provisions into three categories for ease of reference. State Plaintiffs' Br. at 38. The first category includes the three core ACA provisions the Supreme Court has called "closely intertwined": the individual mandate, 26 U.S.C. § 5000A(a), the guaranteed-issue requirement, 42 U.S.C. §§ 300gg, 300gg-1, and the community-rating requirement, 42 U.S.C. § 300gg-4. *King*, 135 S. Ct. at 2487. The second category includes the remaining "[m]ajor provisions of the Affordable Care Act," *NFIB*, 567 U.S. at 697 (joint dissent), namely other provisions dealing with "insurance regulations and taxes," "reductions in federal reimbursements to hospitals and other Medicare spending reductions," the insurance "exchanges and their federal subsidies," and "the employer responsibility assessment." *See, e.g.*, 25 U.S.C. § 4980H; 26 U.S.C. § 36B; 42 U.S.C. §§ 1395ww, 18021-22. The third category includes a variety of minor provisions, for example taxes on certain medical devices or provisions requiring the display of nutritional content at restaurants. *See, e.g.*, 21 U.S.C. § 343(q)(5)(H); 26 U.S.C. § 4191(a).

Moreover, Congress has made a number of substantive amendments to the ACA, revising the statute in 2010, 2011, 2014, 2017, and 2018. *See, e.g.*, Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, 124 Stat. 3285 (2010) (modifying tax credit scale and Medicaid requirements); Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011) (repealing program that required some employers to provide some employees with vouchers for purchasing insurance); Bipartisan
⁵⁰ Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015) ^{*50} (repealing requirement that employers with more than 200 employees enroll new full-time employees in health insurance and continue coverage for current employees). Most of these amendments occurred prior to the 2017 legislation eliminating the shared responsibility payment, but some are more recent. *See, e.g.*, Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018) (repealing Independent Payment Advisory Board).

In summary, then, this issue involves a challenging legal doctrine applied to an extensive, complex, and oft-amended statutory scheme. All together, these observations highlight the need for a careful, granular approach to carrying out the inherently difficult task of severability analysis in the specific context of this case. We are not persuaded that the approach to the severability question set out in the district court opinion satisfies that

need. The district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate. Instead, the opinion focuses on the 2010 Congress' labeling of the individual mandate as "essential" to its goal of "creating effective health insurance markets," 42 U.S.C. § 18091(2)(I), and then proceeds to designate the entire ACA inseverable. In using this approach, the opinion does not address the ACA's provisions with specificity, nor does it discuss how the individual mandate fits within the post-2017 regulatory scheme of the ACA.

The district court opinion begins by addressing the 2010 version of the ACA. Starting with the text of the ACA, the district court opinion points out that the 2010 Congress incorporated into the text its view that "the absence of the [individual mandate] would undercut Federal regulation of the health insurance market." 42 U.S.C. § 18091(2)(H). The district court opinion notes that the 2010 Congress devised the individual mandate, "together with the other provisions" of the ACA, to "add millions of new customers to the health insurance market." 42 U.S.C. § 18091(2)(C). In this way, the 2010 Congress sought to "minimize th[e] adverse selection" that might otherwise occur if healthy individuals "wait[ed] to purchase health insurance until they needed care," 42 U.S.C. § 18091(2)(I)—a strategic choice that would otherwise be available given the ACA's guaranteed-issue and community-rating provisions. According to the district court opinion: because the 2010 Congress found the individual mandate "essential" to this plan to reshape health insurance markets, the individual mandate is inseverable from the rest of the ACA "[o]n the unambiguous enacted text alone."

The district court opinion also addresses ACA caselaw. Citing the Supreme Court's decisions in *NFIB* and *King*, the district court opinion states that "[a]ll nine Justices . . . agreed the Individual Mandate is inseverable from at least the pre-existing-condition provisions." See *NFIB*, 567 U.S. at 548 (Roberts, C.J.), 596-98 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.), 695-96 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.); *King*, 135 S. Ct. at 2487 (stating that the individual mandate is "closely intertwined" with the guaranteed-issue and community-rating provisions). As to the ACA's other provisions, the district court opinion notes that the only group of Justices who fully considered whether the other major and minor provisions were severable was the joint dissent in *NFIB*—and those Justices would have held that "invalidation of the ACA's major provisions requires the Court to invalidate the ACA's other provisions." *NFIB*, 567 U.S. at 704 (joint dissent).

Beyond these points, the district court opinion states that its "conclusion would only be reinforced" if it "parse[d] the ACA's provisions one by one." The district court opinion arrives at this conclusion by reasoning that declaring only the individual mandate unlawful would disrupt the Act's careful balance of "shared responsibility." The district court opinion lists a few examples of how it would expect this to happen with regard to the ACA's major provisions. *52 First, the district court opinion reasons that "the Individual Mandate reduces the financial risk forced upon insurance companies and their customers by the ACA's major regulations and taxes." If the individual mandate fell and the regulations and taxes did not, insurance companies would suffer a burden without enjoying a countervailing benefit—"a choice no Congress made and one contrary to the text." Second, if a court were to declare just the individual mandate and the protections for preexisting conditions unlawful—but not the subsidies for health insurance—then the Act would be transformed into "a law that subsidizes the kinds of discriminatory products Congress sought to abolish at, presumably, the re-inflated prices it sought to suppress." Third, Congress never intended "a duty on employers, see 26 U.S.C. § 4980H, to cover the skyrocketing insurance premium costs" that would "inevitably result from removing" the individual mandate. Fourth, because "the Medicaid-expansion provisions were designed to serve and assist fulfillment of the Individual Mandate," removing the individual mandate would remove the need for that expansion.

As to the ACA's minor provisions, the district court opinion states that it is "impossible to know which minor provisions Congress would have passed absent the Individual Mandate," and that such an inquiry involves too much "legislative guesswork." Relying on the 2010 Congress' labeling of the individual mandate as "essential," the district court opinion ultimately determines that there is "no reason to believe that Congress would have enacted" the minor provisions independently. The district court opinion similarly disclaims the ability to divine the intent of the 2017 Congress—which had zeroed out the shared responsibility payment but left the rest of the ACA untouched—labeling such an inquiry "a fool's errand." To the extent it analyzed the intent of the 2017 Congress, the district court opinion determines that Congress' failure to repeal the individual mandate shows that it "knew *53 that provision is essential to the ACA." In sum, the district court opinion concludes that the entire ACA is inseverable from the individual mandate.

The plaintiffs urge affirmance for essentially the same reasons stated in the district court opinion.⁴³ As to the guaranteed-issue and community-rating provisions, they rely primarily on the 2010 Congress' express findings linking those provisions to the individual mandate. State Plaintiffs' Br. at 39-44; Individual Plaintiffs' Br. at 47-48. The 2010 Congress found that, without the individual mandate, "many individuals would wait to purchase health insurance until they needed care," creating an "adverse selection" problem. 42 U.S.C. § 18091(2)(I); *see also id.* (finding that the individual mandate is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold"). As to the remaining major and some of the minor provisions, the plaintiffs rely primarily on the joint dissent in *NFIB* for the proposition that leaving these provisions standing would "undermine Congress' scheme of shared responsibility," throwing off the balance interlocking insurance market reforms set out in the ACA. 567 U.S. at 698 (joint dissent) (internal quotation marks omitted); State Plaintiffs' Br. at 44-49. As for the most minor provisions, they argue that these were "mere adjuncts" of the more important provisions and would not have been independently enacted. State Plaintiffs' Br. at 50.

⁴³ The individual plaintiffs adopt the state plaintiffs' severability arguments by reference. *See Fed. R. App. P. 28(i).*

On appeal, the federal defendants agree with the plaintiffs that the entirety of the ACA is inseverable from the individual mandate. Fed. Defendants' Br. at 36-49. This marks a significant change in litigation position, as the federal defendants had previously submitted to the district *54 court that only the guaranteed-issue and community-rating provisions were inseverable. And that is not the only new argument the federal defendants make on appeal. For the first time on appeal, the federal defendants argue that the remedy in this case should be limited to enjoining enforcement of the ACA only to the extent it harms the plaintiffs. *See Fed. Defendants' Br. at 26-29* (arguing that the individual "plaintiffs do not have standing to seek relief against provisions of the ACA that do not in any way affect them"); Fed. Defendants' Supp. Br. at 10 ("[T]he judgment itself, as opposed to its underlying legal reasoning, cannot be understood as extending beyond the plaintiff states to invalidate the ACA in the intervenor states.").

The intervenor-defendant states, meanwhile, argue that *every* provision of the ACA is severable from the individual mandate. They argue that the 2017 Congress' decision not to repeal or otherwise undermine any other provision of the ACA shows that it intended the rest of the ACA to remain operative—and that the court should not focus on the intent of the 2010 Congress. Intervenor-Defendant States' Br. at 34-35, 43. They point to the statements of several legislators in the 2017 Congress that seem to evince an assumption that other parts of the ACA would not be altered,⁴⁴ and to Congress' knowledge of reports highlighting the severe consequences a total *55 invalidation of the ACA would have. Intervenor-Defendant States' Br. at 40. Finally, they argue that the passage of time since the ACA's enactment has shown that the individual mandate is not all

that crucial after all, and they provide examples of ACA provisions they say have nothing to do with insurance markets or became operative years before the individual mandate took effect. Intervenor-Defendant States' Br. at 45.

⁴⁴ Although we decline to opine on the merits of the parties' arguments at this juncture, we caution against relying on individual statements by legislators to determine the meaning of the law. "[L]egislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018); see also *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 626 n.9 (5th Cir. 2013) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material.") (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 392-93 (2012) ("Each member voting for the bill has a slightly different reason for doing so. There is no single set of intentions shared by all . . . [y]et a majority has undeniably agreed on the final language that passes into law . . . and that is the sole means by which the assembly has the authority to make law."). And even among legislative history devotees, "floor statements by individual legislators rank among the least illuminating forms." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

Although we understand and share the district court's general disinclination to engage in what it refers to as "legislative guesswork"—and what a Supreme Court Justice has described as "a nebulous inquiry into hypothetical congressional intent," *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (quoting *Booker*, 543 U.S. at 321 n.7 (Thomas, J., dissenting in part))—we nevertheless conclude that the severability analysis in the district court opinion is incomplete in two ways.

First, the opinion gives relatively little attention to the intent of the 2017 Congress, which appears in the analysis only as an afterthought despite the fact that the 2017 Congress had the benefit of hindsight over the 2010 Congress: it was able to observe the ACA's actual implementation. Although the district court opinion states that burdening insurance companies with taxes and regulations without giving them the benefit of compelling the purchase of their product is "a choice no Congress made," it only links this observation to the 2010 Congress. It does not explain its statement that the 2017 Congress' failure to repeal the individual mandate is evidence of an understanding that no part of the ACA could survive without it.

Second, the district court opinion does not do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA, explaining how particular segments are inextricably linked to the individual mandate. The opinion lists a few examples of major provisions and cogently explains their link to the individual mandate, at least as it existed in 2010. For example, the ⁵⁶ opinion discusses the individual mandate's interplay with the guaranteed-issue and community-rating provisions—all of which are found in Title I of the ACA—analyzing how Congress intended those provisions to work and how they might be expected to work without the individual mandate. But in order to strike the delicate balance that severability analysis requires, the district court must undertake a similar inquiry for each segment of the post-2017 law that it ultimately declares unlawful—and it has not done so. Instead, the district court opinion focuses on the 2010 Congress' designation of the individual mandate as "essential to creating effective health insurance markets" and intention that, for at least one set of legislative goals, the individual mandate was intended to work "together with the other provisions" of the ACA. *E.g.*, 42 U.S.C. § 18091(2)(I). On this basis, and on the views of the dissenting Justices in *NFIB* addressing the ACA as it stood in 2012, the district court opinion renders the entire ACA inoperative. More is needed to justify the district court's remedy.

Take, for example, the ACA provisions in Title IV requiring certain chain restaurants to disclose to consumers nutritional information like "the number of calories contained in the standard menu item." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4206, 124 Stat. 119, 573-74 (2012) (codified at 21 U.S.C. § 343). Or consider the provisions in Title X establishing the level of scienter necessary to be convicted of

healthcare fraud. Patient Protection and Affordable Care Act § 10606, 124 Stat. 119, 1006-09, (codified at [18 U.S.C. § 1347](#)). Without more detailed analysis from the district court opinion, it is unclear how provisions like these—which certainly do not directly regulate the health insurance marketplace—were intended to work "together" with the individual mandate. Similarly, the district court opinion's assertion that "most of the minor provisions" of the ACA "are mere adjuncts of" or "aids to the[] effective execution" of the project of the individual mandate is not ⁵⁷ supported by the actual analysis in the district court opinion, which does not dive into those provisions. Finally, some insurance-related reforms became law years before the effective date of the individual mandate; the district court opinion does not explain how provisions like these are inextricably linked to the individual mandate. *See, e.g.*, [42 U.S.C. §§ 300gg-11, 300gg-14\(a\)](#). Whatever the solution to the problem of "legislative guesswork" the district court opinion identifies in severability doctrine as it currently stands, it must include a careful parsing of the statutory scheme at issue to address questions like these.

We have long "require[d] that a district court explain its reasons for granting a motion for summary judgment in sufficient detail for us to determine whether the court correctly applied the appropriate legal test." *Wildbur v. ARCO Chem. Co.*, [974 F.2d 631, 644](#) (5th Cir. 1992). This is because we have "little opportunity for effective review" when the district court opinion leaves some reasoning "vague" or "unsaid." *Myers v. Gulf Oil Corp.*, [731 F.2d 281, 284](#) (1984). "In such cases, we have not hesitated to remand . . ." *Id.* In this case, the analysis the district court opinion provides is substantial and far exceeds the sort of cursory reasoning that normally prompts us to remand. Yet, the vast, wide-ranging statutory scheme at issue in this case also far exceeds the comparatively small number of provisions at issue in other severability cases, *see, e.g., Chadha*, [462 U.S. at 931-35](#) (considering whether 8 U.S.C. § 244(c)(2) could be severed from the rest of § 244)—especially cases in which entire legislative acts are determined to be inseverable, *see, e.g., Murphy*, [138 S. Ct. at 1481-84](#) (considering whether part of [28 U.S.C. § 3702\(1\)](#) could be severed from §§ 3701-04).

Moreover, the Supreme Court has remanded in the severability context upon a determination that additional analysis was necessary. In *Ayotte v. Planned Parenthood of Northern New England*, [546 U.S. 320](#) (2006), the ⁵⁸ Supreme Court took up the issue of what relief was appropriate upon a determination that a New Hampshire provision requiring parental notification prior to abortion was unconstitutional in some applications. *Id.* at 328-32. The Supreme Court determined that, although the district court's choice to use "the most blunt remedy"—total inseverability—was "understandable" under its own precedent, more analysis was needed to determine "whether New Hampshire's legislature intended the statute to be susceptible to" severability. *Id.* at 330-31. As a result, the Supreme Court remanded for "lower courts to determine legislative intent in the first instance." *Id.*

We do the same here, directing the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate. We do not hold forth on just how fine-toothed that comb should be—the district court may use its best judgment to determine how best to break the ACA down into constituent groupings, segments, or provisions to be analyzed. Nor do we make any comment on whether the district court should take into account the government's new posture on appeal or what the ultimate outcome of the severability analysis should be.⁴⁵

Although "we cannot affirm the order as it is presently supported," we do not suggest what result will be merited "[a]fter a more thorough inquiry." *Unger v. Amedisys Inc.*, [401 F.3d 316, 325](#) (5th Cir. 2005). We only note that the inquiry must be made, and that the district court—which has many tools at its disposal—is best positioned to determine in the first instance whether the ACA "remains 'fully operative as a law'" and whether

59 it is evident from "the statute's text or historical context" *59 that Congress would have preferred no ACA at all to an ACA without the individual mandate. *Free Enter. Fund*, 561 U.S. at 509 (quoting *New York*, 505 U.S. at 186).

⁴⁵ The district court should also consider this court's recent severability analysis in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc). That opinion was issued after both the district court's decision and the oral argument here.

It may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded. It may be that all of the ACA is severable from the individual mandate. It may also be that some of the ACA is severable from the individual mandate, and some is not.⁴⁶ But it is no small thing for unelected, life-tenured judges to declare duly enacted legislation passed by the elected representatives of the American people unconstitutional. The rule of law demands a careful, precise explanation of whether the provisions of the ACA are affected by the unconstitutionality of the individual mandate as it exists today.

⁴⁶ For an explanation of some, but certainly not all, of the potential conclusions with regard to severability, see Josh Blackman, *Undone: The New Constitutional Challenge to Obamacare*, 23 Tex. Rev. L. & Pol. 1, 28-51 (2018) (stating that the district court could halt the enforcement of just the individual mandate, halt the enforcement of the entire Act, or halt the enforcement of the community-rating and guaranteed-issue provisions along with the individual mandate, for example). The district court could also issue a declaratory judgment without enjoining any government official.

B.

Remand is appropriate in this case for a second reason: so that the district court may consider the federal defendants' new arguments as to the proper scope of relief in this case. The relief the plaintiffs sought in the district court was a universal nationwide injunction: an order that totally "enjoin[ed] Defendants from enforcing the Affordable Care Act and its associated regulations." Before the district court, the federal defendants urged entry of a declaratory judgment stating that the guaranteed-issue and community-rating provisions—at that time, the only provisions the federal defendants argued were inseverable—were "invalid[ated]" by the zeroing
60 out of the shared *60 responsibility payment. This would be "sufficient relief against the Government," the federal defendants argued, because a declaratory judgment would "operate[] in a similar manner as an injunction" against the federal government, which would be "presumed to comply with the law" once the court provides "a definitive interpretation of the statute."

Ultimately, of course, the district court opinion determined that no ACA provision was severable and resulted in a judgment declaring the entire ACA "invalid." On appeal, the federal defendants first changed their litigation position to agree that no ACA provision was severable. Now they have changed their litigation position to argue that relief in this case should be tailored to enjoin enforcement of the ACA in only the plaintiff states—and not just that, but that the declaratory judgment should only reach ACA provisions that injure the plaintiffs. They argue that the Supreme Court has made clear that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (reasoning that the Court has "no business answering" questions dealing with enforcement of provisions that "burden . . . no plaintiff"); see also *Murphy*, 138 S. Ct. at 1485-86 (Thomas, J., concurring). This argument came as a surprise to the plaintiffs, who explained at oral argument that they saw the government's new position as a possible "bait and switch." The federal defendants admitted at oral argument that they had raised the scope-of-relief issue on appeal "for the first time," but argued that it was necessary to address, as it went to the district court's Article III jurisdiction. The federal defendants therefore suggested that it "would be appropriate to remand to consider the scope of the judgment."

The court agrees that remand is appropriate for the district court to consider these new arguments in the first instance. The district court did not *61 have the benefit of considering them when it crafted the relief now on appeal.⁴⁷ On remand, the district court—which is in a far better position than this court to determine which ACA provisions actually injure the plaintiffs—may consider the federal defendants' position on the proper relief to be afforded. As part of this inquiry, the district court may consider whether the federal defendants' arguments were timely raised, and whether limiting the remedy in this case is supported by Supreme Court precedent. Once again, we place no thumb on the scale as to the ultimate outcome; the district court is free to weigh the federal defendants' changed arguments as it sees fit.

⁴⁷ The consideration of limited relief may affect the intervenors as well. The district court is better suited to resolving these issues in the first instance.

VII.

For these reasons, the judgment of the district court is AFFIRMED in part and VACATED in part. We
62 REMAND for proceedings consistent with this opinion. *62 KING, Circuit Judge, dissenting:

Any American can choose not to purchase health insurance without legal consequence. Before January 1, 2018, individuals had to choose between complying with the Affordable Care Act's coverage requirement or making a payment to the IRS. For better or worse, Congress has now set that payment at \$0. Without any enforcement mechanism to speak of, questions about the legality of the individual "mandate" are purely academic, and people can purchase insurance—or not—as they please. No more need be said; it has long been settled that the federal courts deal in cases and controversies, not academic curiosities.

The majority sees things differently and today holds that an unenforceable law is also unconstitutional. If the majority had stopped there, I would be confident its extrajurisdictional musings would ultimately prove harmless. What does it matter if the coverage requirement is unenforceable by congressional design or constitutional demand? Either way, that law does not do anything or bind anyone.

But again, the majority disagrees. It feels bound to ask whether Congress would want the rest of the Affordable Care Act to remain in force now that the coverage requirement is unenforceable. Answering that question should be easy, since Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place. It is difficult to imagine a plainer indication that Congress considered the coverage requirement entirely dispensable and, hence, severable. And yet, the majority is unwilling to resolve the severability issue. Instead, it merely identifies serious flaws in the district court's analysis and remands for a do-over, which will unnecessarily prolong this litigation and the concomitant uncertainty over
63 the future of the healthcare sector. *63

I would vacate the district court's order because none of the plaintiffs have standing to challenge the coverage requirement. And although I would not reach the merits or remedial issues, if I did, I would conclude that the coverage requirement is constitutional, albeit unenforceable, and entirely severable from the remainder of the Affordable Care Act.

I.

To my mind, this case begins and ought to end with the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). In that case, the Court held that the coverage requirement would be unconstitutional if it were a legal command, because neither the Commerce Clause nor the Necessary and Proper Clause allows Congress to compel individuals to engage in commerce by purchasing health insurance. See *NFIB*, 567 U.S. at 552, 560 (opinion of Roberts, C.J.); *id.* at 652-53 (joint dissent). The

Court concluded, however, that the coverage requirement was constitutional, because—notwithstanding the most natural reading of the provision's text—the coverage requirement was not *actually* a legal command to purchase insurance.

64 Instead, according to the *NFIB* Court, the coverage requirement "leaves an individual with a lawful choice to do or not do a certain act," i.e., purchase health insurance. *Id.* at 574 (Roberts, C.J., majority opinion). All that is required, under this reading, is "a payment to the IRS" if one chooses not to purchase health insurance. *Id.* at 567. Beyond this shared-responsibility payment, there are no further "negative legal consequences to not buying health insurance," and individuals who forgo insurance do not violate the law as long as they make the required payment. *Id.* at 567. "Those subject to the [coverage requirement] may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may *64 not lawfully do is not buy health insurance and not pay the resulting tax." *Id.* at 574 n.11. Forcing individuals to make that choice was constitutional, per *NFIB*, because Congress could "impose a tax on not obtaining health insurance" by exercising its enumerated power to lay and collect taxes, duties, imposts, and excises. *Id.* at 570.

Contrary to the suggestion of the majority, which I address specifically *infra* at Part III, Congress did not alter the coverage requirement's operation when it amended the ACA in 2017. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 ("TCJA"). All the TCJA did, with respect to healthcare, was change the amount of the shared-responsibility payment to zero dollars. Thus, despite textual appearances, the post-TCJA coverage requirement does nothing more than require individuals to pay zero dollars to the IRS if they do not purchase health insurance, which is to say it does nothing at all.

This insight, that the coverage requirement now does nothing, should be the end of this case. Nobody has standing to challenge a law that does nothing. When Congress does nothing, no matter the form that nothing takes, it does not exceed its enumerated powers. And since courts do not change anything when they invalidate a law that does nothing, every other law retains, or at least should retain, its full force and effect.

II.

65 But as the majority goes well past *NFIB*, I respond. To begin, I emphasize the importance of the rule that a plaintiff must have standing to invoke a federal court's power. This is not an anachronism lingering from some era in which empty formalities abounded in legal practice. Quite the opposite: "[T]he requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Davis* *65 v. *FEC*, 554 U.S. 724, 733 (2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) ("Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" (quoting U.S. Const. art. III, § 2)). And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (alteration in original) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)); *accord Raines v. Byrd*, 521 U.S. 811, 818 (1997).

The Constitution's case-or-controversy requirement reflects the Framers' view of the judiciary's place among the coequal branches of the federal government: to fulfill "the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Strict adherence to the case-or-controversy requirement—and to standing in particular—thus "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408; *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("This fundamental limitation preserves the 'tripartite structure' of

our Federal Government, prevents the Federal Judiciary from 'intrud[ing] upon the powers given to the other branches,' and 'confines the federal courts to a properly judicial role.'" (alteration in original) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016))). Thus, "federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen v. Wright*, 66 468 U.S. 737, 752 (1984) (alteration in original) *66 (citation omitted) (first quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892); then quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)), abrogated on other grounds, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). And needless to say, a federal court must conduct an "especially rigorous" standing inquiry "when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Amnesty Int'l*, 568 U.S. at 408 (quoting *Raines*, 521 U.S. at 819-20). "The importance of this precondition should not be underestimated as a means of 'defin[ing] the role assigned to the judiciary in a tripartite allocation of power.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (alteration in original) (quoting *Flast*, 392 U.S. at 95).

The standing doctrine polices this constitutional limit on the judiciary's power "by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List*, 573 U.S. at 157 (alteration in original) (quoting *Lujan*, 504 U.S. at 560). The party seeking redress in the courts has the burden to establish standing. See *Spokeo*, 136 S. Ct. at 1547. To do so, the plaintiff must show it has "(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." *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. 560). This means the injury must be "personal" to the plaintiff and, although the injury does not need to be "tangible," "it must actually exist." *Id.* at 67 1548-49. *67

The plaintiffs' evidentiary burden depends on the stage of the litigation. At each stage, the plaintiffs must demonstrate standing "with the manner and degree of evidence" otherwise required to establish the plaintiffs' merits case. *Lujan*, 504 U.S. at 561. Thus, because this case comes to us on the plaintiffs' own motion for summary judgment, the plaintiffs must conclusively prove all three elements of standing with evidence that "would 'entitle [them] to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991) (quoting *Golden Rule Ins. Co. v. Lease*, 755 F. Supp. 948, 951 (D. Colo. 1991)). If a plaintiff meets its burden, the defendant can nevertheless defeat summary judgment "by merely demonstrating the existence of a genuine dispute of material fact." *Id.* at 1265. In other words, the plaintiffs here must show that, considering the summary-judgment record, all reasonable factfinders would agree that the plaintiffs demonstrate an injury traceable to the coverage requirement and redressable by a favorable decision. See *Alonso v. Westcoast Corp.*, 920 F.3d 878, 885-86 (5th Cir. 2019).

These general principles alone should make the majority's error apparent. More specific authority illuminates it. I explain first why the majority errs in concluding the individual plaintiffs have standing, then I explain why the majority errs in concluding the state plaintiffs have standing.

A.

The majority concludes that the individual plaintiffs have standing to challenge the coverage requirement in the Patient Protection and Affordable Care Act (the "ACA"), 26 U.S.C. § 5000A(a),⁴⁸ because it forces them to 68 purchase *68 health insurance that they would not purchase otherwise. The majority overlooks what will

happen if the individual plaintiffs fail to purchase insurance: absolutely nothing. The individual plaintiffs will be no worse off by any conceivable measure if they choose not to purchase health insurance. Thus, whatever injury the individual plaintiffs have incurred by purchasing health insurance is entirely self-inflicted.

⁴⁸ The coverage requirement is sometimes colloquially known as the "individual mandate." For reasons that will become clear, this nickname can be misleading.

A long line of cases establishes that self-inflicted injuries cannot establish standing because a self-inflicted injury, by definition, is not traceable to the challenged action. *See, e.g., Amnesty Int'l*, 568 U.S. at 416 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves . . ."); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("The injuries to the plaintiffs' fises were self-inflicted, resulting from decisions by their respective state legislatures. . . . No State can be heard to complain about damage inflicted by its own hand."); *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir.) ("[S]tanding cannot be conferred by a self-inflicted injury."), *cert. denied*, 139 S. Ct. 639 (2018). When a plaintiff chooses to incur an expense, the plaintiff must show that the challenged law forced the plaintiff to incur that expense to avoid some other concrete injury. *See Amnesty Int'l*, 568 U.S. at 415-16 (concluding costs plaintiffs incurred trying to avoid surveillance were self-inflicted because plaintiffs' fear of surveillance was speculative); *Contender Farms, L.L.P. v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015) (finding plaintiff had standing to challenge regulations that required plaintiff to either "take additional measures" to comply with regulation or "face harsher, mandatory penalties" and prosecution). In other words, a plaintiff can show standing if the challenged act placed him between the proverbial rock and hard place. But without showing such a dilemma, a plaintiff "cannot
69 manufacture standing" by expending costs to avoid an otherwise noncognizable injury, *69 which is exactly what the individual plaintiffs did here. *Amnesty Int'l*, 568 U.S. at 416.

The majority brushes off this authority by insisting—without explanation—that labeling the plaintiffs' injuries self-inflicted "assumes" that the coverage requirement does not act as a legal command to purchase insurance, which the majority refuses to question at the standing stage. The majority misunderstands the argument. Even accepting that the coverage requirement acts as a legal command, the individual plaintiffs are still free to disregard that command without legal consequence. Therefore, any injury they incur by freely choosing to obtain insurance is still self-inflicted.

Nor does it matter that to avoid inflicting injury upon themselves, the plaintiffs would have to violate an unenforceable statute. Plaintiffs may challenge a statute that requires them "to take significant and costly compliance measures *or risk criminal prosecution.*" *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (emphasis added); *see also, e.g., Int'l Tape Mfrs. Ass'n v. Gerstein*, 494 F.2d 25, 28 (5th Cir. 1974) (explaining that standing to challenge a statute requires a "realistic possibility that the challenged statute will be enforced to [the plaintiff's] detriment"). But "[w]hen plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)); *see also Poe v. Ullman*, 367 U.S. 497, 507 (1961) (Frankfurter, J., plurality) ("It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings
70 brought against the State's prosecuting officials if real threat of enforcement is wanting."); *cf. Zimmerman*, *70 881 F.3d at 389-90 ("[T]o confer standing, allegations of chilled speech or 'self-censorship must arise from a fear of prosecution that is not 'imaginary or wholly speculative.'"" (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006))).

Ullman illustrates this principle well.⁴⁹ The plaintiffs there sought to challenge Connecticut's criminal prohibition on contraception. *Ullman*, 367 U.S. at 498 (Frankfurter, J., plurality). But in the more than 75 years that the statute had been on the books, only one violation had been prosecuted—and even that was a collusive prosecution brought to challenge the law. *Id.* at 501-02. The Court dismissed the challenge for lack of standing, holding that "[t]he fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." *Id.* at 508. The Court explained that it could not "be umpire to debates concerning harmless, empty shadows." *Id.*⁵⁰

⁴⁹ The majority dismisses *Ullman* as an adversity case. Nonetheless, as this court and the Supreme Court have repeatedly recognized, *Ullman* grounds its analysis in terms of standing and ripeness. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008); *Thomes v. Equitable Sav. & Loan Ass'n*, 837 F.2d 1317, 1318 (5th Cir. 1988). In any event, *Ullman* is just one example; other cases demonstrate this concept just as well. See, e.g., *Driehaus*, 573 U.S. at 158-59 ("One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. . . . [W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.").

⁵⁰ The lead opinion in *Ullman* garnered only a four-judge plurality. But Justice Brennan, who concurred in the judgment, wrote that he "agree[d] that this appeal must be dismissed for failure to present a real and substantial controversy" and that "until the State makes a definite and concrete threat to enforce these laws . . . this Court may not be compelled to exercise its most delicate power of constitutional adjudication." *Ullman*, 367 U.S. at 509 (Brennan, J., concurring in judgment). Accordingly, five Justices agreed that plaintiffs lacked standing absent any real threat of enforcement.

Ullman makes this an easy case. Connecticut's contraception law at least allowed the possibility of enforcement, even if it was speculative and unlikely *71 to ever occur. Here, as I cannot say often enough, the coverage requirement *has no enforcement mechanism*. It is impossible for the individual plaintiffs to ever be prosecuted (or face any other consequences) for violating it. In "find[ing] it necessary to pass on" the coverage requirement, the majority "close[s] [its] eyes to reality." *Id.*⁵¹

⁵¹ For the same reason, it does not matter that the district court "expressly found" that the individual plaintiffs "are obligated to" purchase health insurance. Even ignoring the conclusory nature of this supposed finding of fact, it is not the abstract obligation that matters; it is the concrete consequences, if any, that follow from a violation of that obligation. And the district court did not find (and there would be no basis for it to find) that the individual plaintiffs would face any consequences.

The majority does not engage with the lessons of *Ullman* and its progeny. The closest it comes is in its citation to *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019). That case does not abrogate *Ullman*, *Younger*, *Babbitt*, *American Booksellers*, or *Tape Manufacturers*—nor could it. In *Texas v. EEOC*, Texas challenged EEOC administrative guidance stating that employers who screen out job applicants with criminal records could be held liable for disparate-impact discrimination. *Id.* at 437-38. The EEOC argued that Texas did not have standing to challenge the guidance because the guidance reflected only the EEOC's interpretation of Title VII, and the Attorney General, not the EEOC, has the sole power to enforce Title VII against states. See Brief for Appellants Cross-Appellees at 18-19, *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019) (No. 18-10638). In rejecting that argument, this court explained that Title VII's enforcement scheme is not so simple. Although the EEOC may not itself bring enforcement actions against states, it may investigate states and refer cases to the Attorney General for enforcement actions. *EEOC*, 933 F.3d at 447. Therefore, "the possibility of investigation by EEOC and referral to the Attorney General for enforcement proceedings if it fails to align its laws and *72 policies with the Guidance" put pressure on Texas to conform to the EEOC's guidance. *Id.*

In other words, even absent a direct threat of a formal enforcement action from the EEOC, Texas faced other consequences for disobeying the guidance—including the possibility that the Attorney General would enforce Title VII against it. In fact, we noted that "[o]ne Texas agency ha[d] already been required to respond to a charge of discrimination filed with EEOC based on its no-felon hiring policy." *Id.* at 447 n.26. The majority here cites no similar concrete consequences that will (or even plausibly could) follow if the plaintiffs violate the coverage requirement.

