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SUMMARIES

Copyrights

No showing of real estate website’s direct or willful infringement of copyrighted photographs (McKeown, J.)

VHT, Inc. v. Zillow Group, Inc.

9th Cir.; March 5, 2019; 17-35587

The court of appeals affirmed in part and reversed in part a district court judgment and remanded. The court held that plaintiff did not sustain its burden of establishing either direct or willful infringement of its copyrighted photographs.

VHT, Inc. provides professional photographs of new real estate listings to real estate brokers, listing services, and agents. VHT sued Zillow Group, Inc. for copyright infringement, alleging Zillow’s unauthorized use of VHT’s photos on two parts of Zillow’s online real estate marketplace: its “Listing Platform” and home improvement site called “Digs.” VHT alleged that Zillow’s use of VHT’s photos exceeded the scope of VHT’s licenses to the brokers, agents, and listing services that provided those photos to Zillow.

The district court granted partial summary judgment in favor of Zillow on a limited set of claims, while other claims advanced to trial. The jury found in favor of VHT on most remaining claims, awarding over $8.27 million in damages. The district court partially granted Zillow’s post-trial motion for judgment notwithstanding the verdict, reversed in part the jury verdict, and reduced total damages to approximately $4 million.

The court of appeal affirmed in part and reversed in part, holding, as to VHT’s claims of direct infringement, that VHT failed to satisfy its burden of showing that Zillow exercised control over the materials posted to its Listing Platform or Digs, selected any of those materials for upload, download, transmission, or storage, or instigated any copying, storage, or distribution of its photos. Zillow’s mere operation of the online platforms was insufficient to render it liable for direct infringement. The same was not true, however, with regard to some 3,900 images that were selected and tagged by Zillow moderators for searchable functionality and displayed on Digs. Further, the fair use defense did not absolve Zillow of direct liability for these searchable photos. The district court accordingly properly granted summary judgment to VHT with respect to fair use. The court found further that Zillow was not liable to VHT for either contributory or vicarious infringement. The court accordingly affirmed the district court’s grant of Zillow’s motion for judgment notwithstanding the verdict with respect to secondary infringement. Turning to the issue of damages, the court found that substantial evidence did not show either that Zillow was “actually aware” of its infringing activity or that it recklessly disregarded or willfully blinded itself to its infringement. The court accordingly reversed the district court and vacated the jury’s finding of willful infringement.

Criminal Law

Identify theft crimes subject to reduction to misdemeanors under Prop 47 (Pollak, P.J.)

People v. Chatman

C.A. 1st; March 18, 2019; A151408

The First Appellate District modified in part and vacated in part a judgment of conviction and remanded for resentencing. The court held that each of defendant’s identify theft crimes was subject to reduction to either misdemeanor petty theft or misdemeanor shoplifting under Proposition 47.

Shakelia Chatman took mail from one victim. She was later found in possession of a checkbook for the victim’s bank account and pieces of checks written to or by the victim. She was subsequently found in possession of a second victim’s credit card, which card had been used without his permission. Finally, as to a third victim, a $300 charge was posted to her account from a Target store, and Chatman cashed the victim’s forged check at a check cashing store. A jury found Chatman guilty of one count of unauthorized use of personal identifying information, in violation of Penal Code §530.5(a), four counts of fraudulent possession of personal identifying information with a prior conviction, in violation of §530.5(c) (2), one count of mail theft, in violation of §530.5(e), and one count of second degree commercial burglary, in violation of §459.

Chatman appealed, arguing that all of the convictions should be reduced to misdemeanors under Prop 47.

The court of appeal modified in part and vacated in part the judgment, holding that one count needed to be vacated, and the rest needed to be reduced to misdemeanors. Because there was no evidence that the value of any of the personal identifying information Chatman unlawfully obtained or used exceeded $950, each of her offenses needed to be reduced to misdemeanors, under either the shoplifting statute, §459.5, or the petty theft statute, §490.2. As to those counts involving entry into a commercial establishment, the shoplifting statute applied. As to the rest, the petty theft statute applied. Finally, because one of the counts pertaining to the third victim—for possession of personal identifying information in violation of §530.5(c)(2)—was based on the same conduct underlying her conviction under §530.5(a) for cashing a forged check, the conviction under §530.5(c)(2) needed to be vacated. The court remanded for resentencing.
Criminal Law

Warrantless placement of GPS tracker on California parolee’s car does not violate Fourth Amendment (Owens, J.)