My conclusion that individual plaintiffs lack standing is only bolstered by a unanimous opinion issued mere weeks ago by a panel that included the author of today's majority opinion. In that case, the court held that Austin, Texas could not use a suit against the Texas Attorney General to challenge a state statute, which the Attorney General was authorized to enforce, that barred the city from enforcing one of its ordinances. *City of Austin v. Paxton*, No. 18-50646, ___ F.3d ___, 2019 WL 6520769, at *6 (5th Cir Dec. 4, 2019). Although the *Paxton* court based its holding on sovereign immunity, it looked to "our standing jurisprudence," and "note[d] that it's unlikely the City had standing," because it did not show that the Attorney General would likely "inflict 'future harm'" by enforcing the statute against Austin. *Id.* at *6-7. If standing was absent in *Paxton* because enforcement was insufficiently probable, I have no idea why standing should be present in this case, where enforcement of the challenged portion of the ACA is altogether impossible.

In sum, even if the unenforceable coverage requirement must be read as a command to purchase health insurance, it does not harm the individual plaintiffs because they can disregard it without consequence. Binding
 73 *73 precedent squarely establishes that plaintiffs may not sue in such circumstances—and with good reason. The great power of the judiciary should not be invoked to disrupt the work of the democratic branches when the plaintiffs can easily avoid injury on their own.⁵²

⁵² The majority's suggestion that *NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.), supports the individual plaintiffs' standing does not warrant above-the-line attention. In short, the *NFIB* Court did not address standing. *See id.* at 530-708. At the time *NFIB* was decided, the coverage requirement was set to take effect with the shared-responsibility payment as an enforcement mechanism. And there is no indication that any of the *NFIB* plaintiffs were exempt from the shared-responsibility payment. Thus, even if the majority seeks to infer from *NFIB* some jurisdictional ruling in violation of the Supreme Court's "repeated[]" command "that the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996), *NFIB* offers no inferences of value for the majority to draw. Further, counsel's answer to a Justice's hypothetical question does not bind this court.

B.

The majority's conclusion that the state plaintiffs have standing to challenge the coverage requirement fares no better. I would deny the state plaintiffs standing because there is no evidence in the record, much less conclusive evidence, to support the state plaintiffs' alleged injuries.

1.

The majority first concludes that the state plaintiffs have standing because it believes that the coverage requirement increases the number of state employees who enroll in the states' employee healthcare programs. And with more enrollees, the logic goes, the states as employers must file more forms with the IRS at a higher cost to the states.

The majority's biggest mistake is that it ignores the posture of this case: the defendants appeal from the district court's order granting summary judgment *to the plaintiffs*. Accordingly, the state plaintiffs face a tremendous
 74 evidentiary burden—they must produce evidence so conclusive of the coverage *74 requirement's effect on

their healthcare-administration costs that the evidence "would 'entitle [them] to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop*, 939 F.2d at 1264-65 (quoting *Golden Rule Ins.*, 755 F. Supp. at 951).⁵³ And the state plaintiffs provided no evidence *at all*, never mind conclusive evidence, to support the dubious notion that even a single state employee enrolled in one of state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement.⁵⁴

⁵³ The district court was free to—but did not—make findings of jurisdictional fact, which we would review for clear error. See *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005). Indeed, the district court did not address the state plaintiffs' standing at all. Thus, for the state plaintiffs to establish standing on their own motion for summary judgment, they must show the summary-judgment evidence is conclusive.

⁵⁴ The majority misunderstands my position. See Maj. Op. 32 n.31. The state plaintiffs do not need to identify a "specific" person that is likely to enroll, but they still must establish that at least *one* state employee will enroll as a result of the post-TCJA coverage requirement. Otherwise, the state plaintiffs' injuries are not traceable to the provision they challenge and would not be redressed by its elimination.

The majority relies on affidavits from several of the state plaintiffs' healthcare administrators. But these affidavits only establish that the state plaintiffs incur costs complying with the IRS reporting requirements found in 26 U.S.C. §§ 6055(a) and 6056(a). And as the majority recognizes, these requirements are distinct from the coverage requirement. Accordingly, to trace the state plaintiffs' reporting burden to the coverage requirement, the majority must additionally show that at least some state employees have enrolled in employer-sponsored health insurance solely because of the unenforceable coverage requirement. The majority comes up empty at this step, pointing only to a conclusory statement from a South Dakota human-resources director claiming that the coverage requirement, not §§ 6055(a) and 6056(a), caused South Dakota to incur its reporting expenses. This will not do. See, e.g., *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is *75 not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); *Shaboon v. Duncan*, 252 F.3d 722, 737 (5th Cir. 2001) ("[U]nsupported affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." (alteration in original) (quoting *Orthopedic & Sports Injury Clinic v. Wang Labs., Inc.*, 922 F.2d 220, 225 (5th Cir. 1991))).⁵⁵

⁵⁵ The majority suggests we must accept this statement as true because the defendants did not "challenge" this evidence. The majority cites no authority for this proposition, and I am at a loss to understand where the majority came up with its challenge rule. I know of nothing in the Federal Rules of Civil Procedure or the caselaw requiring litigants to "challenge" conclusory statements in declarations. On the contrary, courts in this circuit regularly confront and disregard conclusory statements in the summary-judgment record. See, e.g., *Tex. Capital Bank N.A. v. Dall. Roadster, Ltd. (In re Dall. Roadster, Ltd.)*, 846 F.3d 112, 124 (5th Cir. 2017); *Brown v. Mid-Am. Apartments*, 348 F. Supp. 3d 594, 602-03 (W.D. Tex. 2018). The district courts and litigants of this circuit will be surprised to learn about the majority's new summary-judgment rule.

The majority also claims that the statement is not conclusory. But nothing in the affidavit addresses the postTCJA coverage requirement. The affiant states that his knowledge is "related to the enactment of the ACA," which occurred in 2010. He focuses on "financial costs associated with ACA regulations" and concludes that "South Dakota would be significantly burdened if the ACA remained law." The affidavit does not explain how the postTCJA coverage requirement harms South Dakota. Such generalities, untethered to the actual law at issue in this appeal, cannot establish standing—especially not at the summaryjudgment stage.

Citing *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the majority argues the state plaintiffs can establish standing by "showing that third parties will likely react in predictable ways" to the coverage requirement. *Id.* at 2566. But the majority fails to explain why state employees who do not want health insurance would nevertheless predictably enroll in health insurance solely because an unenforceable statute, here the coverage requirement, directs them to do so. What the majority fails to mention in its discussion of *Department of Commerce* is that the "predictable" behavior at issue there was individuals "choosing to violate their legal duty to respond to *76 the census." *Id.* at 2565 (emphasis added). Thus, *Department of Commerce* shows that people will predictably violate the law when sufficiently incentivized to do so. This directly contradicts the assumption undergirding much of the majority's analysis—that people tend to follow the law regardless of the incentives. And state employees who do not want to enroll in insurance have every incentive to violate the coverage requirement.⁵⁶

⁵⁶ A Congressional Budget Office report released shortly before Congress repealed the shared-responsibility payment further supports this notion. It concluded:

If the [shared-responsibility payment] was eliminated but the [coverage requirement] itself was not repealed . . . only a small number of people who enroll in insurance because of the [coverage requirement] under current law would continue to do so solely because of a willingness to comply with the law.

Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate at 1* (2017) (hereinafter "CBO Report"). On this record, we have been given no reason to believe that any of the state plaintiffs' employees are among this "small number of people." *Id.*

2.

The majority similarly argues that the coverage requirement increases the number of individuals enrolled in the state plaintiffs' Medicaid programs. This argument fails for the same reason: the state plaintiffs produce no evidence—let alone conclusive evidence—showing that anyone has enrolled in their Medicaid programs solely because of the unenforceable coverage requirement. To this end, the best the majority can scrape up is a statement from Teresa MacCartney, a Georgia budget official, stating that "[a]fter the implementation of the ACA, [Georgia] experienced increased enrollment of individuals already eligible for Medicaid benefits under pre-ACA eligibility standards." The majority's takeaway is that the coverage requirement caused this increase. Maybe so. But MacCartney's statement refers specifically to the coverage requirement at the time of the ACA's 77 enactment, when the coverage *77 requirement interacted with the shared-responsibility payment. This statement provides no insight into how the coverage requirement affects Medicaid rolls after the shared-responsibility payment's repeal. In fact, MacCartney signed her declaration on May 14, 2018, more than seven months before the shared-responsibility payment's repeal went into effect. *See* Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 11081(b), 131 Stat. 2054, 2092 (2017).

Accordingly, the majority's analysis again rests on the necessary assumption that people will obey the coverage requirement regardless of the incentives, in direct contradiction to *Department of Commerce*. And because Medicaid is available to eligible recipients at little to no cost, it is especially unlikely that the unenforceable coverage requirement would play any significant part in anyone's decision to enroll. It belies common sense to conclude that anyone who would otherwise pass on the significant benefits of Medicaid would be motivated to enroll solely because of an unenforceable law.

In sum, the majority cites no actual evidence tying any costs the state plaintiffs have incurred to the unenforceable coverage requirement. The state plaintiffs accordingly cannot show an injury traceable to the coverage requirement, so they do not have standing to challenge the coverage requirement.

III.

I would not reach the merits of this case because, as explained in Part II, I would vacate the district court's order for lack of standing. But as the majority errs on the merits too, I voice my disagreement.

"Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *NFIB*, 567 U.S. at 568 (Roberts, C.J., majority opinion). Now that Congress
 78 has zeroed out that payment, the coverage requirement affords individuals the same *78 choice individuals have had since the dawn of private health insurance, either purchase insurance or else pay zero dollars. Thus, to my mind, the majority's focus on whether Congress's taxing power or the Necessary and Proper Clause authorizes Congress to pass a \$0 tax is a red herring; the real question is whether Congress exceeds its enumerated powers when it passes a law that does nothing.⁵⁷ And of course it does not.⁵⁸ Congress exercises its legislative power when it "alter[s] the legal rights, duties and relations of persons." *INS v. Chadha*, 462 U.S. 919, 952 (1983); *cf. id.* ("Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" (citation omitted) (quoting S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897))).

⁵⁷ "In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). The majority would do well if it paused to ask whether it is necessary for a federal court to rule on whether the Constitution authorizes a \$0 tax or otherwise prohibits Congress from passing a law that does nothing. The absurdity of these inquiries highlights the severity of the majority's error in finding the plaintiffs have standing to challenge this dead letter.

⁵⁸ The majority does not argue otherwise.

Lest the majority mistake my position and end up shadowboxing with "bizarre metaphysical conclusions," "quantum musings," or ersatz inconsistencies, Maj. Op. at 44 & n.40, I need to make something explicit at the outset. The TCJA did not change the text or the *meaning* of the coverage requirement, but it did change the real-world *effects* it produces. Before the TCJA, the two options afforded by the coverage requirement—
 79 purchasing insurance or making a shared-responsibility payment—were both *79 burdensome, but Congress could force individuals to choose one of those options by exercising its Taxing Power. Today, the shared-responsibility payment's meaning has not changed—it still gives individuals the choice to purchase insurance or make a shared-responsibility payment—but the amount of that payment is zero dollars, which means that the coverage requirement now does nothing. The majority's contrary conclusion rests on the premise that the coverage requirement compels individuals to purchase health insurance. With this understanding, the majority says that the coverage requirement does exactly what the Supreme Court said it cannot do: compel participation in commerce. *See NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.); *id.* at 652-53 (joint dissent). This conclusion follows fine from the premise, but the premise is wrong. Despite its seemingly mandatory language, the coverage requirement does not compel anyone to purchase health insurance.

In *NFIB*, although five Justices agreed that "[t]he most straightforward reading of the [coverage requirement] is that it commands individuals to purchase insurance," *id.* at 562 (opinion of Roberts, C.J.); *accord id.* at 663 (joint dissent), applying the canon of constitutional avoidance, the Court rejected this interpretation. Instead, the Court interpreted the coverage requirement to offer applicable individuals a "lawful choice" between purchasing health insurance and paying the shared-responsibility payment, which the Court interpreted as a valid exercise of Congress's taxing power. *Id.* at 574 (Roberts, C.J., majority opinion). This is a permissible

construction, the Court concluded, because "[w]hile the [coverage requirement] clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful." *Id.* at 567-68. The Court observed that "[n]either the [ACA] nor any other law attaches negative legal consequences to not *80 buying health insurance, beyond requiring a payment to the IRS." *Id.* at 568. And the Court further explained:

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the [coverage requirement] as tolerable suggests that Congress did not think it was creating four million outlaws.

Id. (citation omitted).

The *NFIB* Court's application of constitutional avoidance as an interpretive tool does not mean that the Court rewrote the statute. Only Congress can do that. Rather, the Court was "choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). "The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382. Accordingly, when the Court ruled in *NFIB* that "[t]hose subject to the [coverage requirement] may lawfully forgo health insurance," *NFIB*, 567 U.S. at 574 n.11, that was an authoritative determination regarding what the text of the coverage requirement meant and what Congress intended.

The majority pushes aside *NFIB*'s construction, acting as though the fact that the *NFIB* Court applied the canon of constitutional avoidance means that its interpretation no longer governs following the repeal of the shared-responsibility payment. But when the Court construes statutes, its "interpretive decisions, *in whatever way reasoned*, effectively become part of the statutory scheme, subject (just like the rest) to congressional change." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (emphasis added). While Congress can change its mind and could have amended the coverage *81 requirement to turn the "lawful choice" described by *NFIB*, 567 U.S. at 574, into an unwavering command, the majority does not suggest that Congress ever made such a choice. Sure, Congress amended the *shared-responsibility payment* in 2017. Yet as the district court went to great lengths to establish and the majority is elsewhere eager to point out, the coverage requirement and the shared-responsibility payment are distinct provisions. *See* Maj. Op. at 19 ("To bring a claim against the [coverage requirement], therefore, the plaintiffs needed to show injury *from the individual mandate*—not from the shared responsibility payment."); *Texas v. United States*, 340 F. Supp. 3d 579, 596 (N.D. Tex. 2018) ("It is critical to clarify something at the outset: the shared-responsibility payment, 26 U.S.C. § 5000A(b), is distinct from the [coverage requirement], *id.* § 5000A(a)."). And Congress did not touch the text of the coverage requirement when it amended the shared-responsibility payment. *See* Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 11081. *Compare* § 5000A(a), with 26 U.S.C. § 5000A(a) (2011). At risk of stating the obvious, if the text of the coverage requirement has not changed, its meaning could not have changed either. By "giv[ing] these same words a different meaning," the majority "invent[s] a statute rather than interpret[s] one." *Clark*, 543 U.S. at 378.

The majority is thus left on unsteady ground: amendment by implication, which "will not be presumed unless the legislature's intent is 'clear and manifest.'" *In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013) (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007)); *see also, e.g., Epic Sys. Corp v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("[I]n approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later *82 statute." (second and third

alterations in original) (quoting *United States v. Fausto*, 484 U.S. 439, 452-53 (1988))). This rule operates with equal force when a judicial construction previously illuminated the meaning of the purportedly amended statute. See *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) ("When Congress intends to effect a change of [a statute's earlier judicial interpretation], it ordinarily provides a relatively clear indication of its intent in the text of the amended provision."); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); cf. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Congress's silence on the matter is thus conclusive.

Yet even if one probes further, it boggles the mind to suggest that Congress intended to turn a nonmandatory provision into a mandatory provision by doing away with the only means of incentivizing compliance with that provision. Congress quite plainly intended to relieve individuals of the burden the coverage requirement put on them; it did not intend to *increase* that burden. And if it did, it certainly did not make that intent "clear and manifest." *Lively*, 717 F.3d at 410. Moreover, the considerations that led the *NFIB* Court to conclude that Congress did not intend the coverage requirement to impose a legal command to purchase health insurance are even more compelling in the absence of the shared-responsibility payment. Whereas before the only "negative legal consequence[] to not buying health insurance" was the payment of a tax, *NFIB*, 567 U.S. at 567-68, now there are no consequences *at all*. And *83 as the Congressional Budget Office ("CBO") has predicted, without the shared-responsibility payment, most applicable individuals will not maintain health insurance solely for the purpose of obeying the coverage requirement. See Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate at 1* (2017). "That Congress apparently regards such extensive failure to comply with the [coverage requirement] as tolerable suggests that Congress did not think it was creating [millions of] outlaws." *NFIB*, 567 U.S. at 568.

Ergo, when Congress zeroed-out the shared-responsibility payment without amending the coverage requirement, it did not do away with the lawful choice it previously offered applicable individuals; it simply changed the parameters of that choice. Under the old scheme, applicable individuals could lawfully choose between maintaining health insurance and paying a tax. Under the new scheme, applicable individuals can lawfully choose between maintaining health insurance and doing nothing. In other words, the coverage requirement is a dead letter—it functions as an expression of national policy or words of encouragement, at most. Accordingly, although I would not reach the merits, I would reverse if I did.

IV.

I agree with much of what the majority has to say about the district court's severability ruling. But I fail to understand the logic behind remanding this case for a do-over. Severability is a question of law that this court can review *de novo*. And the answer here is quite simple—indeed, a severability analysis will rarely be easier. After all, "[o]ne determines what Congress would have done by examining what it did," and Congress declawed the coverage requirement without repealing any other part of the ACA. *Legal Servs. Corp v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting); see also *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) ("[T]he touchstone for [severability analysis] is legislative intent."). *84 Consequently, little guesswork is needed to determine that Congress believed the ACA could stand in its entirety without the unenforceable coverage requirement.

The majority suggests that remand is necessary because the district court "has many tools at its disposal" and is thus "best positioned to undertake" the severability inquiry. Maj. Op. at 60. It is true that the district court is better able to assess factual issues than appellate judges, because it can hold evidentiary hearings, but I cannot see how that could be relevant, since severability is a question of law that we review *de novo*. Further, it is not clear what sort of evidence the district court could receive that would be useful when deciding severability questions except perhaps legislative history, a source which the majority derides. *See* Maj. Op. at 56 n.45 ("[W]e caution against relying on individual statements by legislators to determine the meaning of the law."). When it comes to analyzing the statute's text and historical context, *see id.*, we are just as competent as the district court. There is thus no reason to prolong the uncertainty this litigation has caused to the future of this indubitably significant statute.⁵⁹

⁵⁹ The majority also suggests that remand is necessary so that the district court can consider remedial issues, raised by the United States for the first time on appeal, regarding the appropriate scope of relief. But such issues are largely moot if, as I believe, the coverage requirement is completely severable from the rest of the ACA. For example, I do not perceive a meaningful difference between a nationwide injunction prohibiting enforcement of the already-unenforceable coverage requirement versus an injunction against enforcement that is limited to the plaintiff states. In any case, this court could—and, in my view, should—resolve the severability issue even if remanding remedial issues is appropriate.

A.

Before I address the more specific problems with the district court's inseverability ruling, some background on the ACA is in order. Congress ⁸⁵ passed the ACA in 2010 to address a growing crisis of Americans living without health insurance. Prior to the ACA, nearly 50 million Americans (about 15 percent of the population at the time) were uninsured. *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1244 (11th Cir. 2011), *rev'd on other grounds*, *NFIB*, 567 U.S. 519. Although many large employers provided health insurance, coverage was often cost prohibitive for small businesses and consumers seeking insurance through the individual market (i.e., directly instead of through an employer). *See* U.S. Gov't Accountability Office, GAO-12-166R, Health Care Coverage: Job Lock and the Potential Impact of the Patient Protection and Affordable Care Act 3-4 (2011). Moreover, insurance companies could—and regularly would—deny coverage to high-risk consumers, especially those with preexisting medical conditions. *Id.* at 4.

The pre-ACA status quo created numerous economic and social problems. Most obviously, America's uninsured population could not afford spiraling healthcare costs, thus exacerbating health problems, leading to an estimated 45,000 premature deaths annually, Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289, 2292 (2009), and causing "62 percent of all personal bankruptcies," 42 U.S.C. § 18091(2)(G). The uninsured crisis caused some subtler problems too. For one thing, hospitals would have to absorb the costs of treating uninsured patients and would inevitably pass those costs along to insurance companies, which would then pass them along to consumers. *See* § 18091(2)(F) ("The cost of providing uncompensated care to the uninsured was \$43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families."). *See generally* Amicus Br. of HCA Healthcare, Inc. at 9-13. And dependency on employer-based healthcare ⁸⁶ decreased labor mobility, discouraged entrepreneurship, and kept potential caregivers away from the home. *See* GAO-12-166R, *supra*, at 5-6.

In enacting the ACA, Congress sought to address these and other problems with the national healthcare system by drastically reducing the number of uninsured and underinsured Americans. To achieve this goal, the ACA undertook a series of reforms, most notably to the individual insurance market. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, 124 Stat. 119 (2010). Among the ACA's most important

(and visible) reforms are two related provisions: guaranteed issue and community rate. *See* 42 U.S.C. §§ 300gg, 300gg-1. The guaranteed-issue provision requires health-insurance providers to accept every individual who applies for coverage, thus preventing insurers from denying coverage based on a consumer's preexisting medical condition. *See* § 300gg-1(a). The community-rate provision prevents insurers from charging a higher rate because of a policyholder's medical condition. *See* § 300gg(a).

Left without some counterbalance, the guaranteed-issue and community-rate provisions threatened to overload insurers' risk pools with high-risk policyholders. Beyond allowing more high-risk consumers to purchase health insurance (as intended), these provisions disincentivized healthy (i.e., low risk) consumers from purchasing health insurance because it allowed them to wait until they developed costly health problems to purchase insurance.⁶⁰ This would have caused premiums to skyrocket, exacerbating many of the problems Congress sought to solve. *See generally* Amicus Br. of Blue Cross Blue Shield Ass'n at 3-4. Thus, the ACA included
 87 several provisions to incentivize low-risk consumers to purchase health insurance. It offered tax ^{*87} credits to offset much of the cost of health insurance for middle-income consumers. *See* 26 U.S.C. § 36B(b). It created healthcare exchanges to facilitate competition among health plans and to lower transaction costs. *See* 42 U.S.C. §§ 18031, 18041. It limited new enrollments to an open-enrollment period set by the Secretary of Health and Human Services, which mitigates the adverse-selection problem by preventing consumers from purchasing health insurance only when they need it. *See* § 18031(c)(6). And it included the coverage requirement at issue in this lawsuit. *See* § 5000A(a).

⁶⁰ This is known as the adverse-selection problem.

Although the coverage requirement has been among the ACA's best-known provisions, the ACA's reforms to the private insurance market extend well beyond it. As just mentioned, Congress created other mechanisms to achieve the same goal as the coverage requirement: incentivize low-risk consumers to purchase health insurance. The ACA also included other provisions expanding access to the private insurance market, including a requirement that employers with 50 or more employees offer health insurance, *see* 26 U.S.C. § 4980H, and a requirement that health-insurance providers allow young adults to remain on their parents' insurance until they turn 26, *see* 42 U.S.C. § 300gg-14. And it included provisions designed to make health-insurance policies more attractive, such as those directly regulating premiums, *see, e.g., id.* § 300gg-18(b), limiting benefits caps, *see id.* § 300gg-11, and prescribing certain minimum-coverage requirements for health plans, *see, e.g., id.* § 300gg-13. Moreover, the ACA contains countless other provisions that are unrelated to the private insurance market—
 88 and many that are only ^{*88} tangentially related to health insurance at all.⁶¹ The following are only some of many possible examples:

⁶¹ The ACA contains ten titles. Only the first title focuses on the private insurance industry. The other titles address wide-ranging topics from the "prevention of chronic disease," ACA tit. IV, to the "health care work force," *id.* tit. V.

- Section 3006, which directs the Secretary of Health and Human Services to "develop a plan to implement a value-based purchasing program for payments under the Medicare program . . . for skilled nursing facilities."
- Section 4205, which requires chain restaurants to conspicuously display "the number of calories contained in . . . standard menu item[s]."
- Section 5204, which creates a student-loan repayment assistance program "to eliminate critical public health workforce shortages in Federal, State, local and tribal public health agencies."
- Section 6402, which, among other things, strengthens criminal laws prohibiting healthcare fraud.
- Title III of Part X, which reauthorizes and amends the Indian Health Care Improvement Act, a decades-old statute creating and maintaining the infrastructure for tribal healthcare services.

Given the breadth of the ACA and the importance of the problems that Congress set out to address, it is simply unfathomable to me that Congress hinged the future of the entire statute on the viability of a single, deliberately unenforceable provision.⁶²*89

⁶² I do not mean to suggest that, as a policy matter, Congress chose the best (or even worthwhile) solutions to these problems. Such matters are beyond my job description, so I express no opinion on them. But the district court should have thought more critically about whether Congress likely intended to leave its chosen solution to a serious problem so vulnerable to judicial invalidation.

B.

In *Planned Parenthood of Northern New England*, the Court announced the three principles that must guide our severability analysis. "First, we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Planned Parenthood of N. New Eng.*, 546 U.S. at 329 (alteration in original) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). "Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] [a] law to conform it to constitutional requirements' even as we strive to salvage it." *Id.* (first alteration in original) (quoting *Am. Booksellers*, 484 U.S. at 397). "Third, the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* at 330 (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

In accordance with these principles, the Court's cases suggest a two-part inquiry. First, we must ask "whether the law remains 'fully operative' without the invalid provisions." *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018); see also *United States v. Booker*, 543 U.S. 220, 258-59 (2005); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). If so, the remaining provisions are "presumed severable" from the invalid provision. *Chadha*, 462 U.S. at 934 (quoting *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 234 (1932)). This presumption is rebutted only if "the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred" no statute over the statute with only the permissible provisions. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). And as should be clear by now, "the 'normal rule' is *90 'that partial, rather than facial, invalidation is the required course.'" *Id.* at 508 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

1.

The majority has identified the most glaring flaw in the district court's severability analysis: the district court "gives relatively little attention to the intent of the 2017 Congress, which appears in the analysis only as an afterthought." When one takes this fact into account, there can be little doubt as to Congress's intent.

We have unusual insight into Congress's thinking because Congress was given a chance to weigh in on the ACA's future without an effective coverage requirement and it decided the ACA should remain in place. By zeroing out the shared-responsibility payment, the 2017 Congress left the coverage requirement unenforceable. If Congress viewed the coverage requirement as so essential to the rest of the ACA that it intended the entire statute to rise and fall with the coverage requirement, it is inconceivable that Congress would have declared the coverage requirement as it did. And make no mistake: Congress declared the coverage requirement. As the CBO found only a month before Congress passed the TCJA, "[i]f the [coverage requirement] penalty was eliminated but the [coverage requirement] itself was not repealed, the results would be very similar to" if the coverage requirement itself were repealed. 2017 CBO Report, *supra*, at 1. Regardless of lofty civic notions about people who follow the law for the sake of following the law, the objective evidence before Congress was that "only a small number of people" would obey the coverage requirement without the shared-responsibility payment. *Id.*; *cf. Dep't of Commerce*, 139 S. Ct. at 2565-66 (concluding people will "predictabl[y]" "violate their legal duty" when incentivized to do so). Congress accordingly knew that repealing the shared-

91 responsibility payment would have the same essential *91 effect on the ACA's statutory scheme as would repealing the coverage requirement.

Furthermore, as various amici highlight, judicial repeal of the ACA would have potentially devastating effects on the national healthcare system and the economy at large. *See, e.g.*, Amicus Br. of Am.'s Health Ins. Plans (discussing impact on health-insurance industry); Amicus Br. of 35 Counties, Cities, and Towns (discussing impact on municipalities); Amicus Br. of Bipartisan Econ. Scholars (discussing impact on economy); Amicus Br. of Am. Hosp. Ass'n et al. (discussing impact on hospitals). Regardless of whether the ACA is good or bad policy, it is undoubtedly *significant* policy. It is unlikely that Congress would want a statute on which millions of people rely for their healthcare and livelihoods to disappear overnight with the wave of a judicial wand. If Congress wanted to repeal the ACA through the deliberative legislative process, it could have done so. But with the stakes so high, it is difficult to imagine that this is a matter Congress intended to turn over to the judiciary.

2.

A second flaw in the district court's analysis is the great weight it places on the fact that Congress in 2017 did not repeal its statutory findings emphasizing the coverage requirement's importance to the guaranteed-issue and community-rate provisions. *See* 42 U.S.C. § 18091. The district court overread the significance of § 18091.

Congress enacted the findings in § 18091 to demonstrate the coverage requirement's role in regulating interstate commerce. When it invokes its commerce power, Congress routinely makes such findings to facilitate judicial review. *See United States v. Morrison*, 529 U.S. 598, 612 (2000) ("While 'Congress normally is not required to
92 make formal findings as to the substantial burdens that an activity has on interstate *92 commerce,' the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'" (alterations in original) (citation omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 562-63 (1995))). Indeed, § 18091(2), the subsection the district court focused its attention on, is entitled "Effects on the national economy and interstate commerce."

Section 18091 is not an inseverability clause, and nothing in its text suggests that Congress intended to make the coverage requirement inseverable from the remainder of the ACA. If Congress intended to draft an inseverability clause, it knew how to do so. *See* Office of Legislative Counsel, U.S. Senate, Senate Legislative Drafting Manual § 131(b) (1997) (explaining purpose of inseverability clause). *Compare id.* § 131(c) (providing as example of proper form for inseverability clause: "EFFECT OF INVALIDITY ON OTHER PROVISIONS OF ACT.—If section 501, 502, or 503 of the Federal Election Campaign Act of 1971 (as added by this section) or any part of those sections is held to be invalid, all provisions of and amendments made by this Act shall be invalid"), *with* § 18091(2)(H) ("The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market."). In fact, both the House and the Senate legislative drafting guides suggest that Congress should include an inseverability clause if it wants to make a statute inseverable because "[t]he Supreme Court has made it quite clear that invalid portions of statutes are to be severed 'unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not.'" Office of Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting

93 *93 Style § 328 (1995) (quoting *Chadha*, 462 U.S. at 931); *accord* Senate Legislative Drafting Manual, *supra*, at § 131(a). The absence of a genuine inseverability clause should be all but conclusive in assessing the legislature's intent.

Moreover, the argument that § 18091 is meant to signal Congress's intent that the coverage requirement be inseverable proves far too much. Section 18091 discusses the coverage requirement's importance to the entire federal healthcare regulatory scheme, including—along with the ACA—the Public Health Service Act ("PHSA") and the Employee Retirement Income Security Act ("ERISA"). *See* § 18091(2)(H) ("Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The [coverage] requirement is an essential part of *this larger regulation* of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market." (emphasis added)). It is not suggested that Congress intended a court to strike down the PHSA and ERISA if it found the coverage requirement unconstitutional. This would be especially implausible given the intensity of the debate over the coverage requirement's constitutionality from the get-go. *See NFIB*, 567 U.S. at 540 ("On the day the President signed the [ACA] into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida."). Yet in signaling that the coverage requirement is "an essential part of this larger regulation," Congress did not distinguish between the ACA and these prior statutes. Thus, § 18091 cannot reasonably be read to bear on the coverage requirement's severability.

3.

Another flaw in the district court's analysis is its suggestion that the Supreme Court concluded in *NFIB* and

94 *King v. Burwell*, 135 S. Ct. 2480 (2015), *94 that the coverage requirement is inseverable from the ACA's guaranteed-issue and community-rate provisions. The district court misconstrued these opinions. And even if the district court read them correctly, these opinions address the coverage requirement as enforced by the shared-responsibility payment. They give little valuable insight into the coverage requirement's role in the post-TCJA ACA.

In *NFIB*, only the dissenters addressed the coverage requirement's severability. The district court did not suggest it is bound by a Supreme Court dissent, and of course it is not. The district court instead took language from the other five Justices out of context to conclude that each of them viewed the coverage requirement as inseverable. But none of the language the district court cited addresses severability. *See NFIB*, 567 U.S. at 547-

48 (opinion of Roberts, C.J.) (discussing Government's argument that coverage requirement plays a role in regulating interstate commerce); *id.* at 597 (Ginsburg, J., dissenting in part) (same). Although the Justices' reasoning certainly suggests that they saw the coverage requirement as an important part of the statutory scheme as it existed in 2012, this does not mean the Justices found it "evident" that Congress would have preferred the entire statute to fall without the coverage requirement. *Alaska Airlines*, 480 U.S. at 684.

King likewise contains some helpful commentary about the ACA's original statutory scheme, but it does not discuss severability or otherwise control the severability analysis. The Court ruled in *King* that the ACA's tax credits were available to every eligible consumer regardless of whether the state in which a consumer lived established its own exchange or relied on the federally operated exchange. 135 S. Ct. at 2496. The coverage requirement came up because many more individuals would have been exempt from the shared-responsibility payment if tax credits were not available to them. *Id.* at *95 2493-95; *see also* § 5000A(e)(1)(A) ("No penalty shall be imposed . . . with respect to . . . [a]ny applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income . . .").⁶³ Noting the importance of the tax credits and coverage requirement (as enforced by the shared-responsibility payment) to the statutory structure, the Court concluded as a matter of statutory interpretation that Congress did not intend a scheme in which neither tax credits nor the coverage requirement were operating to bring low-risk consumers into the insurance pools. *See King*, 135 S. Ct. at 2492-94 ("The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. . . . It is implausible that Congress meant the [ACA] to operate in this manner.").

⁶³ Lest there be any confusion, the exemption at issue in *King* exempted individuals otherwise subject to the coverage requirement from the shared-responsibility payment; it did not exempt them from the coverage requirement itself. Exemptions from the shared-responsibility payment are listed in § 5000A(e)(1), whereas exemptions from the coverage requirement itself are listed in § 5000A(d).

The district court framed *King* as saying that Congress intrinsically tied the community-rate and guaranteed-issue provisions to the coverage requirement, meaning that those provisions must be inseverable from the coverage requirement. But the district court ignored a crucial aspect of the *King* Court's analysis: it explicitly discussed the coverage requirement as enforced by the shared-responsibility payment. *See id.* at 2493 (referring to the coverage requirement as "a requirement that individuals maintain health insurance coverage *or make a payment to the IRS*" (emphasis added)). Indeed, as the Court identified it, the crux of the problem with denying consumers tax credits in federal-exchange states was that doing so would make a large *96 number of individuals unable to afford insurance, thus exempting them from the shared-responsibility payment. *See id.* These widespread exemptions would, in turn, make the coverage requirement "ineffective." *Id.* *King* thus speaks far more to the shared-responsibility payment's role in the ACA's pre-TCJA statutory scheme than it does the coverage requirement's role in the statutory scheme.

Even to the extent the Court in *NFIB* or *King* meant to opine on the coverage requirement's severability, these cases were both decided before the TCJA. They thus give no insight into how the coverage requirement fits into the post-TCJA scheme. Whatever reservations the Court previously harbored about severing the coverage requirement, Congress plainly did not share those concerns when it zeroed out the shared-responsibility payment. Congress either concluded that healthcare markets under the ACA had reached a point of stability at which they no longer needed an effective coverage requirement,⁶⁴ or it chose to accept the negative side effects of effectively repealing the coverage requirement as a cost of relieving the burden it placed on applicable individuals. Either way, the legislative considerations have necessarily shifted.

64 See CBO Report, *supra*, at 1 (concluding that "[n]ongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade" if the coverage requirement were repealed); Amicus Br. of Blue Cross Blue Shield Ass'n at 24-27 (explaining that tax credits and other ACA provisions are driving enough consumers into insurance markets to make the coverage requirement unnecessary). -----

In sum, there was no reason for the district court to conclude that *any* provision in the ACA was inseverable from the coverage requirement. The majority does not necessarily disagree. I thus do not understand its
97 decision to remand when, even on the majority's analysis of the case, it could instead *97 reverse and render a judgment declaring only the coverage requirement unconstitutional.

V.

Limits on judicial power demand special respect in a case like this. For one thing, careless judicial interference has the potential to be especially pernicious when it involves a complex statute like the ACA, which carries such significant implications for the welfare of the economy and the American populace at large. For another, the legitimacy of the judicial branch as a countermajoritarian institution in an otherwise democratic system depends on its ability to operate with restraint—and especially so in a high-profile case such as the one at bar. The district court's opinion is textbook judicial overreach. The majority perpetuates that overreach and, in remanding, ensures that no end for this litigation is in sight.

I respectfully dissent.

[Supreme Court to Hear Obamacare Appeal](#)

The New York Times

June 26, 2020 Friday 08:41 EST

Copyright 2020 The New York Times Company All Rights Reserved

Section: US

Length: 1556 words

Byline: Adam Liptak and Abby Goodnough

Highlight: The Affordable Care Act, which has survived two major challenges in the Supreme Court, faces another test.

Body

The Affordable Care Act, which has survived two major challenges in the Supreme Court, faces another test.

WASHINGTON — The [Supreme Court](#) agreed on Monday to hear a third major challenge to the [Affordable Care Act](#), setting up likely arguments this fall in a case that could wipe out President Barack Obama's signature domestic achievement.

The court granted requests from Democratic state officials and House members who wanted to thrust the fate of the Affordable Care Act into the public eye just as Americans prepare to vote this November. The Supreme Court did not say when it would hear the case, but under its ordinary practices, arguments would be held in the fall and a decision would land in the spring or summer of 2021.

Democrats, who consider health care a winning issue and worry about possible changes in the composition of the Supreme Court, had urged the justices to act quickly even though lower courts had not issued definitive rulings. They wanted to focus political attention on the health law's most popular provisions — like guaranteed coverage for pre-existing medical conditions, emergency care, prescription drugs and maternity care — and to ensure that the case was decided while justices who had rejected earlier challenges to the law remain on the court.

In the meantime, the law remains almost entirely intact but faces an uncertain future.

The case the justices will hear was brought by Republican state officials, who argued that [when Congress in 2017 zeroed out the penalty](#) for failing to obtain health insurance, lawmakers rendered the entire law unconstitutional. The Trump administration [sided with the state officials](#), arguing that the rest of the health care law could not survive without a penalty for flouting the requirement that most Americans have health insurance, sometimes called the individual mandate.

A Federal District Court judge in Texas agreed, ruling that the entire law was invalid, but he postponed the effects of his ruling until the case could be appealed. In December, the United States Court of Appeals for the Fifth Circuit, in New Orleans, agreed that the mandate was unconstitutional but [declined to rule](#) on the fate of the remainder of the health law, asking the lower court to reconsider the question in more detail.

The Democratic states and the House, which intervened in the case to defend the health law, asked the Supreme Court to put its consideration of whether to hear the appeal on an unusually fast track. The court [turned down that request](#) in January.

Supreme Court to Hear Obamacare Appeal

Having lost that fight, the states and the House asked the court to hear their appeal in the ordinary course. They said Supreme Court review was warranted because part of a federal law had been held to be unconstitutional, which is often reason enough for the justices to agree to hear a case. They added that the lower courts' rulings had created doubt about the balance of the law.

"The uncertainty created by this litigation is especially problematic because individuals, businesses, and state and local governments make important decisions in reliance on the A.C.A.," [lawyers for the states](#) wrote. "Prolonged uncertainty about whether or to what extent important provisions of the A.C.A. might be invalidated makes these choices more difficult, threatening adverse consequences for American families, health care markets and the broader economy."

In urging the court to deny review, [the Trump administration said](#) that the justices should wait for a definitive ruling from the lower courts. "Immediate review is unwarranted in the case's present posture," the administration's brief said, "because the court of appeals did not definitively resolve any question of practical consequence."

One issue that could be particularly consequential for the election is the threat the case poses to the law's protections for people with pre-existing conditions. Those protections, which bar insurers from denying coverage to people with past or chronic illnesses or charging them more, [are popular with Americans of all political persuasions](#). Democrats made them a huge focus of their successful 2018 effort to retake the House, and will undoubtedly put them front and center again.

"Thanks to Donald Trump, pre-existing condition protections are on the chopping block this fall," Senator Ron Wyden, Democrat of Oregon, said in a statement on Monday shortly after the court's announcement. "Americans who count on their health care will hear loud and clear who is fighting to secure protections for pre-existing conditions, and who is trying to take them away."

Another of the law's provisions that might gain political salience this year, as the coronavirus becomes a serious concern, is its requirement that insurance plans cover vaccinations at no cost.

"This case is a stark life-and-death reminder how much is at stake this fall and what's on the ballot right now: Democrats must nominate the candidate whom they know can beat Trump and bring along the Senate, to ensure we can protect our health care for generations to come," Vice President Joseph R. Biden Jr. said in a statement.

The public has remained deeply divided on the health law since it [passed a decade ago this month](#), but in February, the law reached its highest favorability rating since the Kaiser Family Foundation started measuring public opinion shortly after the law's passage. The [latest Kaiser poll](#) found that 55 percent of the public supported it, and that repealing the law was no longer the top health care issue for Republican voters, a sharp contrast to 2016.

Of the remaining Democratic presidential candidates, Mr. Biden and Michael R. Bloomberg, a former mayor of New York, strongly support keeping and improving the Affordable Care Act. Senators Bernie Sanders of Vermont and Elizabeth Warren of Massachusetts favor doing away with it, and all private health insurance, and instead creating a "Medicare for all" program run by the federal government. Representative Tulsi Gabbard of Hawaii supports Medicare for all for everyone who wants it and wants to preserve private insurance as an option.

California's attorney general, Xavier Becerra, a Democrat, said the case, *California v. Texas*, No. 19-840, underscored the two sides' differing approaches to the Affordable Care Act.

"We should all be working to improve health care instead of ripping coverage away from those most in need," he said in a statement. "As Texas and the Trump administration fight to disrupt our health care system and the coverage that millions rely upon, we look forward to making our case in defense of the A.C.A. American lives depend upon it."

The Trump re-election campaign released a statement focused on the Democrats' "Bernie Sanders-inspired, socialist health care agenda," with no mention of the lawsuit or the Affordable Care Act.

Supreme Court to Hear Obamacare Appeal

Ken Paxton, a Republican and the attorney general of Texas, the state leading the lawsuit, issued his own statement, saying that the entire law was “unsupportable” now that the appeals court had agreed that the individual mandate was unconstitutional, adding, “I look forward to finally settling the matter before the U.S. Supreme Court.”

Robert Henneke, the lawyer representing two individual plaintiffs in Texas in the case, emphasized the growing support of some Democrats for a single-payer health system, saying in an interview, “The left will be demagoguing this lawsuit, but I think it’s a bit disingenuous, given that a large number of their elected officials have moved toward Medicare for all and single-payer health care.”

There was no immediate reaction from the Justice Department.

The Supreme Court has already ruled in two major cases challenging core provisions of the health law. In both, it left most of the law in place.

In 2012, [the court upheld](#) the law’s requirement that most Americans obtain insurance or pay a penalty, saying it was authorized by Congress’s power to assess taxes. The vote was 5 to 4, with Chief Justice John G. Roberts Jr. writing the controlling opinion, which was joined in its key section by the court’s four-member liberal wing.

In 2015, [the court said](#) the federal government can provide nationwide tax subsidies to help poor and middle-class people buy health insurance, rejecting an argument that the subsidies were available only in states that had created marketplaces, known as exchanges, to allow people who lack insurance to shop for individual health plans. A contrary ruling would have created havoc in the insurance markets and undermined the law.

The vote was 6 to 3, with Chief Justice Roberts and Justice Anthony M. Kennedy joining the court’s four more liberal members to form a majority.

[Justice Kennedy retired in 2018](#), but the remaining members of the majorities in the two cases are still on the court.

The number of uninsured Americans under 65 decreased by [18.6 million](#) from 2010, when the health law was passed, to 2018. Most of them gained insurance through expanded Medicaid, the government insurance program for the poor. Others got coverage through new private insurance options, often with subsidies to help cover the cost, or, for adults under 26, through their parents’ health plans.

PHOTO: In 2015, the Supreme Court ruled that the federal government could provide tax subsidies for the purchase of health insurance. (PHOTOGRAPH BY DOUG MILLS/THE NEW YORK TIMES) (A15)

Load-Date: July 14, 2020

End of Document

Pagination

* F.3d
** BL

Majority Opinion >

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SHARONELL FULTON; CECELIA PAUL; TONI LYNN SIMMS-BUSCH; CATHOLIC SOCIAL SERVICES, Appellants
v. CITY OF PHILADELPHIA; DEPARTMENT OF HUMAN SERVICES FOR THE CITY OF PHILADELPHIA;
PHILADELPHIA COMMISSION ON HUMAN RELATIONS SUPPORT CENTER FOR CHILD ADVOCATES;
PHILADELPHIA FAMILY PRIDE (Intervenors in D.C.)

No. 18-2574

November 6, 2018, Argued April 22, 2019, Opinion Filed

Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil Action No. 2-18-cv-02075). District Judge: Honorable Petrese B. Tucker.

Stephanie H. Barclay, Nicholas R. Reaves, Mark L. Rienzi, Lori H. Windham (Argued), Becket Fund for Religious Liberty, Washington, DC, Nicholas M. Centrella, Conrad O'Brien, Philadelphia, PA, Counsel for Appellants.

Marcel S. Pratt, City Solicitor, Diana Cortes, Chair, Litigation Group, Jane Lovitch Istvan (Argued), Chief Deputy Solicitor, Appeals, Eleanor N. Ewing, Chief Deputy City Solicitor, Affirmative & General Litigation, Elise M. Bruhl, Benjamin H. Field, Schaundra Oliver, Michael W. Pfautz, Philadelphia, PA, Counsel for Appellees.

David J. Hacker, Office of Attorney General of Texas, Office of Special Litigation, Austin, TX, Counsel for Amicus Appellants, State of Missouri, State of Nebraska, State of Oklahoma, State of Alabama, State of Arkansas, State of Louisiana, State of Texas, Commonwealth of Kentucky.

John J. Bursch, Bursch Law, Caledonia, MI, David A. Cortman, Rory T. Gray, John M. Sharp, Kristen K. Waggoner, Alliance Defending Freedom, Lawrenceville, GA, Counsel for Amicus Appellants, Alliance Defending Freedom, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, Focus on the Family.

William Haun, Shearman & Sterling, Washington, DC, Counsel for Amicus Appellant, Jewish Coalition for Religious Liberty.

Miles Coleman, Nelson Mullins Riley & Scarborough, Greenville, SC, Counsel for Amicus Appellants Mike Enzi, Roy Blunt, John Boozman, Tom Cotton, Ted Cruz, Steve Daines, Tim Scott, James M. Inhofe, James Lankford, James E. Risch, Mike Kelly, Robert Aderholt, Jim Banks, Lou Barletta, Diane Black, Kevin Brady, Kevin Cramer, Jeff Duncan, Neal P. Dunn, Matt Gaetz, Glenn Grothman, Andy Harris, Jody B. Hice, Randy Hultgren, Walter B. Jones, Steve King, Doug Lamborn, Billy Long, Barry Loudermilk, Tom Marino, Mark Meadows, Ralph Norman, Pete Olson, John Ratcliffe, Dana Rohrabacher, Todd Rokita, Keith Rothfus, Steve Russell, Steve Scalise, Christopher Smith, Randy K. Weber, Roger Williams.

Andres M. Picciotti-Bayer, Catholic Association Foundation, Washington, DC, Counsel for Amicus Appellants, Former

Foster Children & Foster Parents; Catholic Association Foundation.

Leslie Cooper (Argued), James D. Esseks, American Civil Liberties Union, New York, NY, Fred T. Magaziner, Catherine V. Wigglesworth, Dechert, Philadelphia, PA, Mary Catherine Roper, Molly M. Tack-Hooper, American Civil Liberties Union of Pennsylvania, Philadelphia, PA, Counsel for Intervenor-Appellees, Philadelphia Family Pride, Support Center for Child Advocates.

Alexander J. Luchenitser, Richard B. Katskee **[**2]**, Americans United for Separation of Church & State, Washington, DC, Counsel for Amicus Appellee Americans United for Separation of Church & State.

Steven M. Freeman, David L. Barkey, Melissa Garlick, Amy E. Feinman, Anti-Defamation League, New York, NY, M. Duncan Grant, Alexander L. Harris, Pepper Hamilton, Philadelphia, PA, Counsel for Amicus Appellees Anti-Defamation League of Philadelphia, Asian Pacific American Advocates, Bend the Arc a Jewish Partnership for Justice, Hindu American Foundation, Interfaith Alliance Foundation, Japanese American Citizens League, Jewish Social Policy Action Network, Jewish Women International, Keshet, Muslim Advocates, National Council of Jewish Women, People for the American Way Foundation, Sikh Coalition, South Asian Americans Leading Together, Rabbinic Call for Human Rights.

Julie Wilensky, Shannon P. Minter, Catherine Sakimura, National Center for Lesbian Rights, San Francisco, CA, Counsel for Amicus Appellees, National Center for Lesbian Rights, Civil Rights Education and Enforcement Center, Disability Rights Advocates, Disability Rights Education and Defense Fund Inc., Equal Justice Society, GLBTQ Legal Advocates and Defenders, Legal Aid at Work, Impact Fund, National Association of the Deaf, National Federation of the Blind, Transgender Law Center.

Cathren I. Cohen, Marshall Currey Cook, Karen Loewy, Lambda Legal, New York, NY, Counsel for Amicus Appellees, Fosterclub, Garden State Equality, Gender and Sexuality Development Clinic of Children's Hospital of Philadelphia, Human Rights Campaign, Lambda Legal Defense & Education Fund Inc., Mazzone Center, National LGBTQ Task Force, Pennsylvania Youth Congress Foundation, The Trevor Project, True Colors Fund.

Maura Healey, Attorney General of the Commonwealth of Massachusetts, Elizabeth N. Dewar, State Solicitor, Abigail B. Taylor, Angela R. Brooks, Genevieve C. Nadeau, Office of Attorney General of Massachusetts, One Ashburton Place, McCormack Building 20th Floor Boston, MA, Counsel for Amicus Appellees State of California, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Illinois, State of Iowa, State of Maine, State of Maryland, State of Minnesota, State of New Jersey, State of New York, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Washington, Commonwealth of Massachusetts.

Jeffrey S. Trachtman, Norman C. Simon, Tobias B. Jacoby, Jason M. Moff, Elise Funke, Kramer Levin Naftalis & Frankel, New York, NY, Counsel for Amicus Appellees Rev. Lavonne Althouse, Dr. Kharma Amos, Rev. Robert Burke, Dr. Randy Bush, Central Atlantic Conference of United Church of Christ, Central Atlantic Conference of American Rabbis, Covenant Network of Presbyterians, Dr. Beverly Dale, Dr. Janet Edwards, Rev. Jean Erb, Evangelical Lutheran Church in American, Rev. Margaret Diane Fisher, Friends for Lesbian Gay Bisexual Transgender and Queer Concerns; Rev. Phillip Geliebter, Rev. Michael Giansiracusa, Rev. Hilary Greer, Rev. Sara Hale, Erin Hirsh, Melford Holidand, Rev. Rebecca Irwin-Diehl, **[**3]** Dr. Elizabeth Kaeton, Rev. Catherin Kerr, Mary Kisner, Dr. Vincent Kolb, Lutherans for Full Participation; Men of Reform Judaism, Rev. Jeffrey Miller, More Light Presbyterians, Muslims for Progressive Values, Rev. Bill Neely, Linda Noonan, Penn Central Conference of United Church of Christ, Penn Northeast Conference of the United Church of Christ, Penn West Conference of United Church of Christ, Pennsylvania Southeast Conference of United Church of Christ, David Pickett, Rev. William Podobinski, Reconciling Works, Reconstructionist Rabbinical Association, Religious Institute, Serena Rice, Rev. Michael Ruk, Michele Schenk, Rev. Matthew Simpson, Stated Clerk of the General Assembly of Presbyterian Church, Megan Sutker, Stephanie Anne Thompson, Union for Reform Judaism, Unitarian Universalist Association, Rev. Naomi Washington-Leapheart, Amy Welin, Dr. Traci West, Women of Reform Judaism, Rev. Joan Wylie.

Justin Goodyear, Wilmer Cutler Pickering Hale and Dorr, New York, NY, Elizabeth Mitchell, Emily L. Stark, Lauren J. Schreur, Wilmer Cutler Pickering Hale and Dorr, Washington, DC, Counsel for Amicus Appellees Child Welfare League, National Association of Social Workers, North American Council of Adoptable Children, Voice for Adoption.

Joshua A. Matz, Kaplan Hecker & Fink, New York, NY, Counsel for Amicus Appellees Caroline Mala Corbin, Frederick Gedicks, Richard C. Shragger, Micah Schwartzman, Elizabeth Sepper, Nelson Tebbe.

Kendyl T. Hanks, Greenberg Traurig, Austin, TX, Counsel for Amicus Appellees Children's Rights, Barton Child Law & Policy Center, Emory Law School, Center for Children & Youth Justice, Center for Children's Advocacy, Center for the Study of Social Policy, Center on Children and Families, Children and Family Justice Center, Children's Action Alliance, Children's Advocacy Institute, Children's Defense Fund-New York, Children's Law Center of California, Children's Law Center of Kentucky, Children's Law Center of Minnesota, Coalition for Juvenile Justice, Columbia Legal Services; First Star, Inc., Florida's Children First, Inc., Harvard Law School Child Advocacy Program, Juvenile Law Center, Lawyers For Children, Legal Counsel for Youth and Children, Legal Services for Children, Professor Bruce A. Boyer, Professor Michael J. Dale, National Center for Youth Law, Nebraska Appleseed, New Mexico Child Advocacy Network, Partners for Our Children, Pegasus Legal Services for Children, Rutgers School of Law Children's Justice Clinic, University of Miami Children & Youth Law Clinic, Youth Law Center.

Philip E. Karmel, Bryan Cave Leighton Paisner, New York, NY, Counsel for Amicus Appellees, Family Equality Council, COLAGE.

Before: AMBRO, SCIRICA, and RENDELL, Circuit Judges.

AMBRO

[*146] AMBRO, Circuit Judge

A reporter from the *Philadelphia Inquirer* informed the City of Philadelphia's Department of Human Services in March 2018 that two of its agencies would not work with same-sex couples as foster parents. Human Services investigated this allegation, which it considered a violation of the City's anti-discrimination laws. When the agencies **[**4]** confirmed that, because of their religious views on marriage, they would not work with gay couples, Human Services ceased referring foster children to them. One of those agencies, Catholic Social Services (sometimes abbreviated to "CSS"), brought this action claiming that the City has violated its rights under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, as well as under Pennsylvania's Religious Freedom Protection Act. It seeks an order requiring the City to renew their contractual relationship while permitting it to turn away same-sex couples who wish to be foster parents. CSS sought preliminary injunctive relief to this effect from the District Court. When it denied the request after a three-day hearing, *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661 (E.D. Pa. 2018), CSS appealed.

Our question is not whether the City or CSS has behaved reasonably. Nor is our task to mediate a mutually agreeable compromise between the parties.¹ It is to determine **[*147]** whether the City's actions were lawful. Did it have the authority to insist, consistent with the First Amendment and Pennsylvania law, that CSS not discriminate against same-sex couples as a condition of working with it to provide foster care services? Or, inversely, has CSS demonstrated that the City transgressed fundamental guarantees of religious liberty?

At this stage and on this record, we conclude that CSS is not entitled to a preliminary injunction. The City's non-discrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy. *See Emp't Div. v. Smith*, 494 U.S. 872, 877-78, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). It has failed to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill

will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation. Thus we affirm.

I. Background

Catholic Social Services is a religious non-profit organization affiliated with the Archdiocese of Philadelphia that provides foster care services in Philadelphia. Created in 1917 as the Catholic Children's Bureau, it is part of a tradition of caring for children in need that stretches back even further, to the yellow fever outbreak of 1797. As an affiliate of the Catholic Church, CSS sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry. When the Catholic Children's Bureau was founded, foster care was handled on a private basis, but over the following century that changed. Today that care is comprehensively regulated both by the Commonwealth of Pennsylvania and by the City of Philadelphia.

The Commonwealth, the City, and the private foster care agencies each play a role in the Philadelphia foster care system. State regulations set the criteria people or families must meet to become foster parents, as well as the duties of both foster parents and foster care agencies. See 55 Pa. Code § 3700.62 *et seq.* Those agencies then develop relationships with individual foster families, [**5] which begin when a family approaches an agency seeking to become foster parents. It must evaluate the applicants under the Commonwealth's criteria to determine whether they would be suitable candidates. See 23 Pa. Cons. Stat. § 6344(d) ; 55 Pa. Code § 3700.64 . One criterion concerns the "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationship, especially as they might affect a foster child." 23 Pa. Cons. Stat. § 6344(d)(2)(iv) ; 55 Pa. Code § 3700.64(b)(1) .

When a child in need of foster care comes into the City's custody, Human Services refers that child to one of the foster care agencies with which it has a contractual relationship. Once the City refers a child to an agency, that agency selects an appropriate foster parent for the child, although Human Services can oppose a child's placement with a particular foster parent if necessary.

At the outset of this litigation, the City of Philadelphia had contracts with 30 foster care agencies, including CSS. These are one-year contracts renewed on an annual basis. Agencies are compensated by the City for their services; CSS's contract provided for a *per diem* rate for each child [*148] placed in one of its affiliated foster homes. This payment did not cover its full expenses, meaning that CSS operated at a loss. The contract required it to certify its foster parents in accord with state regulations, but did not otherwise impose conditions on the certification process. It did, however, include language prohibiting CSS from discriminating due to race, color, religion, or national origin, and it incorporated the City's Fair Practices Ordinance, which in part prohibits sexual orientation discrimination in public accommodations.

This last requirement, and the parties' differing understandings of it, led to this controversy. CSS takes the position that it cannot certify a same-sex married couple as foster parents consistent with its religious views. As an affiliate of the Catholic Church, CSS adheres to the belief that marriage is between a man and a woman. It is not unwilling to work with LGBTQ individuals as foster parents. However, state regulations require it to consider an applicant's "existing family relationships" as part of the certification process. In applying this criterion, CSS will only certify foster parents who are either married or single; it will not certify cohabitating unmarried couples, and it considers all same-sex couples to be unmarried. So far as the record reflects, no same-sex couples have approached CSS seeking to become foster parents.

On March 9, 2018, a reporter from the *Philadelphia Inquirer* called Human Services and stated that two of the City's foster care agencies, CSS and Bethany Christian Services, would not work with same-sex couples as foster parents. The *Inquirer* published an article to this effect on March 13, 2018. In response, the Commissioner of Human Services, Cynthia Figueroa, called officials at both CSS and Bethany Christian asking if this report was true. Both organizations confirmed the report. James Amato, the Secretary of CSS, told Commissioner Figueroa that his [**6] agency would not certify same-sex couples because it was against the Church's views on marriage and, when told this was discrimination, replied that he was merely following the teachings of the Catholic Church. Commissioner Figueroa then called a number of other foster care agencies asking whether they had similar policies; none did. All but one of the

other agencies Figueroa called were religiously affiliated. As for the one secular agency, she testified that she had a "good relationship" with its CEO.

Shortly thereafter, Amato attended a meeting with Figueroa in an unsuccessful attempt to resolve the impasse. At this meeting, Amato invoked CSS's hundred-year history of providing services to the City. Figueroa responded by noting that times had changed over the course of that relationship, that women and African-Americans did not have the same rights when it started, and that she herself would likely not have been in her position a century earlier. Figueroa, who is Catholic and Jesuit-educated, also remarked to Amato that it would be great if CSS could follow the teachings of Pope Francis. Amato later testified that Figueroa specifically stated that CSS should follow Pope Francis as opposed to the Archdiocese of Philadelphia or its Archbishop Charles J. Chaput; Figueroa denied mentioning anyone other than Pope Francis. Figueroa also indicated to Amato that the matter had the attention of the highest levels of City government, by which she testified she meant herself, her chain of command, and ultimately Mayor James Kenney. She also testified that prior to this meeting she spoke briefly with the Mayor; she told him that she was working to address the issue and would brief him after more decisions had been made.

[*149] Immediately after his meeting with Figueroa, Amato received a phone call from a representative of Human Services who informed him that it would no longer refer new foster children to CSS, a policy known as an "intake freeze."² Figueroa testified that she implemented the freeze because of her serious concern that CSS's relationship with Human Services might end in the near future. Given the preference for stability in placing foster care children, she did not want to send any new children to an agency they might well have to leave in a matter of months. This was not the first time Human Services had instituted an intake freeze out of a concern that it might not be able to continue working with a given agency. The freeze nonetheless did not affect children already placed with CSS.

Nor did it affect other aspects of CSS's relationship with the City. Family foster care is only one component of Philadelphia's framework for at-risk children. The City also employs private agencies to operate "congregate care" facilities, or group homes, for children in state custody who have not been assigned to a foster family for one reason or another. And it partners with "Community Umbrella Agencies" that work with children in the community to address problems in their home environment that might prevent them from remaining **[**7]** at home. CSS operates as a congregate care provider and a Community Umbrella Agency, and its services in those capacities were not affected by the intake freeze or any subsequent developments in this dispute pertaining to foster care. Indeed, in each unrelated area it continues working with the City to this day.

On several occasions Human Services granted exceptions to the intake freeze where there were particularly strong reasons why CSS would be the best placement for an individual child—for example, if one of that child's siblings had already been placed with a CSS family. It does not appear that any exemption requests were denied.

Meanwhile, on March 15, 2018, two days after the *Inquirer* article, the City Council passed a resolution authorizing the Philadelphia Commission on Human Relations to "investigate Department of Human Services' policies on contracting with social services agencies that . . . discriminate against prospective LGBTQ foster parents." The resolution stated that "the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom," and declared that any "agency which violates City contract rules in addition to the Fair Practices Ordinance should have their contract with the City terminated with all deliberate speed." The following day (March 16), lawyers for the Commission wrote to CSS with a battery of questions regarding its policies about working with same-sex couples or LGBTQ individuals. It responded on April 16, 2018, challenging both the legal basis for what it termed the "City's unlawful suspension" of its contract and the Commission's jurisdiction over the matter. Centrally, CSS argued that its screening of would-be foster parents was not a public accommodation and hence not subject to the Fair Practices Ordinance.

Lawyers from the City wrote back separately on the jurisdictional and substantive points on May 7, 2018. As to substance, the City asserted that its contract with CSS had not been formally suspended, and that **[*150]** it did not require any referrals to that agency. Therefore the City could not possibly have breached the contract by suspending referrals. The letter noted several provisions of the contract that, it argued, forbade CSS's policy of discrimination.

After setting out the City's legal interpretation of the contract, the letter stated its plan going forward:

Please also note that CSS's current contract expires on June 30, 2018, and the City is under no legal obligation to enter into a new contract for any period thereafter. We are hopeful that we can work out any differences before then, but please be advised that—except where the best interests of a child demands otherwise—the City does not plan to agree to any further referrals to CSS, and the City intends to assist with the transition of foster families to other agencies, absent assurances that CSS is prepared to adhere to its contractual obligations and, in implementing its City contract, to comply with all applicable laws, including those [**8] related to non-discrimination. We believe our current contract with CSS is quite clear that this is our right, but please be advised that any further contracts with CSS will be explicit in this regard.

The letter underscored "respect [for CSS's] sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services." It stressed the importance of equality as "both a legal requirement, and an important City policy and value that must be embodied in our contractual relationships." In addition, the City reaffirmed that it did not want to see its "valuable relationship with CSS . . . come to an end," but instead hoped that CSS would agree to comply going forward with the terms of the Fair Practices Ordinance.

As to jurisdiction, the City further asserted that foster care is a public accommodation, triggering both the Ordinance's mandate and the Commission's jurisdiction. The City requested a response to the questions in its March 16 letter within 10 days and threatened subpoenas if CSS did not comply. The latter responded by filing this lawsuit, alleging 16 causes of action against the City, Human Services, and the Human Relations Commission. Three individuals who had worked with CSS as foster parents—Sharonell Fulton, Cecilia Paul,³ and Toni Lynn Simms-Busch—were also listed as plaintiffs.⁴ On June 5, 2018, [**151] plaintiffs moved for a temporary restraining order and preliminary injunction. Their proposed order would have required the City to "resume providing foster care referrals to [CSS] and permitting children to be placed with the foster families it has certified without delay," to "rescind its prior directive prohibiting any foster care referrals to [CSS,] . . . to resume all dealings with [it] on the same terms as they had proceeded prior to March 2018," and also to "resume and to continue operating under the current Contract, without breach, termination, or expiration, or to enter into a new Contract identical in all material respects to the current Contract, while this matter remains pending." Doc. #13-1 to *Fulton et al. v. City of Philadelphia et al.*, No. 2:18-cv-02075-PBT (E.D. Pa. 2018). (As noted below, that contractual arrangement has lapsed in any event.)

The District Court promptly held a hearing on plaintiffs' motion for preliminary injunctive relief. The hearing, which spanned three days, included testimony from plaintiffs Simms-Busch, Paul, and Fulton, as well as from Amato,⁵ Deputy Commissioner of Human Services Kimberly Ali, Commissioner Figueroa, and Frank Cervone, a child advocate who testified as an expert witness.⁶ (It was after this hearing that lawyers for the City informed the Court that it had resumed foster care operations with Bethany Christian when the latter agreed to cease discriminating against same-sex couples.)

The District Court denied the application for preliminary injunctive relief in a memorandum opinion, and plaintiffs appealed the same day. They argue to us that the District Court wrongly held that [**9] they were not likely to succeed on the merits of their Free Exercise, Establishment Clause, and Freedom-of-Speech claims, as well as under the Pennsylvania Religious Freedom Protection Act. Plaintiffs asked the District Court for injunctive relief pending appeal the following day, which it denied.

Plaintiffs—now appellants—also sought from our Court emergency injunctive relief pending appeal under Federal Rule of Appellate Procedure 8 . We denied the motion by order.

Finally, appellants filed an emergency application to the Supreme Court for an injunction pending appeal or an immediate grant of *certiorari*. Justice Alito referred the application to the full Court, which denied it. *Fulton v. City of Philadelphia*, 139 S. Ct. 49 , 201 L. Ed. 2d 1127 , [2018 BL 313853], 2018 WL 4139298 (U.S. 2018).