**United States v. Korte**

9th Cir.; March 15, 2019; 18-50051

The court of appeals affirmed a district court judgment. The court held that the warrantless placement of a GPS tracker on a California parolee’s car did not violate the Fourth Amendment.

“In a world of cybercrime and identity theft, Korte stole money the old-fashioned way — he robbed banks.” After serving time in prison for bank robbery, Korte was paroled in August 2016. As a California parolee, Korte was subject to warrantless search and seizure. Relying on this parole condition, law enforcement officers placed a GPS tracker on Korte’s car and later searched its trunk. They also obtained a court order for Korte’s historical cell site location information (CSLI). Relying on the GPS and CSLI data, along with evidence seized from the trunk of Korte’s car, prosecutors were able to indict Korte on multiple counts of bank robbery and attempted bank robbery.

Following the district court’s denial of Korte’s motions to suppress, a jury found him guilty on all counts.

The court of appeals affirmed, holding that the warrantless placement of a GPS tracker on Korte’s car did not violate the Fourth Amendment. Installing a GPS tracker on a car constitutes a search, typically requiring a warrant. The application of this principle to a parolee’s car, however, is less clear. Given the Supreme Court’s strong pronouncement that parolees in California have very limited Fourth Amendment rights, the court agreed with the district court that use of the GPS tracker was a lawful parole search. This conclusion aligned with the California Court of Appeal’s holding in another case that use of a GPS tracker was authorized by the defendant’s parole search condition. As to Korte’s CSLI data, the court upheld the data’s admissibility under the good faith exception to the warrant requirement, finding that when the government obtained Korte’s CSLI data, acting by court order and without a warrant was still authorized. Finally, Korte’s uncontested control over the car was sufficient to permit a warrantless search of its trunk. Judge D.W. Nelson concurred, writing separately to express concern over the ever diminishing reasonable expectation of privacy afforded to probationers and parolees, especially as related to their digital privacy.

Election and Political Law

No First Amendment right to run for public office for which one is unqualified (Yegan, J.)

**Boyer v. Ventura County**

C.A. 2nd; March 18, 2019; B289919

The Second Appellate District affirmed a judgment. The court held that a candidate has no First Amendment right to run for an elected office for which he is unqualified to serve.

Bruce Boyer sought to have his name placed on the ballot for an upcoming election for Ventura County Sheriff. Boyer had no prior law enforcement experience. The county clerk refused, citing statutes requiring that candidates have prior law enforcement experience. The county clerk refused, citing statutes requiring that candidates have prior law enforcement experience. Boyer filed a petition for writ of mandate seeking to compel the placement of his name on the ballot.

The trial court denied the petition.

The court of appeal affirmed, holding that constitutional, statutory, and case law, as well as common sense, compelled denial of Boyer’s petition. Under Elections Code §13.5, no person shall be considered a legally qualified candidate for sheriff unless he or she has filed a declaration of candidacy accompanied by documentation that the person meets the statutory qualifications to run as county sheriff as set forth in Gov. Code §24004.3. Section 2004.3, in turn, requires that a candidate for sheriff must possess one of five combinations of education and law-enforcement experience. That requirement does not run afoul of either the California Constitution or the First Amendment. The state Constitution empowers the Legislature to provide for the election of county sheriffs and to set minimum qualifications for sheriff candidates. And a would-be candidate’s First Amendment right to run for public office does not override the state’s interest in assuring that a person elected to public office is qualified to administer the complexities of that office.

Employment Litigation

Title VII’s religious organization exemption not jurisdictional (Korman, J.)

**Garcia v. Salvation Army**

9th Cir.; March 18, 2019; 16-16827

The court of appeals affirmed a district court judgment. The court held that Title VII’s religious organization exemption (ROE) is not jurisdictional, and thus can be forfeited, but may properly be raised for the first time at summary judgment absent a showing of prejudice.

Ann Garcia became a Salvation Army parishioner in 1999. In 2002, she began working for her local Salvation Army
chuch, first as a pastor’s assistant and later as a social services coordinator. In 2011, Garcia “left the church” and stopped attending religious services, although she continued her work as a church employee. According to Garcia, tensions thereafter escalated between her and the church pastor. In 2013, she was fired. Garcia sued the church for religious discrimination in violation of Title VII of the Civil Rights Act of 1964 and for disability discrimination under the Americans with Disabilities Act (ADA). Garcia alleged that the Salvation Army subjected her to a hostile work environment because she stopped attending religious services and retaliated against her for filing an internal grievance complaining of religion-based mistreatment. The resulting stress precipitated health problems that the Salvation Army failed to accommodate.