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 1331 . Our jurisdiction to [*152] review the District Court's denial of a preliminary injunction stems from 28 U.S.C. § 1292(a)(1) .

Ordinarily, when reviewing a district court's ruling on a motion for preliminary injunctive relief, we review findings of fact for clear error, conclusions of law *de novo*, and the ultimate decision to grant or deny preliminary relief for abuse of discretion. *Reilly v. City of Harrisburg*, 858 F.3d 173 , 176 (3d Cir. 2017). Because this case implicates First Amendment interests, however, we do not rely on the normal clear-error standard for factual review, but instead conduct an independent examination of the record as a whole. *Brown v. City of Pittsburgh*, 586 F.3d 263 , 268-69 (3d Cir. 2009). Thus we defer to the District Court's factual findings only insofar as they concern witness credibility. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144 , 156-57 (3d Cir. 2002).

When evaluating a motion for preliminary injunctive relief, a court considers four factors: (1) has the moving party established a reasonable likelihood of success on the merits (which need not be more likely than not); (2) is the movant more likely than not to suffer irreparable harm in the absence of preliminary relief; (3) does the balance of equities tip in its favor; and (4) is an injunction in the public interest? *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 , 20 , 129 S. Ct. 365 , 172 L. Ed. 2d 249 (2008); *Reilly*, 858 F.3d at 179 . If a plaintiff meets the first two requirements, the District Court determines in its sound discretion whether all four factors, taken together, balance in favor of granting the relief sought. *Id.*

III. Discussion

A. The Free Exercise Clause

CSS principally contends that the City's actions violated its rights under the Free Exercise Clause. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This prohibition applies to the States through the Fourteenth Amendment . *See Cantwell v. Connecticut*, 310 U.S. 296 , 303 , 60 S. Ct. 900 , 84 L. Ed. 1213 (1940). Per *Employment Division v. Smith*, 494 U.S. 872 , 877 , 110 S. Ct. 1595 , 108 L. Ed. 2d 876 (1990), the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires."

Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of doctrines it believes to be false, impose [**10] special disabilities on the basis of religious views of religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (internal citations and question marks omitted) (emphasis in original). Likewise, it forbids government acts specifically designed to suppress religiously motivated practices or conduct. *Id.* at 877-78 .

The Free Exercise Clause does not, however, "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252 , 263 n.3, 102 S. Ct. 1051 , 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in the judgment)). As Justice Felix Frankfurter stated nearly eighty years ago, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual [*153] from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Id.* at 879 (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586 , 594-95 , 60 S. Ct. 1010 , 84 L. Ed. 1375 (1940) (Frankfurter, J.)). Among other things, this means that religious or conscientious objections do not supersede the basic obligation to comply with generally applicable civil rights laws provided those laws are applied neutrally. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com'n*, 138 S. Ct. 1719 , 1727 , 201 L. Ed. 2d 35 (2018) ("Nevertheless, while . . . religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public

accommodations law."); *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694 n.24, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (observing that, under *Smith*, the Free Exercise Clause did not require public law school to grant religious exemption to its "all-comers" policy forbidding discrimination by student organizations).

CSS contends that the City's enforcement of its laws and policies was neither neutral nor generally applicable. It first argues that the City's reliance on the Fair Practices Ordinance, which prohibits discrimination on the basis of sexual orientation in public accommodations, is misplaced because evaluating prospective foster parents is not a public accommodation.⁷ The District Court disagreed and held that the Ordinance did apply to CSS. We need not address this issue, however, as the contract between CSS and the City expired on June 30, 2018. As a result, requiring the City to comply with the terms of that agreement is now moot. What remains is whether it may insist on the inclusion of new, explicit language forbidding discrimination on the ground of sexual orientation as a condition of contract renewal, or whether it must offer CSS a new contract that allows it to continue engaging in its current course of conduct.⁸

To support its claim that the City's proposed anti-discrimination clause is not permissible under *Smith*, CSS invokes **[**11]** cases where courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a **[*154]** specific religious group or otherwise impermissibly targeted religious conduct. *See, e.g., Masterpiece Cakeshop*, 138 S. Ct. 1719, 201 L. Ed. 2d 35; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). These cases, and similar decisions by our Court, clarify *Smith* by reaffirming that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application. Thus, a challenger under the Free Exercise Clause must show that it was treated differently *because of its religion*. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views.

The focus on different treatment of religious and secular conduct is clear in *Lukumi*, the font of this doctrine. There the City of Hialeah, Florida had adopted an ordinance prohibiting the slaughtering of animals except in certain recognized circumstances. The history of the law's adoption made plain, however, that this was no earnest piece of animal welfare legislation but rather an attempt to suppress the practice of Santeria, a fusion of traditional African religion and Catholicism that developed in Cuba in the Nineteenth Century and incorporates animal sacrifice in many of its rituals. *Lukumi*, 508 U.S. at 524. The emergency sessions that led to the ordinance, held immediately after a Santeria church first tried to open in town, were rife with unrestrained hostility. Council members referred to supposed Biblical prohibitions on animal sacrifice except for consumption and asked "What can we do to prevent the Church from opening?" *Id.* at 541. The audience cheered these remarks and taunted the president of the Church, plus the chaplain of the city police department called Santeria "an abomination to the Lord." *Id.* at 541-42.

Moreover, the ordinance itself, though ostensibly concerned with animal welfare, plainly reflected this hostility. Its restriction on animal killing was limited to "sacrifice," and was further limited to the context of "a public or private ritual or ceremony." *Id.* at 527. Although it did not apply if the killing was "for the primary purpose of food consumption," or if the animals were "specifically raised for food purposes," the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as would often happen in Santeria rituals. *Id.* at 527-28. As the Court noted, the "net result" of these definitions was that "few if any killings of animals are proscribed other than Santeria sacrifice. . . . Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. This "gerrymander" of the ordinance, *id.*, along with the striking hostility at the public meetings, left the Court with only "one conclusion: The ordinances had as their object the suppression of religion." *Id.* at 542.

Masterpiece **[**12]** *Cakeshop* featured similar demonstrations of religious animosity and differing treatment of religious conduct.⁹ Denver baker Jack Phillips refused to make a cake for a gay couple's wedding reception, citing his religious conviction that marriage is only the union of a man **[*155]** and a woman. Phillips believed that, were he "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, [it] would have been a personal endorsement and participation in the ceremony and relationship that they were entering

into." *Masterpiece Cakeshop*, 138 S. Ct. at 1724 . The couple sued under Colorado's public accommodations statute. The case was referred to the state's Civil Rights Commission, which concluded that Phillips had engaged in prohibited discrimination and that neither Phillips's religious free exercise nor his free speech rights were violated by applying this anti-discrimination law to him.

The Supreme Court ultimately reversed; while Colorado generally had the right to enforce its civil rights laws against Phillips, it was bound under the First Amendment to afford him a "neutral and respectful consideration." *Id.* at 1729 . Instead, the Commission expressed open hostility toward Phillips and his religion and treated him differently from others similarly situated because of that religion. The Court noted ambiguous expressions from commissioners that could be taken either as reflecting resentment toward Phillips's religious views or simply the uncontroversial principle that "a business cannot refuse to provide services based on sexual orientation, regardless of" those views. *Id.* ("One commissioner suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.' A few moments later, the commissioner restated the same position: 'If a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.'" (internal citations omitted).

These ambiguous statements were more sinister, however, in the context of another commissioner's naked hostility toward religion.

Freedom of religion and religion ha[ve] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id. This, the Court noted, disparaged Phillips's religion "in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." *Id.* By calling religion the "most despicable" way to justify hurting others, the comment also suggested that the commissioner thought Phillips's actions were worse *specifically because of* their religious character.

The inference **[**13]** that Phillips was treated worse because of his religion was bolstered by the Commission's different treatment of other bakers who refused to bake cakes bearing homophobic expressions. The state Civil Rights Division found that these actions did not violate the state's civil rights laws because the requested message was offensive in nature. *Id.* at 1730-31 . Thus it appeared that the state had "treated the other bakers' conscience-based objections as legitimate, but [Phillips's] as illegitimate—thus sitting in judgment of his religious beliefs themselves." *Id.* at 1730 .

Our Court's Free Exercise Clause jurisprudence in the wake of *Smith* and *Lukumi* likewise asks whether challengers have been treated worse than others who engaged in similar conduct because of their religious character. For example, in *Fraternal **[*156]** Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), we held unconstitutional the Newark Police Department's policy that officers could not have facial hair. The Department had granted exceptions to this policy due to medical need, but would not grant similar exceptions to Sunni Muslims whose religion forbade them to shave their beards. *Id.* at 360 . This was "sufficiently suggestive of discriminatory intent . . . to trigger heightened scrutiny[.]" *id.* at 365 , which the policy could not survive.

Similarly in *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the Borough of Tenafly had on its books an ordinance prohibiting the affixing of "any sign or advertisement, or other matter upon," among other things, telephone poles. *Id.* at 151 . In practice, this ordinance was almost never enforced, and it was common to see house number signs, lost animal signs, commemorative ribbons, holiday displays, wreaths, and various other fixtures on the town's telephone poles. But when Orthodox Jewish residents sought to erect an *eruv* by placing *lechis* on utility poles,¹⁰ the Borough refused to grant them a similar exemption and sought to enforce the ordinance. We held that the Borough thereby violated the Free Exercise Clause. Although the ordinance itself was general and neutral, such that *Smith* might apply, it had not been enforced evenhandedly. Instead, the Borough had an apparent practice of granting

ad hoc exceptions but refused to make one for the Orthodox Jews' religious practice. This system of discretionary exemptions called for strict scrutiny (meaning they must be justified by a compelling government interest and narrowly tailored to achieve that compelling interest), and the Borough's actions could not survive.

These cases have in common that religiously motivated conduct was treated worse than otherwise similar conduct with secular motives. The ordinance in *Lukumi* was pretzeled to prohibit only Santeria ritual sacrifices and no other animal killings, even those no more humane or necessary. In *Fraternal Order of Police* the City of Newark granted exemptions to its facial hair policy for medical reasons but not for religious ones. In *Tenafly* an ordinance virtually never enforced was exacted [**14] exclusively on the religious practice of Orthodox Jews. And in *Masterpiece* the comments of Commission members, along with the disparate treatment of other bakers' secular claims of conscience, raised suspicion that Phillips had been treated more harshly because the Commission found his religious views offensive.

The question in our case, then, is whether CSS was treated differently because of its religious beliefs. Put another way, was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, that question has a clear answer: no. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

As evidence that the City acted out of religious hostility, CSS first points to the City Council's resolution authorizing the Commission on Human Relations' inquiry, which stated that "Philadelphia has laws [**157] in place to protect its people from discrimination that occurs under the guise of religious freedom." But this comment falls into the grey zone identified by the Supreme Court in *Masterpiece*—a remark that could express contempt for religion or could merely state the well-established legal principle that religious belief will not excuse compliance with general civil rights laws. Unlike the commissioner in *Masterpiece* who suggested that religious justifications for discrimination are merely rhetorical, here City officials repeatedly emphasized that they respected CSS's beliefs as sincere and deeply held. The Commission's May 7, 2018 letter, for instance, stated that "[w]e respect your sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services." This is the kind of respectful consideration found lacking in *Masterpiece*, and nowhere in the record did the City depart from this respectful posture.

CSS next points to Commissioner Figueroa's statements during her meeting with Amato that "it would be great if we could follow the teachings of Pope Francis." Taken out of context, some might think this remark improper, as it has clear religious overtones. But context is important: the comment was made during a negotiation attempting to find a mutually agreeable solution to this controversy. In that light, Figueroa's statement is best viewed as an effort to reach common ground with Amato by appealing to an authority within their shared religious tradition. The First Amendment does not prohibit government officials working with religious organizations in this kind of partnership from speaking those organizations' language and making arguments they may find compelling from within their own faith's perspective. And though these attempts to persuade CSS were ultimately unsuccessful, the record does not suggest that the City then sought to punish [**15] it for this disagreement.

CSS also argues that Commissioner Figueroa's decision to call mostly religious foster care agencies to ask if they had a similar policy is evidence that the City impermissibly targeted religion. But focusing her inquiries on religious agencies made sense: the only agencies Figueroa knew that refused to work with same-sex couples—CSS and Bethany Christian—did so for religious reasons. She had little reason to think that nonreligious agencies might have a similar policy. In fact, no other religious agency besides the two mentioned by the reporter had this policy, and Figueroa did call one secular agency as well.

Finally, CSS points to several public statements (the most recent of which occurred in 2015) made by Mayor Kenney critical of the Archdiocese of Philadelphia and of Archbishop Chaput. No doubt the Mayor expressed concerns toward the local Catholic Church, with a particular focus on the Church's stance on gay rights. But CSS's claim that he "prompted" Human Services' 2018 inquiry in this case misstates the record. Figueroa testified that she discussed the

issue with the Mayor prior to meeting with Amato and told the Mayor she would brief him once a decision had been made. There is nothing in the record before us suggesting that he played a direct role, or even a significant role, in the process.

The evidence CSS offers of religious bias or hostility appears significantly less than what was present in *Lukumi* or even in *Masterpiece*. Nor is there much to suggest that the City treated CSS differently because of its religion. It argues that it has been subject to selective enforcement, akin [*158] to that in *Tenafly* and *Fraternal Order of Police*, because the City adopted what CSS sees as novel legal arguments invented during this controversy to justify its actions against CSS. First, it claims that the City had never previously taken the position that the Fair Practices Ordinance applies to the screening of foster parents. But nothing before us suggests that the City took this position disingenuously or as a pretext for persecuting CSS. Its interpretation of the Ordinance, with which the District Court agreed, was hardly frivolous. Nor is it suspicious that the City had never previously taken this position: the record contains no evidence of any foster care agencies discriminating in ways that would violate the Fair Practices Ordinance prior to this controversy. The issue simply seems not to have come up previously.

Second, CSS argues that the City created what CSS calls a "must-certify policy" as a justification for the actions against it. The City's position, according to CSS, is that foster agencies must at least evaluate any applicants who come to them seeking to become foster parents rather than referring them to a different agency—although agencies would retain their discretion whether to certify an applicant as fit after evaluation. CSS perceives that the City would object to any referral, and it argues that this was a novel position adopted during this controversy. Amato [**16] testified that referrals from one agency to another are a routine way of finding the best fit for a given applicant. But the record here is unclear, both as to the City's current position and as to its policy prior to this case. The former is not necessarily an objection to any referrals at all so much as an objection to referrals made for an improper basis, *i.e.*, that the referring agency refuses to work with members of a protected class. As to the latter, the referrals Amato described may have only involved an agency suggesting that a family might prefer a different agency rather than refusing to work with a particular applicant outright. It would be consistent for the City to insist that, while agencies are free to inform applicants if they believe a different agency would be a better fit, they must leave the ultimate decision up to the applicants. In any case, this dispute does not indicate improper religious hostility on the City's part, only a routine regulatory disagreement.

Third, CSS argues that the City has acted inconsistently because Human Services will consider factors such as race or disability when placing foster children with foster parents. But there are many differences between CSS's behavior and the City's consideration of race or disability when placing a foster child. Most significantly, unlike CSS, Human Services never refuses to work with individuals because of their membership in a protected class. Instead it seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account.¹¹ And there is no instance in the record of Human Services knowingly permitting any other foster agency to discriminate against members of a protected class.

In sum, at the preliminary injunction stage CSS shows insufficient evidence that the City violated the Free Exercise Clause. The Fair Practices Ordinance has not been gerrymandered as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or [*159] the kind of animosity against religion found in *Masterpiece*. Here the City has been working with CSS for many decades fully aware of its religious character. It continues to work with CSS as a congregate care provider and as a Community Umbrella Agency even to this day despite CSS's religious views regarding marriage. And the City has expressed a constant desire to renew its relationship with CSS as a foster care agency if it will comply with the City's non-discrimination policies protecting same-sex couples.

CSS sees the City's non-discrimination policy as a pretext to exclude it from public life because of its religious character, and invokes *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017), in which the Supreme Court held unconstitutional rules excluding religious organizations from a public grant program. CSS's counsel at oral argument described the proposed contract language expressly forbidding discrimination on the basis of orientation as a "poison pill." Tr. of Oral Arg. at 61. CSS likewise states in its brief that "[t]he City [**17] thus proposes to change its foster care contract specifically to prohibit [CSS's] religious exercise." Appellant's Reply Br. at

3. But it can point to no specific evidence demonstrating that the City acted other than out of a sincere commitment to equality and non-discrimination.

CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements. That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs. If all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well. As the Intervenor's rightly state, the "fact that CSS's non-compliance with the City's non-discrimination requirements is based on its religious beliefs does not mean that the City's enforcement of its requirements constitutes anti-religious hostility." Intervenor's Br. at 22.

We thus believe the District Court did not abuse its discretion in finding that CSS has failed to demonstrate a sufficient likelihood of success on the merits of its Free Exercise Clause claim.

B. The Establishment Clause

CSS argues that the City's actions violated not only the First Amendment's Free Exercise Clause but also its Establishment Clause. "The clearest command of the . . . [Establishment] Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228 , 244 , 102 S. Ct. 1673 , 72 L. Ed. 2d 33 (1982). In this case, the two Religion Clauses largely run together: insofar as CSS alleges that it has been blacklisted for its religious beliefs, it is alleging both a Free Exercise violation (persecution for its religious views) and an Establishment Clause violation (the City declaring some religious viewpoints favored and others disfavored).

Insofar as the Establishment claim here is analytically independent of the Free Exercise claim, CSS contends the City has dictated its preferred religious viewpoint—that [*160] religious institutions should recognize the marriage of same-sex couples—and has conditioned CSS's future contract on adherence to that perspective. *See, e.g., Lee v. Weisman*, 505 U.S. 577 , 588 , 112 S. Ct. 2649 , 120 L. Ed. 2d 467 (1992) (prayer at public high school graduation violated the First Amendment , in part because the government not only chose the clergyman but imposed guidelines on the composition of his prayer). To support this claim it focuses primarily on Commissioner Figueroa's statement in her meeting with Amato [**18] that "it would be great if we could follow the teachings of Pope Francis." CSS sees this as the City telling it which religious leaders to follow and how to interpret their teachings, and then "punishing" it when it refused to comply. *See Appellant's Br.* at 38-40.

If the City truly were punishing CSS for refusing to adopt its preferred view of Catholic teaching, no doubt that would be an impermissible establishment of religion. But that is not what happened here. Human Services still works with CSS as a congregate care provider and a Community Umbrella Agency. It still works with Bethany Christian as a foster care agency, even though Bethany also maintains its religious opposition to same-sex marriage. This supports the view that CSS is not being excluded due to its religious beliefs. Indeed, the City has maintained its other relationships with CSS and has merely insisted that, if CSS wants to continue providing foster care, it must abide by the City's non-discrimination policy in doing so. There is simply no evidence that this is a veiled attempt to coerce or impose certain religious beliefs on CSS.

The District Court thus did not abuse its discretion in finding that CSS has not shown a likelihood of success on the merits of its Establishment Clause claim.

C. Freedom of Speech

In addition to its claims under the First Amendment's Religion Clauses, CSS also claims that the City has violated its freedom-of-speech rights in two different ways: by compelling it to speak in ways it finds disagreeable and by

retaliating against it for engaging in protected speech.

i. Compelled Speech

For over 70 years it has been axiomatic that the Free Speech Clause also protects the right not to speak. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 , 634 , 63 S. Ct. 1178 , 87 L. Ed. 1628 (1943) ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."). CSS claims it has been compelled to speak because Pennsylvania law imposes a requirement that, after evaluating prospective foster parents, an agency must "give written notice to foster families of its decision to approve, disapprove or provisionally approve the foster family." 55 Pa. Code § 3700.69 . Because the City forbids CSS from finding an applicant unqualified for a "discriminatory reason," including their sexual orientation or same-sex relationship, it is therefore forcing CSS "to make written endorsements that violate its sincere religious beliefs." Appellant's Br. at 53.

The problem with this argument is that the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government. In *Rust v. Sullivan*, 500 U.S. 173 , 111 S. Ct. 1759 , 114 L. Ed. 2d 233 (1991), the Supreme Court upheld conditions on government grants under Title X of the Public Health Service Act preventing grant programs from providing to their [*161] patients not only abortion services but also counseling or information about abortion. *Id.* at 193-200 . The Court held that this was not an impermissible restriction on speech or [**19] viewpoint discrimination because the government is free to fund only those programs that comport with its own view on matters such as abortion.

Agency for International Development v. Alliance for Open Society International, 570 U.S. 205 , 133 S. Ct. 2321 , 186 L. Ed. 2d 398 (2013) ("AOSI"), clarified this rule by holding that, while the government may place conditions on the use of public grant monies, it may not require grant recipients to adopt the government's views as their own. Thus, the requirement that organizations receiving money to combat HIV/AIDS not use that money "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. § 7631(e) , was acceptable under *Rust*. But the rule that no funds could be used by any organization "that does not have a policy explicitly opposing prostitution and sex trafficking," *id.* § 7631(f) (emphasis added), unconstitutionally compelled speech. It did not simply tell grant recipients how to use the government's money, but required them to affirm their own agreement with the government's policy—not unlike the requirement in *Barnette* that schoolchildren recite the Pledge of Allegiance.

CSS argues that it has been required to adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents, and that this violates the rule of *AOSI*. It contends that the speech in question is beyond the scope of its contract with the City because the requirement of performing evaluations comes from state law rather than from the contract itself, and because the compensation formula in the contract is not tied to the number of evaluations performed. We disagree. The speech here only occurs because CSS has chosen to partner with the government to help provide what is essentially a public service. The exact allocation of responsibility between the Commonwealth and the City, or the funding structure in the contract, does not change that. Neither *Rust* nor *AOSI*, nor any other relevant precedent, focused on the precise funding structure of the government contracts at issue. Instead, the cases focus on whether the condition pertains to the program receiving government money, as the City's non-discrimination requirements do here.

The City would violate *AOSI* if it refused to contract with CSS unless it officially proclaimed its support for same-sex marriage. But to the contrary, the City is willing to work with organizations that do not approve of gay marriage, as its continued relationship with Bethany Christian, its continued relationship with CSS in its other capacities, and its willingness to resume working with CSS as a foster care agency attest. It simply insists that CSS abide by public rules of non-discrimination in the performance of its public function under any foster-care contract. Therefore CSS's compelled speech claim does not at this time have a reasonable likelihood of success, and the District Court did not abuse its discretion in so holding.

ii. Speech Retaliation

To prevail on a speech retaliation claim, a plaintiff must show that it engaged in constitutionally [**20] protected activity, that the government responded with retaliation, and that the protected activity caused the retaliation. See *Eichenlaub v. Township of Indiana*, 385 F.3d 274 , 282 (3d Cir. 2004). This rule is a straightforward application of the First Amendment 's basic command that the government may [*162] not punish those who utter protected speech. Where the plaintiff is a government employee, additional considerations come into play, and the plaintiff's speech is only protected if it occurred in his or her capacity as a citizen rather than as a public employee. See *Garcetti v. Ceballos*, 547 U.S. 410 , 421 , 126 S. Ct. 1951 , 164 L. Ed. 2d 689 (2006). CSS argues that it provides foster care services as a religious ministry protected by the First Amendment and that it "engages in protected speech when it evaluates families" as potential foster parents. *Id* . It also asserts retaliation against it for statements made to the *Inquirer*, and for its subsequent statements to Human Services confirming that it would not work with same-sex couples as foster parents.

This claim is unlikely to succeed because the City's actions were regulatory rather than retaliatory in nature. The speech retaliation doctrine is implicated where the government has taken some action against an individual ostensibly unrelated to that individual's protected speech yet motivated by a desire to retaliate. See, e.g., *Eichenlaub*, 385 F.3d at 282-85 (approving retaliation claim alleging that the Township denied building permit applications to punish a landowner's speech at a public meeting). Here, on the contrary, the City has directly regulated the very conduct CSS claims is constitutionally protected: its refusal to evaluate or work with same-sex couples. Thus the City has "retaliated" against CSS only in the same way enforcement of any government regulation "retaliates" against those who violate it.

Insofar as CSS claims it was subject to retaliation for its statements to the *Inquirer* and to Human Services confirming that it engages in the discriminatory conduct to which the City objects, this too cannot support a valid retaliation claim. We do not read the City's actions as punishing CSS for those statements rather than for the discriminatory conduct itself. Once again, the District Court did not abuse its discretion in ruling that CSS has failed to establish a reasonable likelihood of success on its speech retaliation claim.

D. The Pennsylvania Religious Freedom Protection Act

CSS's final claim is under the Pennsylvania Religious Freedom Protection Act (RFPA), 71 Pa. Stat. Ann. § 2401 *et seq.* Similar in some ways to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, the RFPA generally provides that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability." It may do so, however, if it proves by a preponderance of the evidence that the burden both is "(1) [i]n furtherance of a compelling interest of the agency" and is "(2) [t]he least restrictive means of furthering the compelling interest." 71 Pa. Stat. Ann. § 2404 . "Substantially burden" is defined as an action that does any of the following: [**21]

- (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs[;]
- (2) Significantly curtails a person's ability to express adherence to the person's religious faith[;]
- (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion[;]
- (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

Id. § 2403 . CSS argues that all four forms of substantial burden exist here. Its argument as to each prong ultimately rests on this: CSS's foster care work is part of its [*163] religious ministry, its religious convictions prevent it from "endorsing" same-sex marriage, and under the City's policies it may not engage in its foster care ministry while abiding by its convictions. Thus, CSS must choose either endorsing a viewpoint that violates the tenets of its faith or ceasing its religious ministry of providing foster care.

Pennsylvania courts applying the RFPA scrutinize claims of religious burden to see whether the burdened activity is truly "fundamental to the person's religion." *See, e.g., Commonwealth v. Parente*, 956 A.2d 1065 , 1074 (Pa. Commw. Ct. 2008) ("Parente never testified that his activities . . . constitute 'activities which are fundamental to his religion' Rather, at best, Parente's testimony merely establishes that he engaged in these activities based upon his religious beliefs or that they flowed from a religious mission.").¹²

In *Ridley Park United Methodist Church v. Zoning Hearing Board Ridley Park Borough*, 920 A.2d 953 (Pa. Commw. Ct. 2007), for instance, the Pennsylvania Commonwealth Court held that a church was not entitled to a RFPA exemption from a local zoning code in order to operate a daycare center on its property. While the daycare center "aided in carrying out the Church's religious mission," it was not a "fundamental religious activity of a church." *Id.* at 960 . By analogy, "ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission." *Id.* Thus it appears that Pennsylvania courts consider an activity "fundamental to a person's religion" if it is an inherently religious activity as opposed to something that could be done either by a religious person or group or by a secular one. The parallel here is direct: caring for vulnerable children can flow from a religious mission, but it is not an intrinsically religious activity under Pennsylvania law.

It thus seems unlikely that the Pennsylvania courts would recognize a substantial burden on CSS's exercise of religion in this case. We have noted before, however, that this facet of RFPA jurisprudence "appears to create some tension between state and federal law," as the "Supreme Court has cautioned against making religious interpretations in the First Amendment context." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231 , 258 (3d Cir. 2008) (Scirica, J., concurring); *see also Smith*, 494 U.S. at 886-87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs . . . in the free exercise field . . . than it would be **[**22]** for them to determine the 'importance' of ideas . . . in the free speech field.").

Thus we make clear that even if we were to assume there is a substantial burden here, CSS is not likely to prevail on its RFPA claim because the City's actions are the least restrictive means of furthering a compelling government interest. It is black-letter law that "eradicating discrimination" is a compelling interest. *See Roberts v. U.S. Jaycees*, 468 U.S. 609 , 623 , 104 S. Ct. 3244 , 82 L. Ed. 2d 462 (1984). And mandating compliance is the least restrictive means of pursuing that interest. *See Hobby Lobby*, 573 U.S. at 733 ("The Government has a compelling **[*164]** interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); *see also E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 , 594 (6th Cir. 2018) (denying several alternative means of enforcing the government's interest in preventing discrimination against transgender employee in favor of simply enforcing the ban on that discrimination).¹³

CSS offers several reasons why the City has no compelling interest in enforcing the Fair Practices Ordinance here. First, it asserts that evaluating potential foster parents is not a public accommodation. Second, it calls the harm the City seeks to prevent speculative, citing *Brown v. Entertainment Merchants Association*, 564 U.S. 786 , 799-800 , 131 S. Ct. 2729 , 180 L. Ed. 2d 708 (2011), for the principle that "ambiguous proof" of speculative harms will not suffice to provide a compelling interest. Finally, it argues that the City cannot have a compelling interest in preventing it from discriminating because doing so will not increase the number of foster agencies willing to work with same-sex couples: either the City allows CSS to continue discriminating, in which case there are 29 agencies willing to work with those applicants, or it ceases operation altogether, in which case there will still be 29 agencies willing to work with those applicants.

These arguments miss the mark entirely. The government's interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do. And that interest is by no means limited to public accommodations as defined by the Fair Practices Ordinance. Thus, even if we were to assume that evaluating potential foster parents is not a public accommodation, the City would still have a compelling interest in adding a non-discrimination provision to future contracts.

Nor is the harm the City seeks to prevent speculative. *Brown* held that a law restricting violent video games, on the theory that they would make children become more violent, could not be sustained, in part due to the lack of sound empirical support for this theory. See 564 U.S. at 800-01. This has no application here, where the mere existence of CSS's discriminatory policy is enough to offend the City's compelling interest in anti-discrimination. CSS notes that no same-sex couples have ever—so far as the record reflects—approached it seeking to become foster parents. This is not surprising [**23] given the Philadelphia Archdiocese's well-known opposition to gay marriage. But this is beside the point. The harm is not merely that "gay foster parents will be discouraged from fostering." Appellant's Br. at 63. It is the discrimination itself.

So even if CSS could show a substantial burden on its religious exercise as defined by the RFPA, the City's actions appear to survive strict scrutiny. Thus the District [**165] Court did not abuse its discretion in determining that CSS has not established a reasonable likelihood of success on the merits of its RFPA claim.

E. Other Preliminary Injunction Considerations

We conclude, as the District Court did, that at the preliminary injunction stage and on the record before us, CSS is not reasonably likely to succeed on the merits of any of its claims. This alone defeats the request for a preliminary injunction. See *Reilly*, 858 F.3d at 179. In any event, we also agree with the District Court that CSS has not met the other factors considered for a preliminary injunction.

To prevail, CSS must show not only a reasonable likelihood of success but also that it is more likely than not to suffer irreparable harm without an injunction. It identified several alleged irreparable harms before the District Court, but on appeal it wisely focuses on the prospect that, without a contract from the City, it will go out of business. Arguably even this would be compensable through money damages. Cf. *Lehigh Valley Cmty. Mental Health Ctrs., Inc. v. Pa. Dep't of Human Servs.*, [2015 BL 351497], 2015 U.S. Dist. LEXIS 144717, at *3 (E.D. Pa. 2015) (finding that the threat of going out of business did not qualify as an irreparable injury). In any case, CSS has not met its burden of demonstrating that it is more likely than not to suffer this injury. Its congregate care and Community Umbrella Agency functions are unaffected, it has other foster care contracts with neighboring counties, and even as to its foster care services in Philadelphia CSS cites only to Amato's self-professed "guess" that it would have to cease those operations within months.

Even if CSS could establish both of the gatekeeping factors—likelihood of success on the merits and irreparable harm—neither the balance of the equities nor the public interest would favor issuing an injunction here. The District Court set out at length the City's interests in requiring CSS to abide by its non-discrimination policy, see *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. at 703-04, and we agree that the City's interests weigh substantially in its favor—particularly in ensuring that government services are open to all Philadelphians. Placing vulnerable children with foster families is without question a vital public service, no doubt why there are 29 other foster care agencies, including Bethany Christian, that provide this service. Deterring discrimination in that effort is a paramount public interest.

F. Conclusion

The City stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services. Under *Smith*, the First Amendment does not prohibit government regulation of religiously motivated [**24] conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while CSS may assert that the City's actions were not driven by a sincere commitment to equality but rather by antireligious and anti-Catholic bias (and is of course able to introduce additional evidence as this case proceeds), the current record does not show religious persecution or bias. Instead it shows so far the City's good faith in its effort to enforce its laws against discrimination.

Hence we hold that the District Court did not abuse its discretion in denying the motion for preliminary injunctive relief and affirm its thorough and well-reasoned decision.

fn 1

That being said, District Judge Tucker commented that she "would prefer that the [p]arties seek . . . some compromise to their current dispute without court intervention." *Id.* at 667 . We agree, especially given the long and constructive relationship between the parties.

fn 2

This intake freeze also affected Bethany Christian, although, as noted below, Bethany has since worked out an agreement with the City and has resumed receiving foster care referrals.

fn 3

Ms. Paul died during the pendency of this action. She fostered children for over 40 years, taking into her home more than 100 children, and personally adopting six. In 2015, the City of Philadelphia recognized her as the "Outstanding Foster Parent of the Year." Thomas Paul, adopted son of Ms. Paul, "believes he was raised by a living saint." Brief of *Amici Curiae* Former Foster Children and Foster Parents and the Catholic Association Foundation at 4.

fn 4

We have doubts whether the individual plaintiffs have standing to bring this complaint, as the City took no direct action against them. Any harms to the individual plaintiffs were the consequence of the City's actions against CSS. *See Kowalski v. Tesmer*, 543 U.S. 125 , 130 , 125 S. Ct. 564 , 160 L. Ed. 2d 519 (2004) (party seeking to assert the rights of others must show (1) a "close" relationship with the one who possesses the right, and (2) some "hindrance" to the possessor's ability to assert its own rights). But the issue of standing was not raised, and the limits on third-party standing are not a matter of our constitutional jurisdiction under Article III but rather "stem from a salutary 'rule of self-restraint.'" *Craig v. Boren*, 429 U.S. 190 , 193 , 97 S. Ct. 451 , 50 L. Ed. 2d 397 (1976) (*quoting Barrows v. Jackson*, 346 U.S. 249 , 255 , 73 S. Ct. 1031 , 97 L. Ed. 1586 (1953)). In any event, the individual plaintiffs claim only that the City violated the Constitution by taking action against CSS. Hence we may safely analyze this case solely in terms of whether CSS's rights have been violated.

fn 5

At the hearing, Amato mentioned a CSS policy of which the City had been previously unaware, namely that CSS required would-be foster parents to submit a so-called "pastoral letter" from a religious figure (of any faith or denomination) certifying that they were actively religious, regularly attended services, *etc.* The City took issue with this policy, arguing that it violated both CSS's contract with the City and the Establishment Clause of the First Amendment to the federal Constitution. CSS then informed the Court that, while it did not believe the "pastoral letter" requirement violated any applicable laws, it would abandon that requirement going forward "in order to eliminate any potential issue regarding how the parties would operate under a preliminary injunction."

fn 6

Plaintiffs contested the propriety of Cervone's testimony, as he had signed legal papers in the case on behalf of the Center for Child Advocates, an organization seeking to intervene in the case (ultimately successfully), and Cervone had not yet withdrawn that appearance. In any event his testimony is not important to the issues on appeal.

fn 7

CSS makes a similar argument toward what it calls the City's "must-certify" policy, which it claims was the second basis for the City's actions in addition to the Fair Practices Ordinance. CSS asserts that the City had never enforced such a policy before this dispute. The City, meanwhile, disclaims the policy's existence, and says that it was solely enforcing its longstanding rules against discrimination. But as noted above, because the existing contract between CSS and the City has expired, we need not address whether any "must-certify" policy was a sufficiently neutral, general rule to support the City's actions. (See below for a fuller discussion of the dispute over the "must-certify" policy as it relates to the City's motivation.)

fn 8

It should be noted that the remedy CSS seeks—an injunction forcing the City to renew a public services contract with a particular private party—would be highly unusual. CSS cites several affirmative action cases where courts granted equitable relief to government contractors, such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). But the injunctions in those cases merely forbade government entities from enforcing their express affirmative action policies going forward. See *id.* at 210. We have some doubt, therefore, that CSS could be entitled to the relief it seeks. We do not rest our decision on that ground, however, as it involves novel and complex questions of remedies law, and instead address the merits of CSS's claims.

fn 9

Unlike *Lukumi*, where the impermissible hostility toward Santeria was apparent during the adoption of the animal sacrifice ordinance, in *Masterpiece* it came out in the conduct of the officials charged with executing the law.

fn 10

An *eruv* is a ceremonially created space outside of the home wherein Orthodox Jews may engage in the otherwise proscribed activities of pushing and carrying objects on the Sabbath. This can be done by placing *lechis*, thin black strips made of hard plastic and nearly identical to the coverings on ordinary ground wires, on utility poles to mark the boundaries of the *eruv*. 309 F.3d at 152.

fn 11

The issue of race in foster care and adoption is notoriously thorny and complex, and is the subject of considerable scholarly literature. See, e.g., PACT: An Adoption Alliance, *Biracial, Multiracial, Interracial Identity in Adoption* (accessed March 11, 2019), <http://www.pactadopt.org/resources/biracial-multiracial-adoption-identity.html> (collecting scholarly articles).

fn 12

This is different than the federal Religious Freedom Restoration Act and Supreme Court jurisprudence, which does not delve into investigating a person's religious beliefs. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.").

fn 13

Note that this "strict scrutiny" test under RFPA is different from the strict scrutiny that would apply under *Lukumi*, *Fraternal Order of Police*, and *Tenafly* if Catholic Social Services were able to demonstrate religious targeting or enforcement disparities. In the latter case, we would examine not the general interest behind the City's anti-discrimination laws but the specific interest in the different enforcement of those laws against religious and secular

groups. *See Tenafly*, 309 F.3d at 172 (applying strict scrutiny to the Town's justifications for treating *lechis* differently from those violations of the ordinance it had long tolerated). That would be a more difficult burden for the City to bear than under the RFPA, where the question is simply the weight of the government's interest in enforcing its anti-discrimination laws generally.

Supreme Court to Hear Case on Gay Rights and Foster Care

The justices will consider whether a city may exclude a Catholic adoption agency from its foster care system because it refuses to work with gay couples.



By [Adam Liptak](#)

Feb. 24, 2020

WASHINGTON — The Supreme Court on Monday agreed to decide whether Philadelphia may exclude a Catholic agency that does not work with same-sex couples from the city's foster-care system.

The city stopped placements with the agency, Catholic Social Services, after a 2018 article in *The Philadelphia Inquirer* described its policy against placing children with same-sex couples. The agency and several foster parents sued the city, saying the decision violated their First Amendment rights to religious freedom and free speech.

A unanimous three-judge panel of the United States Court of Appeals for the Third Circuit, in Philadelphia, ruled against the agency. The city was entitled to require compliance with its nondiscrimination policies, the court said.

Leslie Cooper, a lawyer with the American Civil Liberties Union, said the Supreme Court's decision in the case would affect many families.

"This case could have profound consequences for the more than 400,000 children in foster care across the country," she said. "We already have a severe shortage of foster families willing and able to open their hearts and homes to these children. Allowing foster care agencies to exclude qualified families based on religious requirements that have nothing to do with the ability to care for a child such as their sexual orientation or faith would make it even worse."

In a Supreme Court brief, the agency agreed that the legal questions before the justices were enormously consequential.

"Here and in cities across the country, religious foster and adoption agencies have repeatedly been forced to close their doors, and many more are under threat," the brief said. "These questions are unavoidable, they raise issues of great consequence for children and families nationwide, and the problem will only continue to grow until these questions are resolved by this court."

The case, *Fulton v. City of Philadelphia*, No. 19-123, is the latest clash between anti-discrimination principles and claims of conscience. It is broadly similar to that of a Colorado baker who refused to create a wedding cake for a same-sex couple.

In 2018, the Supreme Court refused to decide the central issue in that case: whether businesses may claim exemptions from anti-discrimination laws on religious grounds. It ruled instead that the baker had been mistreated by members of the state's civil rights commission who had expressed hostility toward religion.

The foster care agency relied on the decision, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, in arguing that it too had been subjected to hostility based on anti-religious prejudice. It added that its free-speech rights would be violated were it forced to certify that same-sex couples are fit to be foster parents.

The city responded that the agency was not entitled to rewrite government contracts to eliminate anti-discrimination clauses.

"It has never been the case that religious entities, or entities with deeply held secular views, are constitutionally entitled to enter into government contracts and then defy any terms to which they object," the city's brief said. If the agency's "sweeping constitutional claims were accepted," the brief said, "they would cause mayhem in government contracting."

The agency asked the court to use the case to reconsider an important precedent limiting First Amendment protections for religious practices. The precedent, *Employment Division v. Smith* in 1990, ruled that neutral laws of general applicability could not be challenged on the ground that they violated the First Amendment's protection of the free exercise of religion.

The decision, arising from a case involving the use of peyote in Native American religious ceremonies, is unpopular among conservative Christians, who say it does not offer adequate protection to religion, and with some justices. Last year, the court's four

most conservative members — Justices Kavanaugh, Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch — signaled that they were open to reconsidering the decision.

The court is likely to hear arguments in the case in the fall, after its next term starts in October.

In a second case concerning religion, the court turned down a request that it decide whether Walgreens was entitled to fire a worker who refused to attend a training session on his Sabbath.

Justice Samuel A. Alito Jr., joined by Justices Clarence Thomas and Neil M. Gorsuch, issued a concurring opinion saying the court should in a future case consider how flexible employers must be in accommodating their workers' religious practices.

Title VII of the Civil Rights Act of 1964 requires employers to “reasonably accommodate” employees’ religious practice so long as they can do so “without undue hardship” on the company’s business. In 1977, in *Trans World Airlines v. Hardison*, the Supreme Court defined “undue hardship” expansively, ruling that it included any accommodation that imposed more than a “de minimis cost” on the employer.

Justice Alito wrote that the 1977 decision had employed questionable reasoning. “We should grant review in an appropriate case,” he wrote, “to consider whether *Hardison*’s interpretation should be overruled.”

The new case, *Patterson v. Walgreen Co.*, No. 18-349, was brought by Darrell Patterson, a Seventh-day Adventist whose faith required him not to work on Saturdays. Walgreens generally accommodated him but fired him for refusing a Saturday shift during what the company contended was an emergency.

The United States Court of Appeals for the 11th Circuit, in Atlanta, ruled for Walgreens under the 1977 decision, saying the company had done all the law required it to do.

“The undisputed facts show,” a unanimous three-judge panel of the court wrote in an unsigned decision, “that Walgreens offered Patterson reasonable accommodations that he either failed to take advantage of or refused to consider, and that the accommodation he insisted on would have posed an undue hardship to Walgreens.”

Majority Opinion >

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Clemente Avelino Pereida, Petitioner v. William P. Barr, Attorney General of the United States, Respondent

No. 17-3377

October 24, 2018, Submitted March 1, 2019, Filed

Petition for Review of an Order of the Board of Immigration Appeals.

For Clemente Avelino Pereida, Petitioner: David Victor Chipman, Raul F. Guerra, MONZON LAW, Lincoln, NE.

For William P. Barr, Attorney General of the United States, Respondent: Linda Y. Cheng, Trial Attorney, U.S. DEPARTMENT OF JUSTICE, N.W., Washington, DC; Carl H. McIntyre, U.S. DEPARTMENT OF JUSTICE, Civil Division, Office of Immigration Litigation, Ben Franklin Station, Washington, DC; Oil Oil, OIL, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

Before ERICKSON, BEAM, and GRASZ, Circuit Judges.

BEAM

[*1130] BEAM, Circuit Judge.

Clemente Avelino Pereida, a native and citizen of Mexico, petitions for review of the decision of the Board of Immigration Appeals (Board) affirming the Immigration Judge's (IJ) grant of the Department of Homeland Security's (DHS's) motion to pretermitt Pereida's cancellation of removal application. Pereida pleaded no contest to a Nebraska criminal attempt charge (Neb. Rev. Stat. § 28-201(1)(b)) arising from the use of a fraudulent social security card to obtain employment at National Service Company of Iowa, operating in rural Crete, Saline County, in violation of Nebraska Revised Statute § 28-608 (2008).¹ The determinative issue in this matter is whether Pereida's criminal attempt conviction qualifies as a crime involving moral turpitude (CIMT), making him ineligible for cancellation of removal. The criminal impersonation offense underlying Pereida's attempt conviction is a divisible statute with subsections, some of which qualify as CIMTs and one subsection that may not. Applying the modified categorical approach, it is not possible to ascertain which subsection formed the basis for Pereida's conviction. It is Pereida's burden to establish his eligibility for cancellation of removal and he thus bears the adverse consequences of this inconclusive record. Accordingly, because Pereida cannot establish that he was eligible for cancellation of removal, we uphold the Board's determination that he has not shown such eligibility. Thus, we deny Pereida's petition for review.

I. BACKGROUND

Pereida is a citizen of Mexico who entered the United States without authorization or inspection in, according to his application for cancellation of removal, approximately 1995. He has thus lived in the United States for an extended period of time and, according to the immigration record, has been gainfully employed, paid taxes and with his wife, raised his family (comprised of their three children) here. On August 3, 2009, DHS issued a Notice to Appear (NTA) charging Pereida with removability. Pereida admitted the factual allegations in the NTA and conceded the charge of removability, but in March 2011 filed an application for Cancellation of Removal and Adjustment of Status pursuant to 8 U.S.C. § 1229b(b)(1) . In August 2014, DHS filed a Motion to Pretermitt Pereida's application asserting that he had been convicted of a CIMT, which is a mandatory **[**2]** bar to his requested relief, given Pereida's no contest plea to a charge of attempted criminal impersonation

The IJ analyzed the substantive crime of criminal impersonation in Nebraska underlying Pereida's criminal attempt charge and held that the statute is divisible; that **[*1131]** Pereida was necessarily convicted under a subsection requiring the specific intent to defraud, deceive or harm; and thus Pereida's conviction under this statute constituted a CIMT. Having found Pereida's attempted criminal impersonation conviction to be a CIMT, the IJ additionally held that because the conviction was punishable by a maximum term of "not more than one year imprisonment," Neb. Rev. Stat. § 28-106(1) , it constituted a conviction "of an offense under subsection 1182(a)(2) [and] 1227(a)(2) ," barring Pereida from the relief requested, at least according to the IJ's analysis of 8 U.S.C. § 1229b(b)(1)(C) . The IJ's decision was reviewed by the Board, which did not go so far in its analysis.

The Board agreed that only three subsections under Nebraska Revised Statute § 28-608 qualified as CIMTs because each contained as a necessary element the intent to defraud or deceive, thus making the statute divisible. Under a modified categorical approach, the Board found no record as to which particular subsection of the statute Pereida was ultimately convicted of violating. This is where the Board ended its analysis. The Board noted that Pereida bore the burden of proving that his particular conviction did not bar relief. 8 U.S.C. § 1229a(c)(4) . Accordingly, the Board found that Pereida failed to carry his burden of proving that his conviction was not a CIMT, and that he was thus statutorily ineligible for cancellation of removal. Pereida petitioned this court for review of the Board's order, claiming that his conviction of attempted criminal impersonation does not fall within the definition of a CIMT. Pereida additionally claims that even if his Nebraska conviction qualifies as a CIMT, it falls within the petty offense exception available under 8 U.S.C. § 1182(a)(2)(A)(ii) .

II. DISCUSSION

We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) to review "constitutional claims or questions of law raised upon a petition for review." "We review the [Board's] factual determinations under a substantial-evidence standard and its legal conclusions de novo." Andrade-Zamora v. Lynch, 814 F.3d 945 , 948 (8th Cir. 2016). Where, as here, the Board adopted the reasoning of the IJ, we consider the two decisions together. Saldana v. Lynch, 820 F.3d 970 , 974 (8th Cir. 2016).

To be eligible for cancellation of removal, Pereida had to meet four requirements. 8 U.S.C. § 1229b(b)(1) . At issue here is whether, under 8 U.S.C. § 1229b(b)(1)(C) , Pereida's conviction for attempted criminal impersonation is a CIMT as defined by the Immigration and Nationality Act (INA) in 8 U.S.C. § 1182(a)(2) or § 1227(a)(2) . If it is, and if no exceptions apply, Pereida is ineligible for cancellation of removal.

We first apply the "categorical approach" to determine whether Pereida's conviction qualifies as a CIMT by comparing the elements of that state offense to see if it fits within the generic definition of a crime involving moral turpitude. Moncrieffe v. Holder, 569 U.S. 184 , 190 , 133 S. Ct. 1678 , 185 L. Ed. 2d 727 (2013). In doing so, we presume that the conviction rested upon nothing more than the least of the acts **[**3]** criminalized by the state statute. Gomez-Gutierrez v. Lynch, 811 F.3d 1053 , 1058 (8th Cir. 2016) (applying the realistic probability test in the context of a CIMT analysis). Deferring to the agency's interpretation of this ambiguous statutory phrase left undefined by Congress, "[c]rimes involving moral turpitude have been held to require conduct 'that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general.'" Guardado-Garcia v. Holder, 615 F.3d 900 , 902 (8th Cir. 2010) (quoting Lateef v. Dep't of Homeland Sec., 592 F.3d 926 , 929

(8th Cir. 2010)). "Crimes involving [*1132] the intent to deceive or defraud are generally considered to involve moral turpitude." Id. (quoting Lateef, 592 F.3d at 929).

The underlying Nebraska offense of criminal impersonation at issue, as it existed at the relevant time, stated:

(1) A person commits the crime of criminal impersonation if he or she: (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another; (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another; (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or (d) Without the authorization or permission of another and with the intent to deceive or harm another: (i) Obtains or records personal identification documents or personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2008).

Reviewing this statute as a whole, there appears to be no disagreement among the parties or each of the reviewing courts to-date that the statute defines crimes that are not categorically CIMTs. Both the IJ and the Board concluded that because three of the subsections of § 28-608 contained as a necessary element the intent to deceive, they qualified as a CIMT. However, because a violation of subsection (c) would not, on its face, require the same mens rea requirement, there was a realistic probability that the statute punished non-turpitudinous conduct as well. We agree. Because this statute is divisible, the inquiry does not end here. Villatoro v. Holder, 760 F.3d 872 , 877 (8th Cir. 2014) (noting that upon application of the categorical approach the inquiry ends if the statute at issue either requires or excludes conduct involving moral turpitude).

Having determined that not all crimes proscribed by the Nebraska statute would qualify as a CIMT, we apply a modified categorical approach to this divisible statute. Mathis v. United States, 136 S. Ct. 2243 , 2249 , 195 L. Ed. 2d 604 (2016) (explaining that a divisible statute "list[s] elements in the alternative, and thereby define[s] multiple crimes). It is at this juncture where the IJ and Board's analyses parted [****4**] ways and where we find the heart of the matter in this particular case. Applying the modified categorical approach to the record before us, we are unable to discern the subsection of § 28-608 under which Pereida was convicted.

It is a maxim oft repeated that under the INA, the alien bears "the burden of proof to establish that [he] satisfies the applicable eligibility requirements" for cancellation of removal, 8 U.S.C. § 1229a(c)(4)(A)(i) , including that he was not "convicted of an offense" that would disqualify him from cancellation of removal, 8 U.S.C. § 1229b(b)(1)(C) . Andrade-Zamora, 814 F.3d at 948 . Here, then, it is Pereida's burden to establish that his conviction for attempted criminal impersonation is not a CIMT. Yet, as Pereida himself acknowledges and argues, there is no indication of the subsection of the statute under which Pereida was convicted, i.e., that the documents filed by DHS, that included the complaint, are insufficient to clarify the matter. This acknowledgment, however, is not in Pereida's favor. There [****1133**] are only a "limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) [that this court can review] to determine what crime, with what elements, [Pereida] was convicted of." Mathis, 136 S. Ct. at 2249 . On this record, without more, or without any indication that the record is complete, as is, we are unable to make the requisite determination, as the Board itself indicated. Even assuming a complete record is before us, the fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief under this circuit's precedent. Andrade-Zamora, 814 F.3d at 949 ("While the government bears the burden to prove the alien is deportable or removable, it is the alien's burden under the INA to prove he is eligible for cancellation of removal[;] . . . [or, stated differently] to prove he did not commit an offense that disqualifies him from cancellation of removal."); Lucio-Rayos v. Sessions, 875 F.3d 573 , 581-82 (10th Cir. 2017) (placing the ultimate burden on the alien where an alien sought discretionary relief and none of the documents in the

record indicated under what provision he was convicted), cert. denied, 139 S. Ct. 865 , 202 L. Ed. 2d 629 , [202 L. ED. 2D 629], 2019 WL 113529 (2019); Syblis v. Att'y Gen. of the U.S., 763 F.3d 348 , 356 (3d Cir. 2014) (joining the Fourth, Seventh, Ninth and Tenth Circuits in holding that an inconclusive record is insufficient to satisfy a noncitizen's burden of proving eligibility for discretionary relief). We are bound by our precedent absent en banc reconsideration or a superseding contrary decision by the Supreme Court regarding this unique situation.

Our inability to discern the particular crime for which Pereida was convicted forecloses any substantive discussions advanced by Pereida on appeal. For example, Pereida references case law from sister circuits in support of his argument that his particular offense of attempted criminal impersonation is not a CIMT, pointing out various viewpoints on the theoretical boundaries and legal uncertainty in the arena of defining what, exactly, constitutes (or should constitute) moral turpitude in situations such [**5] as this. See, e.g., Beltran-Tirado v. INS, 213 F.3d 1179 , 1184-85 (9th Cir. 2000); Arias v. Lynch, 834 F.3d 823 , 830-36 (7th Cir. 2016) (Posner, J., concurring). Pereida also alternatively argues that even *if* this court were to hold that his offense qualifies as a CIMT, the petty offense exception, 8 U.S.C. § 1182(a)(2)(A)(ii)(II) , carries the day on these facts. However, the absence of the necessary substantive determination regarding the existence or not of a CIMT in this case precludes any additional discussion and ends the inquiry before us.²

III. CONCLUSION

For the foregoing reasons, we deny Pereida's petition for review.

fn 1

Nebraska Revised Statute § 28-608 was the statute under which Pereida was arrested in July 2009. The statute was revised, effective August 30, 2009, and is currently found at Nebraska Revised Statute § 28-638 .

fn 2

We do note that whether or not there is a determination regarding the applicability of the petty theft exception under 8 U.S.C. § 1182(a)(2)(A)(ii)(II) , Pereida is ultimately foreclosed in seeking cancellation of removal. This court held in Andrade-Zamora that the cross-reference in 8 U.S.C. § 1229b(b)(1)(C) only refers to the list of offenses and not the immigration consequences. 814 F.3d at 950-51 . Accordingly, Pereida would fail to carry his burden to show that he has not been convicted of an offense under section 1227(a)(2) , which includes CIMTs "for which a sentence of one year or longer may be imposed," because Pereida's Nebraska conviction was punishable by a maximum term of "not more than one year imprisonment." 8 U.S.C. §§ 1227(a)(2)(A)(i)(II) , 1229b(b)(1)(C) ; Neb. Rev. Stat. §§ 28-106(1) , 28-201(4)(e) .

Torres v. Madrid

Decided May 2, 2019

No. 18-2134

05-02-2019

ROXANNE TORRES, Plaintiff - Appellant, v. JANICE MADRID; RICHARD WILLIAMSON, Defendants - Appellees.

Monroe G. McKay Circuit Judge

(D.C. No. 1:16-CV-01163-LF-KK)

(D. N.M.) **ORDER AND JUDGMENT** * Before **BRISCOE, McKAY, and LUCERO**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See Fed. R. App. P. 34(f)*; 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and 10th Cir. R. 32.1.

In this excessive-force case, Roxanne Torres appeals from a district court order that granted the defendants' motion for summary judgment on the basis of qualified immunity. Exercising jurisdiction under [28 U.S.C. § 1291](#), we affirm.

BACKGROUND

Early in the morning on July 15, 2014, New Mexico State Police officers went to an apartment complex in Albuquerque to arrest a woman, Kayenta Jackson, who was *2 "involved with an organized crime ring." *Apt. App.* at 120. The officers saw two individuals standing in front of the woman's apartment next to a Toyota FJ Cruiser. The Cruiser was backed into a parking spot, with cars parked on both sides of it. The officers, who were wearing tactical vests with police markings, decided to make contact with the two individuals in case one was the subject of their arrest warrant.

As the officers approached the Cruiser, one of the individuals ran into the apartment, while the other individual, Torres, got inside the Cruiser and started the engine. At the time, Torres was "trip[ping] . . . out" from having used meth "[f]or a couple of days." *Id.* at 108.

Officer Richard Williamson approached the Cruiser's closed driver-side window and told Torres several times, "Show me your hands," as he perceived Torres was making "furtive movements . . . that [he] couldn't really see because of the [Cruiser's] tint[ed]" windows. *Id.* at 124 (internal quotation marks omitted). Officer Janice Madrid took up a position near the Cruiser's driver-side front tire. She could not see who the driver was, but she perceived the driver was making "aggressive movements inside the vehicle." *Id.* at 115.

According to Torres, she did not know that Williamson and Madrid were police officers, and she could not hear anything they said. But when she "heard the flicker of the car door" handle, she "freak[ed] out" and "put the car into drive," thinking she was being carjacked. *Id.* at 205.

When Torres put the car in drive, Officer Williamson brandished his firearm. At some point, Officer Madrid drew her firearm as well. Torres testified that she "stepped *3 on the gas . . . to get away," and the officers "shot as soon as the [Cruiser] crept a little inch or two." *Id.* at 206. Officer Madrid testified that the Cruiser "drove at [her]" and she fired "at the driver through the windshield" "to stop the driver from running [her] over." *Id.* at 114. Officer Williamson testified that he shot at the driver because he feared being "crush[ed]" between the Cruiser and the neighboring car, as well as "to stop the action of [the Cruiser] going towards [Officer] Madrid." *Id.* at 125.

Two bullets struck Torres. She continued forward, however, driving over a curb, through some landscaping, and onto a street. After colliding with another vehicle, she stopped in a parking lot, exited the Cruiser, laid down on the ground, and attempted to "surrender" to the "carjackers" (who she believed might be in pursuit). *Id.* at 208.

Torres "was [still] tripping out bad." *Id.* She asked a bystander to call police, but she did not want to wait around because she had an outstanding arrest warrant. So, she stole a Kia Soul that was left running while its driver loaded material into the trunk. Torres drove approximately 75 miles to Grants, New Mexico, and went to a hospital, where she identified herself as "Johannarae C. Olguin." *Id.* at 255. She was airlifted to a hospital in Albuquerque, properly identified, and arrested by police on July 16, 2014. She ultimately pled no contest to three crimes: (1) aggravated fleeing from a law-enforcement officer (Officer Williamson); (2) assault upon a police officer (Officer Madrid); and (3) unlawfully taking a motor vehicle.

In October 2016, Torres filed a civil-rights complaint in federal court against Officers Williamson and Madrid. She asserted one excessive-force claim against each officer, alleging that the "intentional discharge of a fire arm [sic] . . . exceeded the degree *4 of force which a reasonable, prudent law enforcement officer would have applied." *Id.* at 15, 16. She also asserted a claim against each officer for conspiracy to engage in excessive force, alleging that the officers had "formed a single plan through non-verbal communication . . . to use excessive force." *Id.* at 15, 16.

The district court construed Torres's complaint as asserting the excessive-force claims under the Fourth Amendment, and the court concluded that the officers were entitled to qualified immunity. It reasoned that the officers had not seized Torres at the time of the shooting, and without a seizure, there could be no Fourth Amendment violation.

DISCUSSION

I. Standards of Review

"We review the district court's summary judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs.*, 862 F.3d 1040, 1046 (10th Cir. 2017). Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P.* 56(a).

Ordinarily, once the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine triable issue. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013). But where, as here, a defendant seeks summary judgment on the basis of qualified immunity, our review is somewhat different. *5

5 "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who must clear two hurdles in order to defeat the defendant's motion." *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). First, "[t]he plaintiff must demonstrate on the facts alleged . . . that the defendant violated [her] constitutional or statutory rights." *Id.* While "we ordinarily accept the plaintiff's version of the facts," we do not do so if that version "is blatantly contradicted by the record, so that no reasonable jury could believe it." *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied*, 2019 WL 358389 (U.S. March 18, 2019) (No. 18-986). Second, the plaintiff must show "that the right was clearly established at the time of the alleged unlawful activity." *Riggins*, 572 F.3d at 1107. "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (internal quotation marks omitted).

As explained below, Torres's claims fail under the first prong of the qualified-immunity analysis.

II. Excessive Force

"We treat claims of excessive force as seizures subject to the Fourth Amendment's objective requirement for reasonableness." *Lindsey v. Hylar*, 918 F.3d 1109, 1113 (10th Cir. 2019) (internal quotation marks omitted). Thus, "[t]o establish [her] claim, [Torres] . . . must show both that a seizure occurred and that the seizure was
6 *6 unreasonable." *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) (internal quotation marks omitted). Consequently, "[w]ithout a seizure, there can be no claim for excessive use of force" under the Fourth Amendment. *Id.* (internal quotation marks omitted).

We agree with the district court that Torres failed to show she was seized by the officers' use of force. Specifically, the officers fired their guns in response to Torres's movement of her vehicle. Despite being shot, Torres did not stop or otherwise submit to the officers' authority. Although she exited her vehicle in a parking lot some distance away and attempted to surrender, her intent was to give herself up to "carjackers." Indeed, she testified that she did not want to wait around for police to arrive because she had an outstanding warrant for her arrest. She then stole a car and resumed her flight. She was not taken into custody until after she was airlifted back to a hospital in Albuquerque and identified by police.

These circumstances are governed by *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010), where this court held that a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim. This is so, because "a seizure requires restraint of one's freedom of movement." *Id.* at 1219 (internal quotation marks omitted). Thus, an officer's intentional shooting of a suspect does not effect a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him." *Id.* at 1224.

Here, the officers' use of deadly force against Torres failed to "control [her] ability to evade capture or control."
7 *Id.* at 1223 (internal quotation marks omitted). Because *7 Torres managed to elude police for at least a full day after being shot, there is no genuine issue of material fact as to whether she was seized when Officers Williamson and Madrid fired their weapons into her vehicle. *See id.* (rejecting plaintiff's contention that "his shooting alone constitute[d] a seizure," given that "he continued to flee without the deputies' acquisition of physical control" and "remained at large for days"); *see also Farrell*, 878 F.3d at 939 (concluding that plaintiffs were not seized when an officer fired his gun at them, because they continued fleeing for several minutes). Without a seizure, Torres's excessive-force claims (and the derivative conspiracy claims) fail as a matter of law.¹

1 Torres argues that Officers Williamson and Madrid cannot dispute whether she was seized because they did not plead lack of seizure as an affirmative defense. But seizure is not an affirmative defense, it is an element of a Fourth Amendment excessive-force claim. *See Farrell*, 878 F.3d at 937.

Torres also complains that the officers did not argue lack of seizure until their reply brief in support of summary judgment. But in the seven months between the filing of the officers' reply brief and the district court's grant of summary judgment, Torres neither sought to file a supplemental opposition to address the officers' legal argument nor requested leave to marshal "facts essential to justify [her] opposition," Fed. R. Civ. P. 56(d).

Finally, to the extent Torres summarily asserts that a seizure occurred because her "vehicle was shot up and rendered undrivable," Aplt. Opening Br. at 22, we do "not consider issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation," *Armstrong v. Arcanum Grp., Inc.*, 897 F.3d 1283, 1291 (10th Cir. 2018) (ellipsis and internal quotation marks omitted).

8 We, therefore, determine that the district court properly entered summary judgment in favor of Officers Williamson and Madrid on the basis of qualified immunity. *8

CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Monroe G. McKay

Circuit Judge

SIDEBAR

A Timely Case on Police Violence at the Supreme Court

The justices will hear arguments in October over whether excessive force claims against the police are barred when the people they shoot get away.



By [Adam Liptak](#)

July 20, 2020

Early on a summer morning in Albuquerque in 2014, two state police officers in dark tactical gear arrived at a housing complex to serve an arrest warrant. In the parking lot, they came upon Roxanne Torres, sitting in her car with the engine running.

Ms. Torres was not the woman they were looking for. But the officers, who did not identify themselves, approached her car. Taking them for carjackers, Ms. Torres started to drive away. The officers shot at her 13 times, hitting her twice, but she managed to flee.

Last month, the Supreme Court refused to hear eight cases on qualified immunity, a doctrine that makes it hard to sue police officers and other officials for misconduct and, as a result, has become a flash point in the nationwide uproar over police brutality. That move disappointed critics across the political spectrum who had hoped the court would play a role in helping resolve the broader debate.

But Ms. Torres's case, which presents an even more fundamental issue, was already on the Supreme Court's docket. It had been scheduled to be argued in March, but the court postponed it in light of the coronavirus pandemic. It will now be heard in October.

The justices may have wanted to duck the question of police violence. The case from Albuquerque, *Torres v. Madrid*, No. 19-292, will force them to confront it.

Ms. Torres sued the officers who shot her, Richard Williamson and Janice Madrid, saying they had used excessive force in violation of her Fourth Amendment rights. The amendment bars unreasonable searches and seizures, and the courts have long treated the use of excessive force by the police as a seizure.

Had the officers managed to stop Ms. Torres, there would be no question that she could sue. She might not win, as courts would then consider whether the seizure was reasonable and whether the suit was blocked by qualified immunity. But her suit would not have been shut down from the start.

The question for the justices is whether it should matter that Ms. Torres managed to escape. The United States Court of Appeals for the 10th Circuit, in Denver, ruled that it did. "A suspect's continued flight after being shot by police," the court said, "negates a Fourth Amendment excessive-force claim."

That is hard to square with a statement in a 1991 Supreme Court decision, which said that "the word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."

Precisely what happened on the morning of July 15, 2014, is contested, but there is no dispute that the officers shot an unarmed woman as she tried to drive away. The officers say they feared that Ms. Torres would run them over.

Ms. Torres soon lost control of her car, stopped in a parking lot and asked a bystander to call the police. Receiving no response, she stole a car that had been left running and drove 75 miles to a hospital in Grants, N.M.

She was airlifted to a hospital in Albuquerque, where she was arrested. She pleaded no contest to charges of fleeing from a police officer, assaulting a police officer and stealing a car.

Even the Trump administration says Ms. Torres was entitled to sue. "A subject's escape will render the seizure fleeting," Solicitor General Noel J. Francisco wrote in a friend-of-the-court brief, "but will not negate the seizure entirely." The brief went on to say that Ms. Torres may well lose her case, but on other grounds.