The district court granted summary judgment to the Salvation Army, holding that Title VII’s religious organization exemption (ROE) protected the Salvation Army from suit, even if it failed to timely assert the defense. The court reasoned that the ROE is jurisdictional—a matter of courts’ Article III power to hear cases and controversies—and cannot be forfeited. The district court also dismissed Garcia’s ADA claims on the merits.

The court of appeals affirmed, holding that although the district court erred in finding the ROE to be jurisdictional, Garcia failed to demonstrate prejudice resulting from the Salvation Army’s failure to timely raise the defense. The ROE is not labeled jurisdictional. It limits entitlement to relief in a narrow class of cases, not the authority of federal courts to adjudicate claims under Title VII. The district court accordingly erred by treating the ROE as jurisdictional where Congress did not. The court found further that the ROE reaches claims for hostile work environment and retaliation; it is not limited in application to hiring and firing decisions. Finally, absent prejudice, the ROE may be raised, as here, at summary judgment. Here, the only prejudice Garcia asserted was that she was denied discovery to test the Salvation Army’s defense. But as a former member of the Salvation Army’s congregations, Garcia was intimately familiar with its religious focus and mission. Absent prejudice, the Salvation Army permissibly invoked the ROE at summary judgment, and it foreclosed Garcia’s Title VII claims. As to Garcia’s ADA claim, the court agreed with the district court that it failed on the merits.

Federal immigration law empowers the Secretary of Homeland Security to arrest and hold a deportable alien pending a removal decision, and generally gives the Secretary the discretion either to detain the alien or to release him on bond or parole. 8 U. S. C. §1226(a). Another provision, §1226(c)—enacted out of “concern[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings,” Demore v. Kim, 538 U. S. 510, 513—sets out four categories of aliens who are inadmissible or deportable for bearing certain links to terrorism or for committing specified crimes. Section 1226(c)(1) directs the Secretary to arrest any such criminal alien “when the alien is released” from jail, and §1226(c)(2) forbids the Secretary to release any “alien described in paragraph (1)” pending a determination on removal (with one exception not relevant here).

Respondents, two classes of aliens detained under §1226(c)(2), allege that because they were not immediately detained by immigration officials after their release from criminal custody, they are not aliens “described in paragraph (1),” even though all of them fall into at least one of the four categories covered by §§1226(c)(1)(A)–(D). Because the Government must rely on §1226(a) for their detention, respondents argue, they are entitled to bond hearings to determine if they should be released pending a decision on their status. The District Courts ruled for respondents, and the Ninth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.


JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, III–A, III–B–I, and IV, concluding that the Ninth Circuit’s interpretation of §1226(c) is contrary to the plain text and structure of the statute. Pp. 10–17, 20–26.

(a) The statute’s text does not support the argument that because respondents were not arrested immediately after their release, they are not “described in” §1226(c)(1). Since an adverb cannot modify a noun, §1226(c)(1)’s adverbial clause “when … released” does not modify the noun “alien,” which is modified instead by the adjectival clauses appearing in subparagraphs (A)–(D). Respondents contend that an adverb can “describe” a person even though it cannot modify the noun used to denote that person, but this Court’s interpretation is not dependent on a rule of grammar. The grammar merely complements what is conclusive here: the meaning of “described” as it appears in §1226(c)(2)—namely, “to communicate verbally … an account of salient identifying features,” Webster’s Third New International Dictionary 610. That is the relevant definition since the indisputable job of the “describe[ion] in paragraph (1)” is to “identify[y]” for the Secretary which aliens she must arrest immediately “when [they are] released.” Yet the “when … released” clause could not possibly describe aliens in that sense. If it did, the directive given to the Secretary in §1226(c)(1) would be incoherent. Moreover, Congress’s use of the definite article in “when

Immigration Law

Government’s failure to detain deportable criminal aliens immediately upon release from criminal custody does not entitle them to bond hearings (Alito, J.)

Nielsen v. Preap

U.S.Sup.Ct.; March 19, 2019; 16–1363
the alien is released” indicates that the scope of the word “alien” “has been previously specified in context.” Merriam-Webster’s Collegiate Dictionary 1294. For that noun to have been previously specified, its scope must have been settled by the time the “when … released” clause appears at the end of paragraph (1). Thus, the class of people to whom “the alien” refers must be fixed by the predicate offenses identified in subparagraphs (A)–(D). Pp. 10–14.