The NAACP Legal Defense and Educational Fund, in a brief supporting Ms. Torres, urged the justices to take account of the history of police violence.

“From the very inception of modern American law enforcement, weapons — and firearms specifically — have been deployed as a means of policing and oppressing African-American communities,” the brief said. “Today, far too many police officers continue to draw and use guns as a means of unjustified control of African-Americans, rather than for valid law enforcement reasons. The 10th Circuit’s decision leaves these countless people without recourse.”

Even if Ms. Torres wins at the Supreme Court, she will have to overcome the doctrine of qualified immunity to prevail in the lower courts. Under that doctrine, officials may be sued for violations of constitutional rights only if the right at issue was clearly established at the time of the conduct in question.

The Supreme Court has used an exquisitely narrow definition of what counts as “clearly established.” Instead of looking to general principles, it requires the plaintiff to do something very difficult in most cases: to identify a decision that concerned nearly identical factual circumstances.

It will not be easy for Ms. Torres to find, for instance, an earlier decision based on circumstances very like her own.

Both Justices Clarence Thomas and Sonia Sotomayor, probably the court’s most conservative and liberal members, have criticized qualified immunity. Justice Thomas wrote that it was created out of thin air. Justice Sotomayor wrote that it had created an impenetrable legal barrier protecting police officers.

The court’s approach, Justice Sotomayor wrote in a 2018 dissent, “sends an alarming signal to law enforcement officers and the public.”

“It tells officers that they can shoot first and think later,” she wrote, “and it tells the public that palpably unreasonable conduct will go unpunished.”

United States v. Borden

Decided Apr 25, 2019

Case No. 18-5409

04-25-2019

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES BORDEN, JR., Defendant-Appellant.

COOK, Circuit Judge.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0212n.06 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE BEFORE: DAUGHTREY, COOK, and GRIFFIN, Circuit Judges.

COOK, Circuit Judge. After Charles Borden, Jr. pleaded guilty to possessing a firearm as a felon, the district court sentenced him as an armed career criminal to 115-months' imprisonment. Borden contends that the court's enhancement of his sentence amounts to a denial of due process. Finding no constitutional violation, we AFFIRM.

I.

Police caught Borden with a pistol during a traffic stop in April 2017. He eventually pleaded guilty to possessing that firearm as a felon, in violation of [18 U.S.C. § 922\(g\)\(1\)](#).

The government recommended sentencing Borden as an armed career criminal, relying on three prior Tennessee aggravated assault convictions as predicate offenses. Borden objected to that classification. He argued that one of his prior aggravated assault convictions did not qualify *2 as a predicate "crime of violence" within USSG § 4B1.2(a) because it involved a reckless variant of the offense. Borden acknowledged, however, that this court's decision in *United States v. Verwiebe*, [874 F.3d 258](#) (6th Cir. 2017) (*cert. denied*, 139 S.Ct. 63 (Oct. 1, 2018)), held just the opposite: reckless aggravated assault is a crime of violence under § 4B1.2(a)'s use-of-force clause. But Borden asserted that applying *Verwiebe* to his case would violate *ex post facto* and due process principles because this court decided *Verwiebe* six months after his arrest for felonious possession.

Finding no due process violation, the district court applied *Verwiebe* retroactively to conclude that all three of Borden's aggravated assault convictions qualified as predicate crimes of violence. It designated him an armed career criminal, increasing Borden's sentencing exposure to 180-months' imprisonment at minimum. But after considering the [18 U.S.C. § 3553\(a\)](#) factors and granting Borden a downward departure for assistance to law enforcement, the court sentenced Borden to just 115-months' imprisonment. This appeal followed.

II.

Since *Verwiebe*, our cases have held repeatedly that reckless aggravated assault in violation of [Tenn. Code Ann. § 39-13-102\(a\)\(1\)\(B\)](#) qualifies as a crime of violence within USSG § 4B1.2(a). *United States v. Harper*, [875 F.3d 329, 330](#) (6th Cir. 2017); *see also Davis v. United States*, [900 F.3d 733, 736](#) (6th Cir. 2018). Borden argues that the district court should have ignored that precedent for two reasons. First, he maintains that applying *Verwiebe* to his case violated the Constitution's *ex post facto* and due process protections because it was decided six months after he committed his offense. Second, Borden challenges *Verwiebe* and *Harper* as wrongly decided. We review his constitutional and statutory-interpretation claims de novo. *See United States v. Copeland*, [321 F.3d 582, 601](#) (6th Cir. 2003); *Verwiebe*, [874 F.3d at 260](#). *3

Due process entitled Borden to "fair warning" as to "the reach of statutes defining criminal activity" and the punishment accompanying a conviction. *Dale v. Haeberlin*, [878 F.2d 930, 934](#) (6th Cir. 1989); *see also Webb v. Mitchell*, [586 F.3d 383, 392](#) (6th Cir. 2009). Bound by these principles of fairness, *Rogers v. Tennessee*, [532 U.S. 451, 462](#) (2001), the district court could not apply *Verwiebe* if by doing so it "enforced changes in interpretations of the law that unforeseeably expand[ed] the punishment accompanying [his] conviction beyond that which [Borden] could have anticipated at the time" he committed his crime, *Dale*, [878 F.2d at 934](#). Thus, the key to our analysis is whether, in April 2017, Borden could have anticipated the punishment he ultimately received, 115-months' imprisonment for possessing a firearm as a felon. *Id.* at 935; *see also Weaver v. Graham*, [450 U.S. 24, 30-31](#) (1981); *United States v. Crenshaw*, [172 F.3d 50, 1999 WL 17642, at *3](#) (6th Cir. Jan. 6, 1999) (table).

At the time of Borden's crime, a felon convicted of possessing a firearm faced up to ten years' imprisonment. [18 U.S.C. § 924\(a\)\(2\)](#). That is, even if the court had given Borden the benefit of then-existing precedent requiring more than recklessness for crimes of violence and declined to enhance Borden's sentence, Borden could have anticipated a sentence of up to ten years. He received nine years and seven months. R. 41, PageID 212. The district court's application of *Verwiebe*, therefore, cannot be said to have disadvantaged Borden; he suffered no deprivation of his due process rights.

To the extent he challenges *Verwiebe* as wrongly decided, Borden is not alone. *See Harper*, [875 F.3d at 330-31](#) (criticizing *Verwiebe* as "mistaken"). Nevertheless, we follow our precedent and conclude that aggravated assault in Tennessee constitutes a crime of violence for USSG § 4B1.2(a) purposes. *Id.* at 330 ("[W]e are bound to hold that reckless aggravated assault in violation of [Tenn. Code Ann. § 39-13-102\(a\)\(1\)\(B\)](#) is a crime of violence . . ."); *see Davis*, [900 *4 F.3d at 736](#). Absent an intervening decision by the Supreme Court or this court sitting en banc, *United States v. Elbe*, [774 F.3d 885, 891](#) (6th Cir. 2014), *Harper* remains controlling authority in this circuit and aggravated assault in Tennessee categorically qualifies as a crime of violence.

III.

We AFFIRM.

Jones v. State

Decided Nov 27, 2018

No. 2015-CT-00899-SCT

11-27-2018

BRETT JONES A/K/A BRETT A. JONES Appellant v. STATE OF MISSISSIPPI Appellee

MICHAEL K. RANDOLPH, PRESIDING JUSTICE FOR THE COURT

Serial: **221459 EN BANC ORDER**

The instant matter is before the Court, en banc, on the Court's own motion. The Petition for Writ of Certiorari filed by Brett Jones was granted by order of the Court signed on July 26, 2018. Upon further consideration, the Court finds that there is no need for further review and that the writ of certiorari should be dismissed, as authorized by [Mississippi Rule of Appellate Procedure 17\(f\)](#).

It is, therefore, ORDERED that the writ of certiorari is hereby dismissed.

SO ORDERED, this the 27th day of November, 2018.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH, PRESIDING JUSTICE

FOR THE COURT TO DISMISS: RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM AND CHAMBERLIN, JJ. KITCHENS, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN
2 STATEMENT JOINED BY WALLER, C.J., KING AND ISHEE, JJ. *2 **BRETT JONES A/K/A BRETT A. JONES v.**

STATE OF MISSISSIPPI

KITCHENS, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT: ¶1. Four justices of this Court granted the petition for writ of *certiorari* filed by Brett Jones to review the circuit court's denial of parole eligibility after a hearing pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). This Court, *en banc*, heard oral argument on the petition. Citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), Jones argues that he is not the rare, permanently incorrigible offender who, consistent with the Eighth Amendment, can be sentenced to a lifetime in prison. Now, five justices dismiss Jones's petition for *certiorari*, finding "no need for further review." Thus the majority, without deigning to provide any discussion of the arguments presented to this Court, waves aside the United States Supreme Court's decision in *Montgomery* and allows an unconstitutional sentence to stand. ¶2. When Brett Jones, now age twenty-nine, was fifteen years of age, he stabbed his grandfather to death. He was convicted of murder, and the Circuit Court of Lee County imposed a mandatory sentence of life imprisonment. See *Miss. Code Ann. § 97-3-21* (Rev. 2006). By operation of *Mississippi Code*

3 Section 47-7-3(1)(h) (Rev. 2011), Jones's life sentence rendered him ineligible for parole. After this Court ordered that Jones be *3 resentenced after a hearing and consideration of the factors from *Miller*, the trial court found that Jones should not be eligible for parole. The Court of Appeals affirmed his conviction and sentence. *Jones v. State*, 938 So. 2d 312 (Miss. Ct. App. 2006). In post-conviction relief proceedings, this Court ordered that Jones be resentenced after a hearing pursuant to *Miller* to determine his entitlement to parole eligibility. ¶3. The circuit court found that Jones was not entitled to parole eligibility. But after that decision, the United States Supreme Court decided *Montgomery*, which held that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and that "*Miller* . . . does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 734, 735. ¶4. Despite the fact that the circuit court was without the benefit of *Montgomery* when it resentenced Jones, the Court of Appeals affirmed Jones's without-parole sentence. This Court's dismissal of the petition for writ of *certiorari* means that the decision of the Court of Appeals will be Mississippi's final word on the constitutionality of Jones's sentence. Because the record does not reflect Jones's permanent incorrigibility, the circuit court's ruling was an abuse of discretion. Therefore, I would vacate his sentence and remand for resentencing to life imprisonment with eligibility for parole.

FACTS AND PROCEDURAL HISTORY

¶5. The Court of Appeals, in its opinion affirming Jones's conviction and sentence, set forth the facts adduced at the murder trial:

During August of 2004, Jones was living with his paternal grandparents, Bertis Jones and Madge Jones. Jones's girlfriend, Michelle

4 *4

Austin, had run away from home in the first week of August 2004. Austin was staying mostly at Jones's grandparents' home, as well as at an abandoned fish restaurant near the home. One August 9, 2004, Bertis Jones discovered Austin in Jones's bedroom and told her to get out of his house. Austin then ran to the fish restaurant. According to her testimony at trial, both Jones and his cousin, Jacob, later came and told her that Jones was "in big trouble" with his grandfather. Austin testified that she asked Jones, "What are you going to do? Kill him?" Austin testified that Jones did not respond to this question. Austin also testified that Jones "said that he was going to hurt his granddaddy."

Jones testified that at about 4 p.m., he went into the kitchen to make a sandwich, and he and the victim got into an argument. Jones "sassed" him, at which point the argument escalated. Jones testified that his grandfather got in his face, pointing and yelling at him. He testified that his grandfather had never done that before. He testified that his grandfather then pushed him, that he pushed him back, and his grandfather then swung at him. Jones testified that he had a steak knife in his hand from making a sandwich, and because he "didn't have anywhere to go between the corner and him," he "threw the knife forward," stabbing his grandfather. He testified that his grandfather backed up, looked at the wound, and came at Jones again. Jones again stabbed him and tried to get past his grandfather. Jones testified that his grandfather grabbed him, they fought some more, and Jones then grabbed a filet knife. He stabbed his grandfather with this knife. Jones testified:

I was stabbing him because I was afraid, I didn't know anything else to do because he was so huge. He's not really a big looking man until he gets in your face with his hands up and swinging at you, and then he turns into a giant. And you just feel like there's no way out, no way to get away from him.

After they "got outside," Jones testified that he knew his grandfather was going to die if he did not try to save him, so he tried to administer CPR. He then tried to carry his grandfather, who was not breathing at that point, into the house "[m]ostly to get him out of the yard." Jones then pulled the body into the laundry room and shut the door. Jones used a water hose to try and clean the blood off of his arms, and then threw his shirt in the garbage under the sink. He then attempted to cover up the blood spots in the carport by pulling his grandfather's car over them. Jones testified that he walked around the house and saw Robert "Frisco" Ruffner; at this point, Jones was covered in blood.

Ruffner, who was living with and doing yard work for Thomas Lacastro, a neighbor at the time, testified that he had "heard an old man, you

5 *5

know, like holler out he was in pain," and about two or three minutes later, he saw Jones walking toward him covered in blood. Ruffner testified that Jones was carrying a knife, trembling and saying, "Kill, kill." Ruffner then ran into the house and called 911.

Thomas Lacastro arrived while Ruffner was on the phone with the police, and Ruffner related to Lacastro what he had seen. Ruffner was hysterical at the time, and Lacastro did not, at first, believe him. Ruffner told Lacastro that Jones had killed his grandfather. Lacastro then saw Jones in the bushes and asked him to come over to his house. Lacastro testified that Jones was pale and "had some blood on him." Lacastro testified that he asked Jones, "Where's your grandfather?" Jones answered, "He's gone," and Lacastro responded, "No, he's not gone. His car is right there, Brett." Jones again tried to say that his grandfather had left, but Lacastro told him, "Brett, you're lying. You need to get out of my yard." At some point during the conversation, Jones told Lacastro that the blood was fake and that "it's a joke." Lacastro responded, "It's not a joke, son. This is not a joke. This is real."

Lacastro testified that Jones then went back toward the bushes, where he met a young lady. He testified that the two walked "up and down the bushes . . . [a]nd then . . . out toward the levee." Lacastro told Jones before he left that he had called the police. After Jones and the young lady left, Lacastro went over to the bushes where they had been "milling around" and saw an oil pan covered in blood. He then went into the carport and saw more blood, but did not go any farther.

Jones testified that when he left the property, he was trying to go to Wal-Mart to meet his grandmother because he "wanted to tell her what happened." He and Austin ran through the woods to a convenience store, where a man asked them if they needed a ride. Jones testified that they got to a gas station in Nettleton, Mississippi, and were trying to get a ride to the Wal-Mart in Tupelo, Mississippi, when police apprehended them.

Jones and Austin gave the officers false names. Officer Gary Turner of Nettleton began a pat-down of Jones and found a pocketknife in his left pocket. Officer Turner asked whether it was the knife Jones "did it with," to which Jones responded, "No, I already got rid of it."

When Investigator Steve White went to investigate the home of Bertis Jones, he found Bertis Jones's body concealed in a utility room in the back of the carport. He found that someone had apparently used a car, an oil pan and a mat to conceal puddles of blood. Investigator White also found a

6 *6

bloodstained T-shirt in the carport, as well as more bloodstained clothing in the kitchen trash can. Officers also found a filet knife in the kitchen sink and a bent steak knife with blood on the tip of it. There were blood spatters on the walls.^[1]

There were a total of eight stab wounds to the body of Bertis Jones. There were also abrasions consistent with the body's having been dragged, and cuts on the hand classified as "defensive posturing injuries." The cause of death was a stab wound to the chest.

Jones was convicted of murder in the Circuit Court of Lee County and sentenced to life imprisonment in the custody of the MDOC.

Jones v. State, 938 So. 2d 312, 313-15 (Miss. Ct. App. 2006) (*Jones I*). ¶6. After his conviction was affirmed, Jones filed an application for leave to file a motion for post-conviction relief in the trial court, which this Court granted. *Jones v. State*, 122 So. 3d 698, 699 (Miss. 2013) (*Jones III*). The Circuit Court of Lee County denied the motion, and Jones appealed. *Id.* The Court of Appeals affirmed the denial of Jones's motion for post-conviction relief. *Jones v. State*, 122 So. 3d 725 (Miss. Ct. App. 2011) (*Jones II*). Jones petitioned this Court for a writ of *certiorari*. ¶7. On June 25, 2012, the United States Supreme Court decided *Miller*, holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders," that is, those who were younger than eighteen years of age at the time of the crime. *Miller*, 567 U.S. at 479. *Miller* "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. This Court addressed *7 *Miller* in *Parker v. State*, 119 So. 3d 987, 996 (Miss. 2013), recognizing that "*Miller* created a new rule with which this State must comport." We determined that, although Mississippi's penalty for murder does not prohibit parole, the application of the parole statute effectively renders a life sentence "tantamount to life without parole." *Id.* at 997. Finding that Mississippi's sentencing and parole scheme contravened *Miller* by rendering Parker ineligible for parole without any consideration by the sentencer of his youth, we vacated the sentence and remanded the case for a new sentencing hearing after which the trial court was to consider the factors identified in *Miller* before resentencing Parker. *Id.* at 998. In *Jones III*, after holding that *Miller* applied retroactively to cases on collateral review, we vacated Jones's sentence and remanded for a new sentencing hearing and consideration of *Miller* consistent with *Parker*. *Jones III*, 122 So. 3d at 703. ¶8. Before the sentencing hearing, the circuit court appointed counsel for Jones and allowed him to retain an expert² and an investigator. Jones called five witnesses at the hearing: his grandmother, Lawanda Madge Jones; his younger brother, Marty Jones; his mother, Enette Wigginton; his cousin, Sharon Frost; and Jerome Benton, a fire and safety manager at the juvenile correctional facility where Jones had been incarcerated from the beginning of his life sentence until he was twenty-one years old. Jones testified as well.

8 The State rested on the records of the trial and post-conviction proceedings. *8 ¶9. The following witnesses testified on Jones's behalf. His grandmother, Lawanda Jones, was the widow of the victim, Bertis Jones. She testified that, before Jones had moved in with them, he had resided with his mother and stepfather, Dan Alcott, in Florida. She testified that Jones's mother had mental health problems and sometimes left the children alone. She further testified that Alcott was physically abusive to Jones and his little brother. She testified that Jones came to live with them after saying that he could not take Alcott's beatings any more. She also testified that when Jones moved to Mississippi, he had stayed with his cousins in Pontotoc and Tupelo before moving in with his grandparents and that he had been living with his grandparents for less than two months on the day her husband was killed. During her earlier testimony at the post-conviction relief hearing, Lawanda Jones testified that Jones had unfettered access to guns and ammunition at his grandfather's house. ¶10. Marty Jones, the younger brother of Brett Jones, testified that they had lived with Alcott for about six or seven years. He verified that Alcott had abused the boys physically and verbally on a regular basis. He testified that Alcott "would get in your face and poke at your chest, poke you in the face, grab you by the arms, grab you by the neck, sling you around and have you sit down, things like that." At times, Alcott's abuse left marks or bruises, but nothing that needed medical attention. Jones, his mother, and his cousin testified that Alcott called Jones and Marty Jones "little motherfuckers" or "little assholes" instead of referring to them by name. Marty Jones and his mother testified that Jones had suffered more abuse at Alcott's hands than had the younger brother. Marty Jones

9 described the brothers' relationship with Alcott as "strained, fear, and stress." Marty Jones testified that *9 their mother, Wigginton, suffered from high anxiety and heavy depression. He was aware that she had been diagnosed as bipolar, which caused her to experience extreme mood swings that negatively affected the children. ¶11. Wigginton testified that Jones was born on July 17, 1989, and that he had just turned fifteen years

old a few weeks before killing his grandfather on August 9, 2004. She testified that she had separated from Jones's father, Anthony Martin Jones, when Jones was little. She described Anthony Jones as a violent alcoholic, which had prompted her to leave him. After the divorce, Anthony Jones saw his children sporadically, and subsequently he was imprisoned for a felony DUI conviction. Wigginton testified that, after Anthony Jones was released from prison, he continued to drink, but Brett Jones lived with him in Mississippi for one school year before returning to his mother's home. ¶12. Wigginton acknowledged that she had abused alcohol and had several mental disorders for which she was on Social Security disability, including panic disorder, anxiety, post-traumatic stress disorder, and bipolar disorder. She described panic attacks interspersed with months of depression. She testified that she previously had attempted suicide. Also, she testified that she had cut herself with razor blades as a way of distracting herself from her mental problems. Jones testified that he and his brother had noticed their mother's injuries from cutting. Both Jones and his grandmother testified that his mother was a drunkard. ¶13. According to Wigginton, she had married Alcott in 1999, and the family moved frequently, with the boys changing schools with each move. She corroborated the testimonies of Jones and his brother that Alcott had hit the children for minor infractions. She said that *10 Alcott would yell in the boys' faces and shake them. Wigginton described Alcott as a hateful person, and she said she had felt unable to escape because she "had nowhere to go" and had neither money nor a vehicle. At one point, Jones had begged his mother not to make them stay with Alcott. ¶14. Jones returned to Mississippi in the summer of 2004 after a fight with Alcott. Jones testified that, after he had gotten home late one night, Alcott grabbed him by the throat and started to remove his own belt, intending to whip Jones. Jones testified that at that point he decided he was not going to tolerate Alcott's abuse any longer. He hit Alcott in the ear, which began to bleed. The police arrested Jones for domestic violence, and he was required to take an anger management course. ¶15. Jones testified that he had been prescribed medications for attention deficit hyperactivity disorder (ADHD) and depression, and later he was prescribed antipsychotic medication. Jones and his mother testified that he had stopped taking drugs "cold turkey" when he moved to Mississippi, which his mother knew was against medical advice. Jones testified that, like his mother, he had issues with cutting himself, beginning at age eleven or twelve. Marty Jones testified that he had been aware that his brother, Jones, cut his arms on occasion. Jones submitted no expert testimony about his mental health issues, medications, or the effects of stopping his medications abruptly. Jones's mother and grandmother both testified that Jones is very intelligent, has a high IQ, and had been enrolled in gifted classes in school. *11 ¶16. Witnesses also testified about Jones's relationship with his girlfriend, Michelle Austin. Jones testified that he had bonded with Austin because she also was from an abusive family. Jones testified that Austin, thinking she might be pregnant, ran away from home after convincing a friend to buy her a bus ticket from Florida to Mississippi to be with Jones. Marty Jones testified that Jones cut himself because of coercion by Austin. Marty Jones witnessed an argument between Jones and Austin in which she "basically was beating him down, screaming at him, calling him all sorts of worthless, and she basically . . . worded it like, 'if you love me, you'll do this,'" referring to self-harm. Jones said that Austin had pressured him to do harmful things to prove his love for her. ¶17. Jones and his cousin, Sharon Frost, testified that Jones had lived with her in Pontotoc, Mississippi, for a couple weeks in the summer of 2004 before moving to his grandparents' house. She testified that her child was one year older than Jones and that Jones always had called her "Aunt Sharon." She corroborated the testimony about Jones's tumultuous upbringing. She testified that she had witnessed fights between Alcott, Enette Wigginton, and the children. Frost said that, during his time with her family, Jones had behaved normally and seemed to enjoy spending time with the other children. ¶18. After his time with Frost, Jones moved to Lee County to live with his grandparents. Weeks later, Jones killed his grandfather. No evidence existed that Jones's grandparents ever abused or mistreated him. When Jones was asked whether he regretted killing his grandfather, he responded, *12 "of course." He testified that, immediately after he had killed his *12 grandfather, he started freaking out, and

tried his hardest to get to his grandmother at her job at a Wal-Mart in Tupelo so he could explain what had happened. ¶19. Benton testified that he was a fire and safety manager at Walnut Grove, the juvenile detention facility where Jones was incarcerated from the time that he was about sixteen years old until he turned twenty-one years old. Jones had worked for him doing janitorial tasks during this period. Benton said that Jones had been a good worker who got along with others and stayed out of trouble. Jones obtained his GED. Benton said that Jones had been "almost like my son." He said that he was in prison because of "an accident" and that he had done "something he regretted." To Benton, Jones had seemed normal and mature for his age, without mental health issues. Benton testified that Jones had no disciplinary issues during the time he knew him. ¶20. Jones testified that he had attempted suicide during his first week at Walnut Grove, but then he began seeing a "psych doctor" and learned to cope. He said that, in 2007 at Walnut Grove, he was written up for a disciplinary incident, a riot which had involved many inmates, in the zone in which he was housed. Since his transfer from the juvenile facility, Jones was written up for "a cussword, but no violence." ¶21. After the hearing, the circuit court judge took the matter under advisement and later reconvened to read his ruling into the record. The judge said he had "considered each and every factor that is identifiable in the *Miller* case and its progeny and those decisions which followed." Then, the court ruled as follows:

At an earlier time, the Court conducted a hearing and heard evidence offered by the defendant, Brett Jones, and the State of Mississippi bearing on

those factors to be considered by the Court as identified by *Miller*. The ultimate question is whether or not, in consideration of those factors, the statutory sentence of life imprisonment, and by application of the parole provisions of the Code, [the sentence] is without parole and whether relief is appropriate to the facts and circumstances in this case.

....

The Court is cognizant of the fact that children are generally different; that consideration of the *Miller* factors and others relevant to the child's culpability might well counsel against irrevocably sentencing a minor to life in prison. All such factors must be considered on a case-by-case basis.

Miller requires that the sentencing authority consider both mitigating and the aggravating circumstances.

And I would note that these are not really terms used in the *Miller* opinion, but I think they are an easy way for us to identify those considerations.

This Court can hypothesize many scenarios that would warrant and be just to impose a sentence which would allow the defendant to be eligible for consideration for parole, notwithstanding the parole law considerations.

The obvious defense raised by the defendant was self-defense; that he acted to protect himself from what he believed to be an imminent threat to his person likely to result in serious injury or death. He testified in detail concerning the circumstances of the killing.

....

On considering the facts as they determined them to be beyond a reasonable doubt, the jury returned a verdict of guilty of murder, thereby rejecting a defense of self-defense and manslaughter, a lesser-included offense. The jury plainly had as possible verdicts in the case, the verdict of not guilty, manslaughter, or murder.

The defendant, Brett Jones, was at the time 15 years of age at the time that he stabbed his grandfather to death. A fair consideration of the evidence indicates that the killing of Mr. Bert Jones was particularly brutal.

During the course of the murder, the defendant stabbed the victim eight times and was forced to resort to a second knife when the first knife broke

when used in the act. The victim appears to have died outside the house, leaving a great amount of blood on the ground.

The defendant attempted to conceal his act by placing the body of the dead or dying Bert Jones in an enclosed part of the garage and attempting to wash away the blood on the ground with a water hose.

He and his female companion then left the scene of the murder and were apprehended by authorities later in Nettleton, approximately 20 miles or so away.

There is no evidence that indicates that anyone other than the defendant participated in the killing of Bert Jones. Likewise, there is no evidence that the defendant acted under the pressure of any family or peer and no evidence of mistreatment or threat by Bert Jones, except the self-defense claim asserted and rejected by the jury.

As noted before, the defendant was 15 years of age at the time of the killing. At the sentencing hearing recently conducted, it was revealed that the female companion was a minor who had come from Florida in order to be with the defendant, and that they, the defendant and the minor female, concealed her presence by her remaining in an outbuilding near the home of the victim.

The killing apparently came about soon after Mr. Bert Jones found the girl in his home in the company of the defendant. The evidence presented at the sentencing hearing indicates that their relationship was intimate and that at some time before the incident she thought she was pregnant. That suspicion proved to be untrue, but demonstrates that the defendant had reached some degree of maturity in at least one area.

The defendant grew up in a troubled circumstance. His mother was gone frequently for extended periods. She had divorced the defendant's father and was living in Florida with her then husband and the defendant and his younger brother. The conditions in that home are unremarkable except for the apparent unsettled lifestyle and an incident in which the defendant and his stepfather had a confrontation resulting from defendant's failure to return home at the time set by the stepfather. The authorities were called, and the defendant was removed and required to enter a program of anger management.

There is no evidence of brutal or inescapable home circumstances. In fact, the reason the defendant was in the home with Bert Jones was to provide him with a home away from the circumstances existing in Florida.

15 *15

In conclusion, the Court, having considered each of the *Miller* factors, finds that the defendant, Brett Jones, does not qualify as a minor convicted and sentenced to life imprisonment without possibility of parole consideration and entitled to be sentenced in such a manner as to make him eligible for parole consideration.

¶22. Brett Jones appealed, and the Court of Appeals affirmed. *Jones v. State*, 2017 WL 6387457, *7 (Miss. Ct. App. Dec. 14, 2017). The Court of Appeals found that the circuit judge had held the required *Miller* hearing. *Id.* The Court of Appeals found that, although the judge had not discussed each and every *Miller* factor, the

judge expressly said he had considered each factor. *Id.* Further, the Court of Appeals found that the judge's bench ruling sufficiently explained the reasons for his decision, that the decision was not arbitrary, and that the decision was supported by substantial evidence. *Id.* ¶23. Jones filed a petition for writ of *certiorari*, which this Court granted with oral argument. Jones argues that (1) he is not the rare, permanently incorrigible offender who must be sentenced to a lifetime in prison; (2) his sentence must be vacated because the circuit court made no finding of permanent incorrigibility; and (3) his sentence must be vacated because the federal and state constitutions categorically bar the practice of sentencing children to die in prison. I would find that Jones is entitled to relief on his first issue.

¹ Lieutenant Scotty Reedy testified that he found a partially eaten sandwich on a table in the breakfast area off the kitchen.

² The order did not specify the type of expert Jones was permitted to retain. Jones's motion for appointment of an expert had not requested a certain kind of expert, but discussed the general importance of expert testimony in a *Miller* proceeding. -----

DISCUSSION

¶24. *Miller* established that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. This is because "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. The Court relied on its precedent involving juvenile sentencing. *¹⁶ See *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (banning capital punishment for juveniles under the age of eighteen); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that life without parole violates the Eighth Amendment when imposed on juveniles in non-homicide cases). But, rather than imposing a categorical ban on sentences of life without parole for youthful offenders, the Court held that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller*, 567 U.S. at 473. "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* at 467 (quoting *Jackson v. Norris*, 378 S.W.3d 103, 109 (Ark. 2011) (Danielson, J., dissenting) (quoting *Graham*, 560 U.S. at 76)). Therefore, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. ¶25. The Court cited three important differences between children and adults, discussed in *Roper* and *Graham*, that undergirded its holding: (1) "children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking"; (2) "children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[I] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings"; and (3) "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Id.* at 471 (quoting *Roper*, 543 U.S. at 569-70). *¹⁷ ¶26. *Miller* held that, because youth is a central consideration, the sentencer must consider the defendant's "youth and attendant characteristics" before imposing a penalty. *Id.* at 483. To enable this endeavor, *Miller* set forth several factors that must be considered by the sentencer. First, the sentencer must consider the defendant's "chronological age and its hallmark features . . . immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 477. The sentencer must consider the family and home environment surrounding the defendant "from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Id.* Also to be considered are the circumstances of the offense, including the extent of the defendant's participation in the conduct and how the defendant may have been affected by familial and peer pressure. *Id.* Another factor to be considered is whether the defendant might have been charged with a lesser

offense but for "incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Id.* at 477-78. Finally, the sentencer must consider the possibility of rehabilitation. *Id.* at 478. ¶27. The sentencer must have the opportunity to consider mitigating circumstances. *Id.* at 479. *Miller* held that the sentencer in homicide cases must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Court concluded that "given all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for
 18 sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* *18 at 479. In *Parker*, this Court recognized that *Miller* requires that the trial court take into account and consider the *Miller* factors before sentencing. *Parker*, 119 So. 3d at 995, 998. ¶28. After the *Miller* hearing in this case and the circuit court's ruling that Jones's sentence would not include parole eligibility, the United States Supreme Court decided *Montgomery v. Louisiana*. *Montgomery* held that *Miller* had announced a new substantive constitutional rule that applied retroactively "to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Montgomery*, at 725, 532. *Montgomery* expressed that

Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity." Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it "necessarily carr[ies] a significant risk that a defendant"—here, the vast majority of juvenile offenders—"faces a punishment that the law cannot impose upon him."

Montgomery, 136 S. Ct. at 734 (citations omitted). *Montgomery* held that *Miller*'s substantive holding was that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 735. The Court emphasized that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. "*Miller* drew a line between
 19 children whose *19 crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id.* ¶29. This Court addressed *Montgomery* in *Chandler v. State*, 242 So. 3d 65 (Miss. 2018), cert. docketed, No. 18-203 (U.S. Aug. 15, 2018). Joey Montrell Chandler, a juvenile at the time of his crime, appealed to this Court from a sentence of life without parole imposed after a *Miller* hearing. *Id.* at 67. Chandler argued that the trial court's findings did not comport with *Miller* and *Parker*. *Id.* at 68. After reviewing the constitutional requirements for sentencing under *Miller*, a five-member majority of this Court rejected Chandler's arguments. *Id.* at 71. First, the Court recognized that *Montgomery* did not require a sentencer to make a fact finding that a juvenile was permanently incorrigible before imposing life without parole. *Id.* at 69. Second, the Court held that no rebuttable presumption exists in favor of parole eligibility for juvenile offenders. *Id.* And third, the Court held that "[n]either *Miller* nor *Parker* mandates that a trial court issue findings on each factor." *Id.* at 70. The Court also declined to apply heightened scrutiny to the trial court's *Miller* decision. *Id.* at 68. Ultimately, the Court found that the trial court had adhered to all constitutional requirements by conducting a hearing and sentencing Chandler after considering, although not issuing findings on, each *Miller* factor. *Id.* This Court also found that the trial court had not abused its discretion by imposing a sentence of life without

parole. *Id.* at 70-71. ¶30. Jones argues that the circuit court's decision did not comport with *Miller* and *Montgomery* because that court did not make an express finding that Jones is one of the rare, permanently incorrigible juvenile offenders for whom life without parole is a proportionate *20 sentence under the Eighth Amendment. As *Chandler* recognized, *Montgomery* did not interpret *Miller* to require a finding of fact on a particular juvenile's permanent incorrigibility. *Montgomery*, 136 S. Ct. at 735. *Montgomery* explained that in considering the concept of federalism, the Supreme Court leaves it to the States to develop ways of implementing constitutional restrictions on criminal sentencing. *Id.* But, having said that, *Montgomery* did express the following: "[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* ¶31. In light of the fact that a sentence of life without parole is disproportionate under the Eighth Amendment for a juvenile whose crime reflects transient immaturity, Mississippi should exercise its authority to impose a formal fact finding requirement for *Miller* decisions. For a juvenile offender, a sentence of life without parole is the harshest penalty allowed by law; consequently, the decision whether to impose that penalty is of the utmost seriousness. Judicial review of such a decision can be enhanced only by the presence of fact findings on each *Miller* factor and on the ultimate question of whether the juvenile's crime reflects transient immaturity or permanent incorrigibility. This Court's concern for child welfare has led it to impose strict fact finding requirements for child custody determinations. *Powell v. Ayars*, 792 So. 2d 240, 244 (Miss. 2001). No reason exists to eschew formal fact findings in the context of determining whether a juvenile offender will suffer the harshest penalty imposed by law for a crime committed as a child. *21 ¶32. Notwithstanding that Mississippi, thus far, will not require express findings, no state may, consistent with the Eighth Amendment, sentence a juvenile to life without parole eligibility if the crime reflects transient immaturity rather than permanent incorrigibility. *Montgomery*, 136 S. Ct. at 734. Only those rare youthful offenders who are permanently incorrigible may, consistent with the Eighth Amendment, receive a sentence of life without eligibility for parole. *Id.* The sentencer's ruling must be reviewed for abuse of discretion, keeping in mind the constitutional standards articulated in *Miller* and *Montgomery*. *Chandler*, 242 So. 2d at 70. ¶33. In this case, the circuit court judge made fact findings on the record regarding some of the *Miller* factors and said that he had considered all the *Miller* factors. Thus, from a purely procedural standpoint, the circuit court's ruling comported with *Chandler*'s holding that no express findings on the *Miller* factors or on permanent incorrigibility are required. But because *Montgomery* was decided after *Miller*, the circuit court did not have the benefit of the Supreme Court's holding in *Montgomery*. Therefore, the circuit court could not have known that *Montgomery* would interpret *Miller* to "dr[a]w a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. ¶34. The evidence adduced in the circuit court fell short of establishing that Jones was one of those "rare children whose crimes reflect irreparable corruption." *Id.* Therefore, the sentence of life without parole was an abuse of discretion, albeit an unwitting one. *22 Understandably, the circuit court lacked the benefit of the *Montgomery* holding in rendering its decision. Nonetheless, this Court is bound by that case's holding. ¶35. Jones committed the crime against his grandfather approximately one month after he had turned age fifteen. As the United States Supreme Court recognized in *Miller*, youth carries "hallmark features" of immaturity, impetuosity, and failure to appreciate risks and consequences. *Miller*, 567 U.S. at 477. Jones's actions reflect such features at every turn. As the circuit court observed, the jury found that Jones had killed his grandfather with deliberate design. He stabbed his grandfather eight times, using a second knife when the first one broke. The primary evidence of deliberate design was provided by his girlfriend, Austin, who testified that, after Bertis Jones had discovered her in Jones's bedroom that morning, Jones told her he was in trouble with his grandfather. She asked if he was going to kill him, and he responded that he was going to hurt his grandfather. Notably, despite the guns and ammunition fully accessible to Jones in the house, he brought no weapon to the crime scene, but used what he

found to be available against a close and helpful relative who had done him no harm. That a teenager in trouble for having been caught concealing his girlfriend at his grandparents' home would attempt to solve the problem by resorting to violence dramatically epitomizes immaturity, impetuosity, and failure to appreciate risks or consequences. ¶36. The circuit court also found that Jones's attempt to hide the body and conceal the blood weighed against him in the *Miller* analysis. But Jones's efforts to hide the body were altogether inept and ineffectual, evincing little or no pre-planning or calculation. The neighbor and his yard man observed a bloody boy immediately after the deadly incident and *23 the yard man testified that the boy was trembling and muttering "kill, kill." Then, Jones decided to deal with the situation by traveling to Tupelo to explain what had happened to his grandmother so she did not have to discover it on her own. Jones's behavior in the immediate aftermath of his tragic actions also demonstrated his fundamental immaturity. ¶37. Further, the undisputed evidence from multiple witnesses was that Jones's family and home environment were incredibly dysfunctional. His mother was mentally ill and abused alcohol; the harmful effects of her maladies were experienced by the children and evident even to the extended family. The emotional and physical abuse Jones suffered at the hands of his stepfather also was undisputed and corroborated by multiple witnesses. The circuit court recognized that Jones had a troubled background and an "unsettled lifestyle" but discounted that evidence because Jones had escaped the dysfunction in Florida by relocating to Mississippi. But Jones's short-lived escape from his dysfunctional and violent home environment did not negate the fact that he had been reared in it and was not far removed from it. The circuit court also found that Jones was under no peer pressure when he stabbed his grandfather. But Jones was under pressure—his girlfriend, also an adolescent with whom he had a volatile emotional relationship—was partially dependent upon him for shelter. The pair had discussed his killing or hurting Jones's grandfather as a solution to the housing problem. Again, Jones's response to this short-sighted situation showed immaturity, impetuosity, and a failure to appreciate risks or consequences. The same is true of Jones's having engaged in sexual relations with Austin; rather than demonstrating his maturity, 23 as the circuit court thought, Jones's participation in this adult behavior before the age of *24 majority reflected immaturity and an utter failure to consider the consequences of his actions. And Jones, both youthful and inexperienced with the justice system, gave an interview to three police detectives without invoking his right to silence or his right to counsel and without a parent or guardian present, providing damning evidence to the State and diminishing his chances of a plea bargain. ¶38. The circuit court made no specific findings on the possibility of eventual rehabilitation. Jones showed that he had obtained a GED while incarcerated at the juvenile detention facility. He performed janitorial services for Benton, who testified that Jones had become like a son to him during his time at Walnut Grove. Jones testified that he had only one disciplinary write-up during his incarceration. That write-up had been for a fight, or "riot," that had involved multiple prisoners. He testified that he preferred to keep to himself, and Benton corroborated his testimony. Benton also testified that Jones had not participated in gang activity. Thus Jones presented evidence indicating a potential for rehabilitation. ¶39. Having evaluated the facts of the crime and the testimony provided by Jones with the utmost care under the factors from *Miller* and faithfully having applied our standard of review to the circuit court's decision, I am constrained to conclude that, because Jones's criminal actions reflected transient immaturity, the Eighth Amendment prohibits a life without parole sentence. I am unable to say that Jones is the rare, permanently incorrigible offender upon whom a life-without-parole sentence constitutionally can be imposed. The federal constitution leaves us but one course of action: to reverse the judgment of the Court of 24 Appeals, to reverse the decision of the Lee County Circuit Court, to vacate the sentence, *25 and to remand for resentencing to life imprisonment with eligibility for parole notwithstanding the present provisions of [Mississippi Code Section 47-7-3\(1\)\(h\)](#). See *Jones III*, 122 So. 3d at 703. This course is the only one that will satisfy the constitutional mandate articulated by the United States Supreme Court in the *Miller* and *Montgomery* decisions. ¶40. I am fully cognizant of the brutal, heinous, and tragic crime committed by Jones.

My opinion that the Eighth Amendment to the United States Constitution prohibits a without-parole sentence for Jones in no way minimizes his despicable act. In every case involving *Miller* sentencing, the Court will be confronted with a homicide committed by an underage individual, a crime which, if committed by an adult, likely would foreclose the possibility of parole. Against that backdrop, which recurs frequently when the perpetrator is a minor, as here, we are bound to apply the directives of the United States Supreme Court in *Miller* and *Montgomery*. Accordingly, only those rare offenders whose crimes reflect permanent incorrigibility constitutionally can be sentenced to life without parole. *Montgomery*, 136 S. Ct. at 734. Because Jones does not fit within that category, Jones's sentence must be vacated, and he must be resentenced to life imprisonment with eligibility for parole.

WALLER, C.J., KING AND ISHEE, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.



Supreme Court to Consider When Juveniles May Get Life Without Parole

The case is the court's latest consideration of the constitutionality of harsh punishments for youthful offenders.



By **Adam Liptak**

March 9, 2020

WASHINGTON — The Supreme Court agreed on Monday to decide whether judges must determine that juvenile offenders are incorrigible before sentencing them to die in prison. The case, involving a teenager who killed his grandfather, is the latest in a series of cases on the constitutionality of harsh punishments for youths who commit crimes before they turn 18.

The case, *Jones v. Mississippi*, No. 18-1259, concerns Brett Jones, who had recently turned 15 in 2004 when his grandfather discovered his girlfriend in his room. The two men argued and fought, and the youth, who had been making a sandwich, stabbed his grandfather eight times, killing him.

In 2005, Mr. Jones was convicted of murder and sentenced to life without the possibility of parole, the mandatory penalty under state law.

In 2012, in *Miller v. Alabama*, the Supreme Court ruled that automatic life sentences for juvenile offenders violated the Eighth Amendment's ban on cruel and unusual punishment. The decision repeatedly criticized mandatory sentences, suggesting that only ones in which judges could take account of the defendant's age were permissible.

In *Montgomery v. Louisiana* in 2016, the court made the *Miller* decision retroactive. In the process, it seemed to read the *Miller* decision to bar life without parole not only for defendants who received mandatory sentences but also "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.

After the U.S. Supreme Court's decision in *Miller*, the Mississippi Supreme Court granted Mr. Jones a new sentencing hearing.

After the hearing, the trial judge resentenced Mr. Jones to life without parole. "The court did not find that Brett was permanently incorrigible, nor did it acknowledge that only permanently incorrigible juvenile homicide offenders may be sentenced to life without parole," Mr. Jones's lawyers told the U.S. Supreme Court in their petition seeking review. "In fact, it did not address Brett's capacity for rehabilitation at all."

The question of whether judges must find that juvenile offenders are incorrigible before sentencing them to die in prison has divided state supreme courts.

In his response to Mr. Jones's petition, Jim Hood, Mississippi's former attorney general, wrote that Mr. Jones had received an adequate hearing and that no specific finding of incorrigibility was required.

The Supreme Court had been set to decide the issue presented in Mr. Jones's case in the case of Lee Malvo, the younger of the two men who terrorized the Washington region with sniper shootings in the fall of 2002.

When that case, *Mathena v. Malvo*, No. 18-217, was argued in October, several justices said consideration of whether juvenile offenders were incorrigible was important.

Justice Elena Kagan, who wrote the majority opinion in the *Miller* decision, said it and the *Montgomery* decision could be boiled down to two words: "Youth matters."

"You have to consider youth," she said, "in making these sorts of sentencing determinations."

Justice Brett M. Kavanaugh said the two rulings required judges to distinguish between "someone who's merely immature as opposed to incorrigible."

The court dismissed Mr. Malvo's appeal last month after a new Virginia law largely made the case moot.

Correction: March 10, 2020

An earlier version of this article referred incorrectly to Jim Hood. He is the former attorney general of Mississippi, not Alabama.

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. @adamliptak · Facebook

A version of this article appears in print on March 10, 2020, Section A, Page 15 of the New York edition with the headline: Supreme Court Will Weigh Role of Incurrigibility in Sentencing of Young Offenders

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN DOE, I; JOHN DOE, II; JOHN
DOE, III; JOHN DOE, IV; JOHN DOE,
V; and JOHN DOE, VI, each
individually and on behalf of
proposed class members,
Plaintiffs-Appellants,

v.

NESTLE, S.A.; NESTLE USA, INC.;
NESTLE IVORY COAST; CARGILL
INCORPORATED COMPANY; CARGILL
COCOA; CARGILL WEST AFRICA,
S. A.; ARCHER DANIELS MIDLAND
COMPANY,
Defendants-Appellees.

No. 17-55435

D.C. No.
2:05-cv-05133-
SVW-MRW

**ORDER AND
AMENDED
OPINION**

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 7, 2018
Pasadena, California

Filed October 23, 2018
Amended July 5, 2019

Before: Dorothy W. Nelson and Morgan Christen, Circuit Judges, and Edward F. Shea,* District Judge.

Order;
Dissent to Order by Judge Bennett;
Opinion by Judge D.W. Nelson;
Concurrence by Judge Shea

SUMMARY**

Alien Tort Statute

The panel filed (1) an order amending its opinion, denying a petition for panel rehearing, and denying on behalf of the court a petition for rehearing en banc; and (2) an amended opinion reversing the district court's dismissal of claims of aiding and abetting slave labor in violation of the Alien Tort Statute.

In its amended opinion, the panel reversed the district court's dismissal, which was based on the district court's conclusion that the complaint, brought by former child slaves who were forced to work on cocoa farms in the Ivory Coast against manufacturers, purchasers, and retail sellers of cocoa beans, sought an impermissible extraterritorial application of the Alien Tort Statute. In a two-step analysis, the panel

* The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

concluded that the ATS is not extraterritorial, but, looking to the statute’s focus, the complaint alleged a domestic application of the statute in defendants’ funding of child slavery practices. The panel concluded that plaintiffs’ allegations painted a picture of overseas slave labor that defendants perpetuated from headquarters in the United States, and this narrow set of domestic conduct was relevant to the ATS’s focus. The panel remanded to allow plaintiffs to amend their complaint to specify, in light of *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018), whether aiding and abetting conduct that took place in the United States was relevant to the domestic corporations named as defendants. The panel held that plaintiffs had Article III standing to bring their claims because they alleged concrete and redressable injury that was fairly traceable to the challenged conduct of one defendant, and their allegations against another defendant were sufficient to allow a final opportunity to replead.

District Judge Shea concurred in the result.

Judge Bennett, joined by Judges Bybee, Callahan, Bea, Ikuta, and R. Nelson; and joined by Judges M. Smith and Bade as to Part II, dissented from the denial of rehearing en banc. In Part I, Judge Bennett wrote that, after *Jesner*, corporations, foreign or domestic, are not proper ATS defendants. In Part II, Judge Bennett wrote that plaintiffs’ claims were impermissibly extraterritorial because the allegations in the complaint were clear that all the relevant misconduct took place in Côte d’Ivoire, not the United States.

COUNSEL

Paul L. Hoffman (argued), John Washington, and Catherine Sweetser, Schonbrun Seplow Harris & Hoffman LLP, Los Angeles, California; Terrence P. Collingsworth, International Human Rights Advocates, Washington, D.C.; for Plaintiffs-Appellants.

Theodore J. Boutrous, Jr. (argued), Abbey Hudson, Matthew A. Hoffman, and Perlette Michèle Jura, Gibson Dunn & Crutcher LLP, Los Angeles, California; Christopher B. Leach and Theodore B. Olson, Gibson Dunn & Crutcher LLP, Washington, D.C.; Colleen Sinzdak, David M. Foster, Craig A. Hoover, and Neal Kumar Katyal, Hogan Lovells US LLP, Washington, D.C.; for Defendant-Appellee Nestlé USA, Inc.

Andrew John Pincus (argued) and Kevin S. Ranlett, Mayer Brown LLP, Washington, D.C.; Lee H. Rubin, Mayer Brown LLP, Mayer Brown LLP, Palo Alto, California; for Defendant-Appellee Cargill Incorporated.

Marc B. Robertson and Richard A. Stamp, Washington Legal Foundation, Washington, D.C., for Amicus Curiae Washington Legal Foundation.

ORDER

The Opinion filed on October 23, 2018, is amended as follows:

IV. Plaintiffs Have Standing to Bring Their Claims

Defendants argue that plaintiffs lack Article III standing to bring their claims. To have standing, plaintiffs must allege “[(1)] a concrete and particularized injury [(2)] that is fairly traceable to the challenged conduct, [(3)] and is likely to be redressed by a favorable judicial decision.” *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016), cert. denied, (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)).

Plaintiffs easily satisfy the first and third requirements. Defendants do not dispute that plaintiffs suffered concrete injury by being abused and held as child slaves. In addition, plaintiffs’ injuries are redressable because when “one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 127 (1998).

Plaintiffs also satisfy the traceability requirement as to Cargill because they raise sufficiently specific allegations regarding Cargill's involvement in farms that rely on child slavery. *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1343 (11th Cir. 2011); *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (Article III traceability requirement "does not exclude injury produced by determinative or coercive effect upon the action of someone else."). Plaintiffs' allegations against Nestle are far less clear, though part of the difficulty is plaintiffs' reliance on collective allegations against all or at least multiple defendants. Notwithstanding this deficiency, the allegations are sufficient to at least allow plaintiffs a final opportunity to replead. On remand, plaintiffs must eliminate the allegations against foreign defendants and specifically identify the culpable conduct attributable to individual domestic defendants.

With the Amended Opinion, a majority of the panel voted to deny the petition for panel rehearing. Judges D. Nelson and Christen voted to deny the petition for panel rehearing, and Judge Shea voted to grant the petition for panel rehearing.

Judge Christen voted to deny the petition for rehearing en banc, and Judge D. Nelson so recommended. Judge Shea recommended granting the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to

rehear the matter en banc. The matter failed to receive a majority of the votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35. No further petitions for rehearing will be entertained.

The petition for rehearing and petition for rehearing en banc are **DENIED**. Judge Bennett’s dissent from the denial of rehearing en banc is filed concurrently herewith. Judges Wardlaw, Watford, Owens, Friedland, Miller, and Collins did not participate in the deliberations or vote in this case.

BENNETT, Circuit Judge, with whom BYBEE, CALLAHAN, BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH and BADE, Circuit Judges, join as to Part II, dissenting from the denial of rehearing en banc:

The Supreme Court has told us that the Alien Tort Statute (“ATS”) must be narrowly construed and sparingly applied, in line with its original purpose: “to help the United States avoid diplomatic friction” by providing “a forum for adjudicating that ‘narrow set of violations of the law of nations’ that, if left unaddressed, ‘threaten[ed] serious consequences’ for the United States.” *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1410 (2018) (Alito, J., concurring) (alteration in original) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)). The Court has given us a roadmap to determine whether artificial entities like corporations can be liable for ATS violations. And the Court has made it equally clear that the ATS reaches only domestic conduct—where a claim “seek[s] relief for violations of the law of nations occurring outside the United States,” the claim

is “barred.” *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, 569 U.S. 108, 124 (2013). Violations of the law of nations—like genocide, slavery, and piracy—are horrific. But in its zeal to sanction alleged violators, the panel majority has ignored the Court’s ATS roadmap. First, the panel majority has failed to properly analyze under *Jesner* whether a claim against these corporate defendants may proceed. And second, the panel majority has compounded that error by allowing this case to move forward notwithstanding that Defendants’ alleged actionable conduct took place almost entirely abroad, turning the presumption against extraterritoriality on its head.

Jesner changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS. Corporations are no longer viable ATS defendants under either step one or step two of the two-step approach the Court announced in *Sosa*, as applied in *Jesner*. The panel majority, however, fails to apply *Jesner*’s controlling analysis and applies an incorrect theory of ATS corporate liability even as the Supreme Court suggests that we reach the opposite conclusion.

The panel majority also all but ignores the Court’s instruction that an ATS claim must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application” of the ATS. *Kiobel II*, 569 U.S. at 124–25. Plaintiffs’ allegations—based almost entirely on violations of the law of nations that allegedly occurred in Africa—are wholly insufficient to state a claim.

The Supreme Court has instructed that we must “exercise ‘great caution’ before recognizing new forms of liability under the ATS.” *Jesner*, 138 S. Ct. at 1403 (quoting *Sosa*,

542 U.S. at 728). We should have heeded this instruction and taken this case en banc to hold that these corporations may not be sued under the ATS and to make clear that the presumption against extraterritoriality still applies in the Ninth Circuit.¹ Thus, I respectfully dissent from the denial of rehearing en banc.

¹ Although not within the scope of Defendants' petitions for rehearing en banc, I believe that it was error for this court to conclude in *Doe I v. Nestle USA, Inc. (Nestle I)*, 766 F.3d 1013 (9th Cir. 2014) that aiding-and-abetting liability is available under the ATS. As the government previously argued in another ATS case, "the adoption of aiding and abetting liability is a 'vast expansion of federal law' that federal courts must eschew in the absence 'of congressional direction to do so.'" Brief for the United States as Amicus Curiae in Support of Petitioners, at 8, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389, at *8 (hereinafter "Br. for the U.S. as Amicus Curiae") (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 464, 183 (1994)). Thus, the fact that the ATS provides for primary liability does not, in the absence of further congressional action, create secondary liability. See *Cent. Bank*, 511 U.S. at 182 ("[W]hen Congress enacts a statute under which a person may sue or recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.").

Just as Congress has not extended the ATS to corporations (and, in fact, expressly limited the Torture Victim Protection Act to individual liability, see *infra* Part I.C), it has not created ATS aiding-and-abetting liability either. Courts, including our own, that have permitted plaintiffs to bring claims for aiding-and-abetting ATS violations have, in the words of the Solicitor General, "veered far off course under the ATS." Br. for the U.S. as Amicus Curiae at 10.

I. After *Jesner*, Corporations Are Not Proper ATS Defendants.

Just last term, the Supreme Court held in *Jesner* that the ATS’s jurisdictional grant does not extend to foreign corporations. 138 S. Ct. at 1407. This appeal presents the question that the Supreme Court expressly left open in *Jesner*: can corporations *ever* be proper ATS defendants? The panel majority avoided this issue by relying on discredited circuit precedent. Applying the correct standard post-*Jesner*, corporations (foreign or not) are clearly not proper ATS defendants. It was error for the panel majority to hold otherwise, and we should have corrected that error en banc.

To determine whether to recognize a cause of action under the ATS, we look to *Sosa*, which involves a “two-step process.” *Jesner*, 138 S. Ct. at 1409 (Alito, J., concurring). “First, a court must determine whether the particular international-law norm alleged to have been violated is ‘accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.’” *Id.* at 1419 (Sotomayor, J., dissenting) (quoting *Sosa*, 542 U.S. at 725). “Second, if that threshold hurdle is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion.” *Id.* at 1420. Corporate liability fails at both steps.

In *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 760 (9th Cir. 2011) (en banc), *vacated and remanded*, 569 U.S. 945 (2013), we held that if a norm of conduct is sufficiently established to give rise to ATS liability, the only relevant liability question is whether the defendant is capable of violating the norm. Although the Supreme Court vacated *Sarei* in light of

Kiobel II, we doubled down on *Sarei*'s erroneous reasoning in *Doe I v. Nestle USA, Inc. (Nestle I)*, 766 F.3d 1013 (9th Cir. 2014), when we held that where there exists a “universal and absolute” norm of conduct that is “applicable to ‘all actors,’” any accused violator is subject to jurisdiction of the United States courts under the ATS. *Id.* at 1022 (quoting *Sarei*, 671 F.3d at 760). As far as I am aware, we have never analyzed the corporate liability issue under *Sosa* step two. The panel majority has neglected to do so here.

Judge Bea persuasively explained why the *Sarei/Nestle I* approach to corporate liability was inconsistent with established Supreme Court precedent, *see Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015) (Bea, J., dissenting from the denial of rehearing en banc) (“*Nestle I* Dissental”), and I do not repeat those arguments here. After *Jesner*, though, there should be no serious doubt that our court’s approach to this issue is incomplete, and the en banc court should have stepped in to correct the panel majority’s failing.

A. *Nestle I* is no longer good law on the corporate-liability issue.

In holding that foreign corporate defendants are categorically not amenable to suit under the ATS, *Jesner* was explicit that federal courts can and must—contrary to *Nestle I*—determine whether certain categories of defendant are beyond the reach of an ATS claim. *See Jesner*, 138 S. Ct. at 1402–03. The panel majority’s application of *Nestle I* to the corporate defendants here, post-*Jesner*, was at best incomplete and at worst simply wrong. In addition, while *Jesner*’s holding was limited by its terms to foreign corporations, five justices in *Jesner* authored or joined

opinions that called into serious doubt the validity of ATS claims against domestic corporations.

1. We should have taken this case en banc to expressly reject *Nestle I*'s approach to corporate liability questions.

First, *Jesner* directly conflicts with the *Nestle I* approach—in particular, our holding that “there is no categorical rule of corporate immunity or liability” under the ATS. *Nestle I*, 766 F.3d at 1022 (citing *Sarei*, 671 F.3d at 747). In *Jesner*, the Court explained that its “general reluctance to extend judicially created private rights of action . . . extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.” *Jesner*, 138 S. Ct. at 1402–03. Justice Kennedy’s opinion for the Court answered that question in the negative for foreign corporations, and in the process invited the lower courts to consider whether the question should be answered similarly as to domestic corporations. *See id.* at 1402.

Here, the panel majority correctly acknowledged that *Jesner* abrogated *Nestle I* to the extent that *Nestle I* permitted an ATS suit against foreign corporate defendants. *Doe v. Nestle, S.A. (Nestle II)*, 906 F.3d 1120, 1124 (9th Cir. 2018). But the panel majority’s subsequent conclusion that *Jesner* left undisturbed this court’s treatment of domestic corporations under the ATS, *id.*, was incorrect. *Jesner*’s holding, to be sure, was limited to foreign corporations, but by acknowledging the existence of categorical rules restricting the ATS liability of certain classes of corporate actors, *Jesner* requires us to discard the approach we adopted in *Sarei* (and re-embraced in *Nestle I*), which focused entirely

on the question whether a norm of *conduct* is sufficiently universal to support an ATS claim. *Jesner* thus confirmed Judge Bea’s dissent’s conclusion in *Nestle I*: “there must be a meaningful inquiry—not a mere labeling of norms as ‘categorical’”—into whether the ATS supports liability against a given defendant. *Nestle I* Dissent, 788 F.3d at 955. Not only did the panel majority fail to conduct a *meaningful* inquiry into corporate liability, it inexplicably failed to conduct any inquiry at all: “*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*’s holding as applied to domestic corporations.” *Nestle II*, 906 F.3d at 1124. The en banc court should have corrected that very clear error.

2. Five justices in *Jesner* strongly suggested that the ATS forecloses corporate liability.

Although *Jesner* did not explicitly rule out domestic corporate ATS liability, there is no basis for the panel majority’s conclusion that *Jesner* preserved our court’s status quo. Justice Kennedy’s three-justice plurality opinion does not mince words in arguing that “[t]he international community’s conscious decision to limit the authority of . . . international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.” 138 S. Ct. at 1401 (plurality op.).

Justice Alito’s view is similar:

Federal courts should decline to create federal common law causes of action under *Sosa*’s second step whenever doing so would not

materially advance the ATS’s objective of avoiding diplomatic strife. . . . All parties agree that customary international law does not *require* corporate liability as a general matter. But if customary international law does not require corporate liability, then declining to create it under the ATS cannot give other nations just cause for complaint against the United States.

Id. at 1410 (Alito, J., concurring) (citation omitted). Corporate liability would “not materially advance the ATS’s objective of avoiding diplomatic strife.” *Id.*

Finally, Justice Gorsuch would have gone even further than the plurality and held that the courts lack authority to create *any* new causes of action under the ATS other than those recognized by the First Congress, which would not include the claims that Plaintiffs here raise. *Id.* at 1412–13 (Gorsuch, J., concurring).

In short, five justices signaled in *Jesner* that they would hold that corporations are not subject to the ATS. We should have revisited en banc the panel majority’s holding that *Jesner* had no impact at all on this issue.²

² The panel majority’s application of *Nestle I* in this case was based on *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), in which we held that “where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority.” *Id.* Because *Jesner* is “clearly irreconcilable” with *Nestle I*, *Miller* provides an additional compelling reason for us to have taken this case up en banc to conduct the analysis required by “higher authority.”

B. No specific, universal, and obligatory norm of international law extends liability to corporate defendants, and such claims are not cognizable under the ATS.

Because no sufficiently established norm of international law subjects corporations to liability, an ATS claim cannot lie against corporations.

1. International law, not federal common law, supplies the rule of decision on corporate liability.

As I explained above, the Court in *Sosa* directed lower courts to consider “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” 542 U.S. at 732 n.20; *see also id.* at 760 (Breyer, J., concurring) (restating the Court’s holding that “[t]he norm must extend liability to the type of perpetrator . . . the plaintiff seeks to sue”). Properly understood, *Sosa* forecloses any argument that the ATS provides authority for the creation of new causes of action under federal common law.³ *See Kiobel v. Royal Dutch Petroleum Co. (Kiobel I)*, 621 F.3d 111, 127 (2d Cir. 2010) (*Sosa* “requires that we look to *international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations”).

³ This view is consistent with Judge Edwards’s concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which looked to the lack of “consensus on non-official torture” to conclude that the ATS did not “cover torture by non-state actors.” *Id.* at 795 (Edwards, J., concurring).

Some courts have concluded that corporate liability is permitted by the ATS, reasoning that while customary international law supplies the cause of action (in this case, a claim for redress of child slavery), “the technical accoutrements to the ATS cause of action, such as corporate liability[,] . . . are to be drawn from federal common law[.]” *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 51 (D.C. Cir. 2011), *vacated*, 527 F. App’x 7 (D.C. Cir. 2013); *see also Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1020 (7th Cir. 2011) (“International law imposes substantive obligations and the individual nations decide how to enforce them.”).

These views are flatly inconsistent with *Sosa*, which requires that courts evaluate the potential liability under international law for certain classes of defendants. And following *Jesner*, these views are even less tenable. Indeed, Justice Sotomayor’s *Jesner* dissent specifically invokes the distinction between norms of “substantive conduct,” which she argues are determined by international law, and “rules of how to enforce international-law norms,” which she argues are left to the individual states. *Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting). That contention, however, only garnered the support of four justices, and was characterized by the plurality as “far from obvious,” *id.* at 1402 (plurality op.). In any event, *Sosa* defines our inquiry and requires us to determine questions of corporate liability by reference to international law.

2. An ATS claim does not lie against corporations because there is no universally accepted international law norm of corporate liability.

Applying *Sosa*'s step one to the question of corporate liability under the ATS, I agree with Justice Kennedy's plurality opinion in *Jesner*, Judge Cabranes's opinion for the Second Circuit in *Kiobel I*, and then-Judge Kavanaugh's dissent in *Exxon Mobil*, that allowing an ATS claim against a corporation does not "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" on which the ATS was based. *Sosa*, 542 U.S. at 725; *see also Jesner*, 138 S. Ct. at 1401 (plurality op.) ("The international community's conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law."); *Kiobel I*, 621 F.3d at 141 ("[T]here is nothing to demonstrate that corporate liability has yet been recognized as a norm of the customary international law of human rights."); *Exxon Mobil*, 654 F.3d at 81 (Kavanaugh, J., dissenting) ("[C]laims under the ATS are defined and limited by customary international law, and customary international law does not extend liability to corporations.").

As Judge Leval's concurrence in *Kiobel I* recognized, "international law, of its own force, imposes no liabilities on corporations or other private juridical entities." *Kiobel I*, 621 F.3d at 186 (Leval, J., concurring). That conclusion is dispositive—in the absence of a clearly defined, universal norm of corporate liability under customary international law,

the remaining domestic corporate defendants are entitled to dismissal.

I note finally that only a few courts have argued that there is, in fact, a specific, universal, and obligatory norm of corporate liability under international law (*Flomo*, 643 F.3d at 1016, for example, makes this argument). This view is the minority and seems to be contrary to fact. Even Justice Sotomayor’s *Jesner* dissent does not argue that such a norm exists. Rather, Justice Sotomayor argues, echoing Judge Leval and others, that there is no international-law reason to distinguish between corporations and natural persons, and thus federal common law (which recognizes corporate liability) should supply the rule of decision. *See Jesner*, 138 S. Ct. at 1425 (Sotomayor, J., dissenting).

Looking to federal common law to fill the gaps where international law is silent is problematic for several reasons. First, it ignores *Sosa*’s requirement that we look to a given defendant’s potential liability under international law to determine whether an ATS claim lies. 542 U.S. at 732 n.20. If there is no international law liability, the ATS does not permit courts to impute liability from another body of substantive law. Second, it simply ignores “the fact that no international tribunal has ever been accorded jurisdiction over corporations.” *Kiobel I*, 621 F.3d at 145. Third, it is a completely backwards application of *Sosa* step one. Rather than asking whether the norm of corporate liability “is sufficiently definite” under international law, *Sosa*, 542 U.S. at 732, it purports to derive a new type of ATS liability from the *absence* of an international law norm distinguishing between individual and corporate actors. *See Jesner*, 138 S. Ct. at 1425 (Sotomayor, J., dissenting) (quoting Judge Leval’s concurrence in *Kiobel I*, 621 F.3d at 175, for the proposition

that “international law . . . takes no position on the question” whether international law distinguishes between a corporation and natural person). But the ATS does not give federal courts the “power to mold substantive law.” *Sosa*, 542 U.S. at 713. In the absence of a clear norm of corporate liability under international law, we cannot extend the ATS to reach corporate actors. *See Kiobel I*, 621 F.3d at 120–21 (“[T]he responsibility of establishing a norm of customary international law lies with those wishing to invoke it, and in the absence of sources of international law endorsing (or refuting) a norm, the norm simply cannot be applied in a suit grounded on customary international law under the ATS.”).

C. The caution urged by the Court in ATS cases counsels heavily against permitting an ATS claim against corporations.

The inquiry should end at *Sosa* step one. But were we to move to *Sosa* step two, dismissal would still be appropriate because only Congress, not the courts, may extend the ATS’s reach to corporate actors. *Sosa* step two, as the Supreme Court applied it in *Jesner*, compels a holding that corporate liability simply does not lie under the ATS absent express congressional approval.

The appropriate inquiry here is “whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.” *Jesner*, 138 S. Ct. at 1399 (plurality op.). Since *Sosa*, the Court has consistently urged lower federal courts to exercise “great caution” before extending the ATS to cover new forms of liability not contemplated by the First Congress. *Sosa*, 542 U.S. at 728. In *Kiobel II*, for example,

the Court observed that foreign policy concerns “are implicated in any case arising under the ATS,” and reiterated the need for deference to the political branches before fashioning new ATS causes of action. 569 U.S. at 117.

In *Jesner*, the Court relied on this judicial reluctance in declining to extend ATS liability to foreign corporations. Highlighting foreign policy and separation-of-powers concerns, the *Jesner* majority reiterated that the responsibility for creating new causes of action—particularly in areas that touch foreign policy (as any ATS case does)—lies with Congress and the President. 138 S. Ct. at 1402–03, 1407.

The panel majority has failed to exercise the caution that the Supreme Court demands in ATS cases. Following the Court’s lead in *Jesner*, we should have held that corporate ATS liability fails *Sosa* step two for two reasons: the Congressional enactment of the Torture Victim Protection Act of 1991 (“TVPA”), and the Court’s *Bivens* jurisprudence.

First, we have some “congressional guidance in exercising jurisdiction.” *Sosa*, 542 U.S. at 731. The TVPA—the *only* ATS cause of action created by Congress, *see* 28 U.S.C. § 1350 note—expressly limits liability to “individuals.” As the *Jesner* plurality explained, the fact that corporations cannot be sued under the TVPA “reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.” 138 S. Ct. at 1403 (plurality op.). The TVPA is “all but dispositive” of the issue of corporate liability under the ATS. *Id.* at 1404 (plurality op.). On the sole occasion it has implemented the ATS for a specific class of conduct,

Congress specifically chose to exempt corporations from liability.

Second, insofar as the Court has expressed considerable skepticism of expanding the breadth of the ATS in the absence of Congressional guidance, its *Bivens* jurisprudence (which “provides . . . the closest analogy” to the ATS, *Sosa*, 542 U.S. at 743 (Scalia, J., concurring in part)) is highly instructive. In *Jesner*, the Court cited a *Bivens* case, *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001), for the proposition that “[a]llowing corporate liability would have been a ‘marked extension’ of *Bivens* that was unnecessary to advance its purpose.” 138 S. Ct. at 1403. As the *Jesner* Court then explained, “[w]hether corporate defendants should be subject to suit was ‘a question for Congress, not us, to decide.’” *Id.* (quoting *Malesko*, 534 U.S. at 72). The Court then immediately observed that “[n]either the language of the ATS nor the precedents interpreting it support an exception to these general principals in this context.” *Id.* at 1403.

Jesner’s discussion of *Bivens* and *Malesko* should dictate the outcome here. In *Malesko*, the Court reasoned that corporations are immune from *Bivens* actions because, “if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.” 534 U.S. at 71. “[T]he deterrent effects of the *Bivens* remedy would be lost.” *Id.* at 69 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)).

The same principle applies with equal force here. International criminal law is chiefly concerned with punishing those natural persons directly responsible for affronts to the law of nations. *See The Nürnberg (Nuremberg)*

Trial (United States v. Goering), 6 F.R.D. 69, 110 (Int'l Military Trib. 1946) (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”). The complaint here amply demonstrates that if given the choice between pursuing a corporate defendant or the individuals responsible for violating international law, plaintiffs will choose the former. But, in the end, whether sound policy would counsel for or against extending ATS liability to corporations, the Supreme Court has clearly stated that such a policy determination is for Congress and not the courts. Under *Malesko* and *Jesner*, ATS liability does not attach to corporate defendants, and we should have corrected the panel majority’s opposite conclusion en banc.

II. Plaintiffs’ Claims Are Impermissibly Extraterritorial.

In *Kiobel II*, the Court held “the presumption against extraterritoriality applies to claims under the ATS.” 569 U.S. at 124. To sustain an ATS action, therefore, the allegations underlying the plaintiff’s claim must “touch and concern the territory of the United States, [and] they must do so with sufficient force to displace the presumption against extraterritorial application.” *Id.* at 124–25. When we seek to apply the ATS to aiding-and-abetting claims, the locus of the actual law-of-nations violation becomes even more significant. *See Doe v. Drummond Co.*, 782 F.3d 576, 592–93 (11th Cir. 2015) (Where, as here, “the [ATS] claim is for secondary responsibility, we must . . . consider the location of any underlying conduct, such as where the actual injuries were inflicted.”).

To determine whether a given “case involves a domestic application of the statute . . . [courts] look[] to the statute’s ‘focus.’” *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). “[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.” *Id.* Put another way, if “all the relevant conduct occurred abroad, that is simply the end of the matter.” *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) (quoting *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013)).

Because all relevant conduct took place abroad, we should have corrected the panel majority’s decision to permit this case to proceed.

A. Allegations of solely foreign misconduct cannot sustain an ATS claim.

Plaintiffs allege that they were victims of child slavery in Côte d’Ivoire. They allege that the perpetrators (who are not named defendants) are slavers and cocoa farmers abroad. They do not allege that any of the named defendants engaged in slavery or are associated with any of the actual perpetrators beyond their status as buyers of cocoa. “[T]he ATS’s focus is . . . conduct that violates international law, which the ATS ‘seeks to “regulate”’ by giving federal courts jurisdiction over such claims.” *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197 (5th Cir.), cert. denied 138 S. Ct. 134 (2017) (quoting *Morrison v. Nat’l Australia Bank, Ltd.*, 561 U.S. 247, 267 (2010)); see also *Kiobel II*, 569 U.S. at 127 (Alito, J., concurring) (“[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the

domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.”). Here, that conduct—Plaintiffs’ enslavement on cocoa plantations—took place abroad, and thus their ATS claims must be dismissed.

The majority opinion identifies three examples of conduct that, in its view, are sufficiently forceful to displace the presumption against extraterritoriality: allegations that 1) “[D]efendants funded child slavery practices in the Ivory Coast” in the form of “personal spending money to maintain the farmers’ and/or the cooperatives’ loyalty as an exclusive supplier,” which the panel majority characterizes as “kickbacks”; 2) Defendants’ employees “inspect operations in the Ivory Coast”; and 3) Defendants made “financing decisions” in the United States. *Nestle II*, 906 F.3d at 1126. The first two sets of allegations (provision of spending money and inspections) relate solely to foreign conduct. The third, which involves domestic corporate decision-making, cannot sustain an ATS claim, even if we assume aiding and abetting liability under the ATS.

Even if payments to cocoa farmers could be properly characterized as “kickbacks” (though they were never described in the complaint as such), the payments, like the slavery, all took place in Africa. The complaint does not even allege that the funds originated in the U.S., only that they were paid to “local farmers.”⁴ Alleged “inspections” of cocoa

⁴ As to Defendant Nestle, the complaint does not even allege that any Nestle entity made any payments to any farmer that used child slaves, only that Nestle “was directly involved in the purchasing and processing of cocoa beans from Côte d’Ivoire.” With respect to Defendant Cargill, the complaint alleges that “19 Malian child slaves were rescued” from one of

farms likewise took place in Africa. The panel majority fails to identify any domestic conduct alleged in the complaint that is “connect[ed] [to] the alleged international law violations.” *Adhikari*, 845 F.3d at 198. Consistent with *Kiobel II*, alleged misconduct that took place entirely abroad cannot sustain an ATS claim.

B. Domestic corporate presence cannot support an otherwise extraterritorial ATS claim.

The complaint does allege some domestic activity. Indeed, “it is a rare case . . . that lacks *all* contact with the territory of the United States.” *Morrison*, 561 U.S. at 266. “But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.” *Id.* To the extent that the complaint alleges relevant domestic conduct at all, it simply alleges corporate presence and decision-making. That cannot form the basis for an ATS/aiding-and-abetting claim.

To begin, no court has held that the mere fact that a defendant is American is sufficient, on its own, to displace the presumption against extraterritoriality. At most, the domestic status of a corporation “may well be . . . *one* factor that, in conjunction with other factors,” could establish a

the farms with which Cargill had an exclusive supplier relationship, but does not allege that Cargill had any relationship with the farm in question at a time it used slave labor, or that Cargill was specifically aware that the farm used slaves.

sufficient connection.⁵ *Mujica*, 771 F.3d at 594 (emphasis added). But, as we explained, “the [Supreme] Court has repeatedly applied the presumption against extraterritoriality to bar suits” where the defendant was a U.S. corporation. *Id.* (compiling cases).

The panel majority concludes that Defendants making “financing decisions” in the United States is conduct sufficient to displace the presumption against extraterritoriality. But *Mujica* teaches us that vague allegations of domestic “decisions furthering the [] conspiracy” will not imbue an otherwise entirely foreign claim with the territorial connection that the ATS absolutely requires. 771 F.3d at 591; *see also Baloco v. Drummond Co.*, 767 F.3d 1229, 1236 (11th Cir. 2014) (presumption not displaced despite allegations of domestic decision-making).

Our holding here also conflicts with two other circuits that have considered the question. In *Doe v. Drummond*, the Eleventh Circuit held that the making of “funding and policy decisions in the United States” does not displace the presumption where the unlawful conduct itself took place in Colombia. 782 F.3d at 598; *see also Baloco*, 767 F.3d at 1236 (holding that domestic decision-making does not displace the presumption in the absence of allegations of “an express agreement between Defendants” and actual perpetrators of human rights abuses, which is not alleged here); *Cardona v.*

⁵ The Second Circuit, though, views the citizenship of the defendant as an “irrelevant factual distinction[.]” for purposes of the rule against extraterritoriality. *Balintulo*, 727 F.3d at 190; *see also Mastafa v. Chevron Corp.*, 770 F.3d 170, 189 (2d Cir. 2014) (“We disagree with the contention that a defendant’s U.S. citizenship has any relevance to the jurisdictional analysis.”).

Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014) (holding that ATS claim against domestic defendant must be dismissed because alleged acts of torture all took place abroad); *see also id.* at 1192 (Martin, J., dissenting) (faulting the majority for ordering dismissal notwithstanding allegations that domestic defendant “review[ed], approv[ed], and conceal[ed]” the scheme in the United States). And in *Adhikari*, the Fifth Circuit held that domestic payments from a U.S. corporation to a foreign subcontractor that was allegedly involved in “human trafficking” did not displace the presumption. 845 F.3d at 197.⁶ Had Plaintiffs filed in the Fifth or Eleventh Circuit, their allegations would have been dismissed for want of adequate allegations of domestic conduct.

The only circuit court decisions that the panel majority identifies to support its view are both Second Circuit cases, *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), and *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016). *Mastafa* is clearly distinguishable. There, plaintiffs alleged “multiple domestic purchases and financing transactions” as well as “New York-based payments and ‘financing arrangements’ conducted exclusively through a New York bank account”—allegations of “specific and domestic” conduct altogether lacking here. 770 F.3d at 191. Indeed, *Mastafa* supports dismissal of the claims here, as the Second Circuit found the plaintiffs’ allegations that “much of the decisionmaking to participate in the . . . scheme” took

⁶ The fact that *Adhikari* involved a claim for primary, rather than secondary, liability is immaterial. Plaintiffs there sought to amend their complaint to add an aiding-and-abetting claim, and the Fifth Circuit held that such an amendment would be futile because the relevant facts alleged did not displace the presumption. 845 F.3d at 199.

place in the United States, “conclusory” and inadequate. 770 F.3d at 190.

Licci fares no better. The plaintiffs alleged that the defendant’s domestic conduct “violated various terrorist financing and money laundering laws.” 834 F.3d at 215. Plaintiffs here do not allege that Defendants made payments to Ivorian farmers to perpetuate law-of-nations violations, but rather to “maintain the farmers’ . . . loyalty as an exclusive supplier.” *Nestle II*, 906 F.3d at 1126. By permitting Plaintiffs’ claims to go forward based on the allegations made here, we essentially read out the presumption against extraterritoriality.

Perhaps recognizing that the complaint alleges only normal business conduct in the United States, the panel majority asserts that Defendants paid “kickbacks” to the farmers in the form of “spending money” (though again, those payments were made in Africa, not the United States). Those “kickbacks,”⁷ in the panel majority’s view, are far more than normal corporate activity: Instead, Defendants are “maintain[ing] ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave

⁷ I understand “kickbacks” differently than the majority. For example, The Anti-Kickback Enforcement Act of 1986 essentially defines a kickback in the contract procurement sphere as providing money or something else of value (to a contractor, subcontractor, or employee of either) for the purpose of improperly obtaining or rewarding favorable treatment. *See* 41 U.S.C. § 8701(2). Providing a farmer money (even extra money) to keep supplying a product is not what I would ever have thought of as a kickback (versus bribing the farmer’s plantation manager to steer business, for example).

labor.” *Nestle II*, 906 F.3d at 1126. This somehow pushes the needle over the line.

But the complaint itself, which never uses the word “kickback,” is devoid of any allegation that the provision of “spending money” was improper or illegal, and on the facts actually alleged, Plaintiffs could not plausibly make such an assertion.⁸ The *factual* allegations in the complaint show only that Defendants sought to stabilize their supply lines and minimize costs by entering into exclusive-dealing arrangements. We have recognized that such agreements “provide ‘well-recognized economic benefits.’” *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 836 F.3d 1171, 1180 n.2 (9th Cir. 2016) (quoting *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997)). Indeed, the complaint merely alleges that “spending money” is meant to “maintain the farmers’ and/or the cooperatives’ loyalty as exclusive suppliers.” Because the complaint lacks an allegation that Defendants provided anything to the farmers for an illegal purpose, the panel majority was flatly wrong to “infer” “kickbacks” from the facts alleged.

The complaint here alleges clear, egregious, and terrible violations of Plaintiffs’ basic human rights. But the allegations are equally clear that all the relevant misconduct took place in Côte d’Ivoire, not the United States. The panel majority’s conclusion to the contrary is based on a reconstruction and/or rewriting of the allegations in the complaint in a way that essentially eliminates the presumption against extraterritoriality. But, no matter how the

⁸ Tellingly, Plaintiffs’ response to the rehearing petitions does not defend the panel majority’s use of the “kickback” label, except to repeat that “all reasonable inferences are made in Plaintiffs’ favor.”

complaint is viewed, it still alleges horrific conduct that took place *outside* the United States.⁹

III. Conclusion.

The Supreme Court directs us to proceed cautiously when interpreting the ATS. Instead, we have adopted a broad and expansive view of the statute that largely disregards recent Supreme Court precedent. I thus respectfully dissent from our decision not to rehear this case en banc.

⁹ The panel majority also erred in allowing Plaintiffs the opportunity to file yet another complaint in this action, which has been pending for almost fifteen years—it will make their *fourth* overall. Rather than address the complaint’s obvious pleading deficiencies, the panel majority asserts that “*Jesner* changed the legal landscape on which plaintiffs constructed their case,” and as a result, Plaintiffs must be allowed to “amend their complaint to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case.” *Nestle II*, 906 F.3d at 1126–27.

Plaintiffs already had the opportunity to plead to allege domestic aiding and abetting after *Kiobel II*. See *Nestle I*, 766 F.3d at 1028. Rather than doing so, Plaintiffs lumped together foreign and domestic entities in their complaint, see *Nestle II*, 906 F.3d at 1126, muddying, rather than clearing up, questions surrounding the locus of the tortious conduct alleged. Nothing in *Jesner* changes the requirement that domestic conduct sufficient to displace the presumption against extraterritoriality is required and *Jesner* is no reason to allow yet another amendment to Plaintiffs’ complaint as the total unallocated domestic conduct alleged here is clearly insufficient.

OPINION

D.W. NELSON, Circuit Judge:

OVERVIEW

Plaintiffs-Appellants (“Plaintiffs”), former child slaves who were forced to work on cocoa farms in the Ivory Coast, filed a class action lawsuit against Defendants-Appellees Nestle, SA, Nestle USA, Nestle Ivory Coast, Archer Daniels Midland Co. (“ADM”),¹ Cargill Incorporated Company, and Cargill West Africa, SA (“Defendants”). In their Second Amended Complaint, plaintiffs alleged claims for aiding and abetting slave labor that took place in the United States under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”). The district court dismissed the claims below based on its conclusion that plaintiffs sought an impermissible extraterritorial application of the ATS. We reverse and remand. In light of an intervening change in controlling law, we think it unnecessary to consider the other issues this case presents at this juncture.

*BACKGROUND***I. Factual Background**

We discussed much of the factual background of this case in *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (“*Nestle I*”). Child slavery on cocoa farms in the Ivory Coast, where seventy percent of the world’s cocoa is produced, is a pervasive humanitarian tragedy.

¹ Plaintiffs voluntarily dismissed ADM from this case.

Plaintiffs are former child slaves who were kidnapped and forced to work on cocoa farms in the Ivory Coast for up to fourteen hours a day without pay. While being forced to work on the cocoa farms, plaintiffs witnessed the beating and torture of other child slaves who attempted to escape.

Defendants are large manufacturers, purchasers, processors, and retail sellers of cocoa beans. Several of them are foreign corporations that are not subject to suit under the ATS. *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1407 (2018). The effect of *Jesner* in tandem with plaintiffs' habit of describing defendants en masse presents a challenge we address below. For now, we describe the case as plaintiffs present it. We take their plausible allegations as true and draw all reasonable inferences in their favor. *See Nestle I*, 766 F.3d at 1018.

Because of their economic leverage over the cocoa market, defendants effectively control cocoa production in the Ivory Coast. Defendant Nestle, USA is headquartered in Virginia and coordinates the major operations of its parent corporation, Nestle, SA, selling Nestle-brand products in the United States. Every major operational decision regarding Nestle's United States market is made in or approved in the United States. Defendant Cargill, Inc. is headquartered in Minneapolis. The business is centralized in Minneapolis and decisions about buying and selling commodities are made at its Minneapolis headquarters.

Defendants operate with the unilateral goal of finding the cheapest source of cocoa in the Ivory Coast. Not content to rely on market forces to keep costs low, defendants have taken steps to perpetuate a system built on child slavery to depress labor costs. To maintain their supply of cocoa,

defendants have exclusive buyer/seller relationships with Ivory Coast farmers, and provide those farmers with financial support, such as advance payments and personal spending money. 19 Malian child slaves were rescued from a farm with whom Cargill has an exclusive buyer/seller relationship. Defendants also provide tools, equipment, and technical support to farmers, including training in farming techniques and farm maintenance. In connection with providing this training and support, defendants visit their supplier farms several times per year.

Defendants were well aware that child slave labor is a pervasive problem in the Ivory Coast. Nonetheless, defendants continued to provide financial support and technical farming aid, even though they knew their acts would assist farmers who were using forced child labor, and knew their assistance would facilitate child slavery. Indeed, the gravamen of the complaint is that defendants depended on—and orchestrated—a slave-based supply chain.

II. Procedural History

Plaintiffs began this lawsuit over a decade ago, and we had occasion to consider it once before in *Nestle I*. On remand after *Nestle I*, defendants moved to dismiss the operative complaint and the district court granted the motion. In its order, the district concluded that the complaint seeks an impermissible extraterritorial application of the ATS because defendants engaged domestically only in ordinary business conduct. The district court did not decide whether plaintiffs stated a claim for aiding and abetting child slavery.

Plaintiffs timely appealed.

STANDARD OF REVIEW

We review a dismissal for lack of jurisdiction de novo. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (citing *Arakaki v. Lingie*, 477 F.3d 1048, 1056 (9th Cir. 2007)). “A dismissal for failure to state a claim is reviewed de novo. All factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party.” *Nestle I*, 766 F.3d at 1018 (quoting *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008) (internal citations omitted)).

DISCUSSION

The legal landscape has shifted since we last considered this case, including during the pendency of this appeal. The Supreme Court’s decisions in *Jesner* and *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), require us to revisit parts of *Nestle I*.

I. Corporate Liability Post-*Jesner*

In *Nestle I*, we held that corporations are liable for aiding and abetting slavery after applying three principles from our en banc decision in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011) (en banc), *vacated on other grounds by Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013). *Nestle I*, 766 F.3d at 1022. Our court in *Sarei* adopted a norm-specific analysis that determines “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.” *Sarei*, 671 F.3d at 760 (quoting *Sosa*, 542 U.S. at 732 n.20). “First, the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability.” *Nestle I*, 766 F.3d at 1022 (citing

Sarei, 671 F.3d at 747–48). Under the second principle, “corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations.” *Id.* (citing *Sarei*, 671 F.3d at 760–61). “Third, norms that are ‘universal and absolute,’ or applicable to ‘all actors,’ can provide the basis for an ATS claim against a corporation.” *Id.* (citing *Sarei*, 671 F.3d at 764–65). We reaffirmed these principles in *Nestle I* and held that since the prohibition of slavery is “universal,” it is applicable to all actors, including corporations. *Id.* at 1022.

As we have noted, the Supreme Court in *Jesner* held that foreign corporations cannot be sued under the ATS. *Jesner*, 138 S. Ct. at 1407. *Jesner* thus abrogates *Nestle I* insofar as it applies to foreign corporations. But *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*’s holding as applied to domestic corporations. See *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

II. Extraterritorial ATS Claim

In *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, the Supreme Court held that the ATS does not have extraterritorial reach after applying a canon of statutory interpretation known as the presumption against extraterritorial application, which counsels that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” 569 U.S. 108, 115 (2013) (citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010)). The Court acknowledged that the canon is not directly on point given that the ATS “does not directly regulate conduct or afford relief.” *Id.* But given the foreign policy concerns the ATS poses, the Court stated that “the

principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.” *Id.*

The Court in *Kiobel II* left the door open to the extraterritorial application of the ATS for claims made under the statute which “touch and concern the territory of the United States . . . with sufficient force to displace the presumption.” *Id.* at 123 (citing *Morrison*, 561 U.S. at 264–73). Because “all the relevant conduct” in *Kiobel II* took place abroad, the Court did not need to delve into the contours of the touch and concern test. *Id.* The only guidance the Court provided about the “touch and concern” test was that “mere corporate presence” would not suffice to meet it. *Id.*

In announcing the “touch and concern” test, the Supreme Court cited to its decision in *Morrison v. National Australia Bank Lt.* In *Morrison*, the Supreme Court undertook a two-step analysis, known as the “focus” test, to determine whether Section 10(b) of the Securities Exchange Act of 1934 applies extraterritorially. *Morrison*, 561 U.S. at 262. Under the first analytical step, the Court asked if there is any indication that the statute is meant to apply extraterritorially, and concluded there is not. *Id.* at 265. Under the second step, the Court asked what the “‘focus’ of congressional concern” was in passing Section 10(b). *Id.* The Court found that the “focus is not on the place where the deception originated, but on purchases and sales of securities in the United States. Section 10(b) [therefore] applies only to transactions in securities listed on domestic exchanges and domestic transactions in other securities.” *Id.* at 249.

In the first appeal of this case, we reasoned that “*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison*’s focus test. *Kiobel II* did not explicitly adopt *Morrison*’s focus test, and chose to use the phrase ‘touch and concern’ rather than the term ‘focus’ when articulating the legal standard it did adopt.” *Nestle I*, 766 F.3d at 1028.

Defendants argue that the Supreme Court’s recent decision in *RJR Nabisco* requires us to apply the focus test to claims under the ATS. In *RJR Nabisco*, the Court applied the *Morrison* focus test to the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and reiterated that *Morrison* reflects a two-step inquiry regarding extraterritoriality. *Id.* at 2103. The Court further stated that “*Morrison* and *Kiobel* [also] reflect a two-step framework for analyzing extraterritoriality issues.” *Id.* at 2101.

Because *RJR Nabisco* has indicated that the two-step framework is required in the context of ATS claims, we apply it here. See *Miller v. Gammie*, 335 F.3d at 893. First, we determine “whether the [ATS] gives a clear, affirmative indication that it applies extraterritorially.” *RJR Nabisco*, 136 S. Ct. at 2101. The Court in *Kiobel II* already answered that the “presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.” *Kiobel II*, 569 U.S. at 185.

Because the ATS is not extraterritorial, then at the second step, we must ask whether this case involves “a domestic application of the statute, by looking to the statute’s ‘focus.’” *RJR Nabisco*, 136 S. Ct. at 2101. Defendants insist that any acts of assistance that took place in the United States are

irrelevant because the extraterritoriality analysis should focus on the location where the principal offense took place or the location the injury occurred, rather than the location where the alleged aiding and abetting took place. We disagree.

The focus of the ATS is not limited to principal offenses. In *Mastafa v. Chevron Corp.*, the Second Circuit held that “the ‘focus’ of the ATS is on . . . conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations or . . . *conduct that constitutes aiding and abetting* another’s violation of the law of nations.” 770 F.3d at 185 (emphasis added); *see also Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 199 (5th Cir. 2017) (stating that aiding and abetting conduct comes within the focus of the ATS). We also hold that aiding and abetting comes within the ATS’s focus on “tort[s] . . . committed in violation of the law of nations.” 28 U.S.C. § 1350.

As part of the step two analysis, we then determine “whether there is any domestic conduct relevant to plaintiffs’ claims under the ATS.” *Adhikari*, 845 F.3d at 195. Under *RJR Nabisco*, “if the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application *even if other conduct occurred abroad.*” *RJR Nabisco*, 136 S. Ct. at 2101 (emphasis added).

In *Mastafa*, the Second Circuit held that the following constituted “specific, domestic conduct”: “Chevron’s [Iraqi] oil purchases, financing of [Iraqi] oil purchases, and delivery of oil to another U.S. company, all within the United States, as well as the use of a New York escrow account and New York-based ‘financing arrangements’ to systematically enable illicit payments to the Saddam Hussein regime that allegedly

facilitated that regime’s violations of the law of nations.” *Mastafa*, 770 F.3d at 195.

In *Licci by Licci v. Lebanese Canadian Bank, SAL*, the Second Circuit again held that the Lebanese Canadian Bank’s (“LCB”) “provision of wire transfers between Hezbollah accounts” through a United States bank constituted domestic conduct which rebutted the presumption against extraterritoriality. 834 F.3d 201, 214–15, 219 (2d Cir. 2016). There, LCB made “numerous New York-based payments and ‘financing arrangements’ conducted exclusively through a New York bank account.” *Id.* at 217 (citing *Mastafa*, 700 F.3d at 191).

Like in *Mastafa* and *Licci*, plaintiffs have alleged that defendants funded child slavery practices in the Ivory Coast. Specifically, plaintiffs allege that defendants provided “personal spending money to maintain the farmers’ and/or the cooperatives’ loyalty as an exclusive supplier.” Because we are required to “draw all reasonable inferences in favor” of plaintiffs, *Mujica v. Airscan, Inc.*, 771 F.3d 580, 589 (9th Cir. 2014), we infer that the personal spending money was outside the ordinary business contract and given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor. Contrary to the district court’s reasoning, providing personal spending money to maintain relationship above the contract price for cocoa is not ordinary business conduct, and is more akin to “kickbacks.” *Mastafa*, 770 F.3d at 175. Defendants also had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions, or “financing arrangements,” originated. *Licci by*

Licci, 834 F.3d at 217 (citing *Mastafa*, 770 F.3d at 191). In sum, the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States. “This particular combination of conduct in the United States . . . is both specific and domestic.” *Id.* at 191. We thus hold that foregoing narrow set of domestic conduct is relevant to the ATS’s focus.

III. Aiding And Abetting Claim

Defendants invite us to rule in the alternative that plaintiffs have not sufficiently alleged the elements of aiding and abetting. We think it unnecessary to reach that issue at this time. As we have explained, *Jesner* changed the legal landscape on which plaintiffs constructed their case. The operative complaint names several foreign corporations as defendants, and plaintiffs concede those defendants must be dismissed on remand. The operative complaint also discusses defendants as if they are a single bloc—a problematic approach that plaintiffs would do well to avoid. In light of *Jesner*, it is not possible on the current record to connect culpable conduct to defendants that may be sued under the ATS.

As we observed in *Nestle I*, “[i]t is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law, unless it is clear that amendment would be futile.” *See Nestle I*, 766 F.3d at 1028 (citations omitted). We are mindful that this case has lingered for over a decade, and that delay does not serve the interests of any party. But we cannot conclude that amendment would be futile, so we remand with instructions that plaintiffs be given an opportunity to amend their complaint. On remand, plaintiffs must remove those defendants who are no longer amenable

to suit under the ATS, and specify which potentially liable party is responsible for what culpable conduct.

IV. Plaintiffs Have Standing to Bring Their Claims

Defendants argue that plaintiffs lack Article III standing to bring their claims. To have standing, plaintiffs must allege “[(1)] a concrete and particularized injury [(2)] that is fairly traceable to the challenged conduct, [(3)] and is likely to be redressed by a favorable judicial decision.” *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016), cert. denied, (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)).

Plaintiffs easily satisfy the first and third requirements. Defendants do not dispute that plaintiffs suffered concrete injury by being abused and held as child slaves. In addition, plaintiffs’ injuries are redressable because when “one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 127 (1998).

Plaintiffs also satisfy the traceability requirement as to Cargill because they raise sufficiently specific allegations regarding Cargill’s involvement in farms that rely on child slavery. *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1343 (11th Cir. 2011); *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (Article III traceability requirement “does not exclude injury produced by determinative or coercive effect upon the action of someone else.”). Plaintiffs’ allegations against Nestle are far less clear, though part of the difficulty is plaintiffs’ reliance on collective allegations against all or at

least multiple defendants. Notwithstanding this deficiency, the allegations are sufficient to at least allow plaintiffs a final opportunity to replead. On remand, plaintiffs must eliminate the allegations against foreign defendants and specifically identify the culpable conduct attributable to individual domestic defendants.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court and **REMAND** to allow plaintiffs to amend their complaint to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case.

SHEA, District Judge:

I concur in the result.

Additional Sources

- Amy Howe, *Justices Grant New Cases, Send Indiana Cases Back For A New Look*, SCOTUS BLOG, (July 2, 2020), <https://www.scotusblog.com/2020/07/justices-grant-new-cases-send-indiana-abortion-cases-back-for-a-new-look/>
- *Federal Republic of Germany vs. Philipp and Federal Republic of Hungary v. Simon*
 - Jess Bravin, *Supreme Court to Decide Federal Courts' Authority Over Claims From Overseas Atrocities*, THE WALL STREET JOURNAL, (July 2, 2020), <https://www.wsj.com/articles/supreme-court-to-decide-federal-courts-authority-over-claims-from-overseas-atrocities-11593717050>
 - Kimberly Strawbridge Robinson, *Justices to Resolve Circuit Split Involving Longtime Immigrants*, BLOOMBERG LAW, (Dec. 18, 2019), https://www.bloomberglaw.com/document/X4T2HJUG000000?bna_news_filter=us-law-week&jcsearch=BNA%25200000016f197fdb84afef3f7f51ac0000#jcite
- *Texas v. California and California v. Texas*
 - Ciara Torres-Spelliscy, *Tracing the Money Behind the Supreme Court Case Against Obamacare*, BRENNAN CENTER FOR JUSTICE, (Aug. 31, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/tracing-money-behind-supreme-court-case-against-obamacare>
 - Adam Liptak and Abby Goodnough, *Supreme Court to Hear Obamacare Appeal*, THE NEW YORK TIMES, (May 6, 2020), <https://www.nytimes.com/2020/03/02/us/supreme-court-obamacare-appeal.html?searchResultPosition=7>
- *Fulton v. City of Philadelphia and Pereira v. Barr*
 - Kate Conger, *Lawsuit Says Trumps Social Media Crackdown Violates Free Speech*, THE NEW YORK TIMES, (June 2, 2020), <https://www.nytimes.com/2020/06/02/technology/trump-twitter-free-speech-lawsuit.html>
 - Amy Howe, *Court Grants Immigration Case*, SCOTUS BLOG, (June 8, 2020), <https://www.scotusblog.com/2020/06/court-grants-immigration-case/>
- *Nestle USA v. Doe I and Cargill v. Doe I*
 - Bloomberg, *U.S. Supreme Court signals interest in child-slavery cocoa lawsuit*, LOS ANGELES TIMES, (January 14, 2020), <https://www.latimes.com/business/story/2020-01-14/u-s-supreme-court-signals-interest-in-child-slavery-cocoa-lawsuit>