(b) Subsections (a) and (c) do not establish separate sources of arrest and release authority; subsection (c) is a limit on the authority conferred by subsection (a). Accordingly, all the relevant detainees will have been arrested by authority that springs from subsection (a), and that fact alone will not spare them from subsection (c)(2)’s prohibition on release. The text of §1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c). If §1226(c)’s detention mandate applied only to those arrested pursuant to subsection (c)(1), there would have been no need for subsection (a)’s sentence on the release of aliens to include the words “except as provided in subsection (c)” It is also telling that subsection (c)(2) does not limit mandatory detention to those arrested “pursuant to” subsection (c)(1) or “under authority created by” subsection (c)(1), but to anyone so much as “described in” subsection (c)(1). Pp. 15–17.

(c) This reading of §1226(c) does not flout the interpretative canon against surplusage. The “when … released” clause still functions to clarify when the duty to arrest is triggered and to exhort the Secretary to act quickly. Nor does this reading have the incongruous result of forbidding the release of a set of aliens whom there is no duty to arrest in the first place. Finally, the canon of constitutional avoidance does not apply where there is no ambiguity. See Warger v. Shauers, 574 U. S. 40, 50. Pp. 20–26.

JUSTICE ALITO, joined by THE CHIEF JUSTICE and JUSTICE KAVANAUGH, concluded in Parts II and III–B–2:

(a) This Court has jurisdiction to hear these cases. The limitation on review in §1226(c) applies only to “discretionary” decisions about the “application” of §1226 to particular cases. It does not block lawsuits over “the extent of the Government’s detention authority under the ‘statutory framework’ as a whole.” Jennings v. Rodriguez, 583 U. S. ___, ___. For reasons stated in Jennings, “§1252(b)(9) does not present a jurisdictional bar.” See id., at ___. Whether the District Court in the Preap case had jurisdiction under §1252(f)(1) to grant injunctive relief is irrelevant because the court had jurisdiction to entertain the plaintiffs’ request for declaratory relief. And, the fact that by the time of class certification the named plaintiffs had obtained either cancellation of removal or bond hearings did not make these cases moot. At least one named plaintiff in both cases could have been returned to detention and then denied a subsequent bond hearing. Even if that had not been so, these cases would not be moot because the harms alleged are transitory enough to elude review. County of Riverside v. McLaughlin, 500 U. S. 44, 52. Pp. 7–10.

(b) Even assuming that §1226(c)(1) requires immediate arrest, the result below would be wrong, because a statutory rule that officials “ ‘shall’ act within a specified time” does not by itself “preclud[e] action later,” Barnhart v. Peabody Coal Co., 537 U. S. 149, 158. This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted §1226(c). Cf. Woodford v. Garceau, 538 U. S. 202, 209. Pp. 17–20.

JUSTICE THOMAS, joined by JUSTICE GORSUCH, concluded that three statutory provisions—8 U. S. C. §§1252(b)(9), 1226(e), and 1252(f)(1)—limit judicial review in these cases and it is unlikely that the District Courts had Article III jurisdiction to certify the classes. Pp. 1–6.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–A, III–B–1, and IV, in which ROBERTS, C. J., and THOMAS, GORSUCH, and KAVANAUGH, J., joined, and an opinion with respect to Parts II and III–B–2, in which ROBERTS, C. J., and KAVANAUGH, J., joined. KAVANAUGH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, J., joined.

Native American Law

Treaty preempts imposition of state tax on fuel imported into state for sale on Yakama Reservation (Breyer, J.)

Washington State Department of Licensing v. Cougar Den, Inc.

U.S.Sup.Ct.; March 19, 2019; 16–1498

The State of Washington taxes “motor vehicle fuel importer[s]” who bring large quantities of fuel into the State by “ground transportation.” Wash. Rev. Code §§82.36.010(4), (12), (16). Respondent Cougar Den, Inc., a wholesale fuel importer owned by a member of the Yakama Nation, imports fuel from Oregon over Washington’s public highways to the Yakama Reservation to sell to Yakama-owned retail gas stations located within the reservation. In 2013, the Washington State Department of Licensing assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees for importing motor vehicle fuel into the State. Cougar Den appealed, arguing that the Washington tax, as applied to its activities, is pre-empted by an 1855 treaty between the United States and the Yakama Nation that, among other things, reserves the Yakamas’ “right, in common with citizens of the United States, to travel upon all public highways,” 12 Stat. 953. A
Washington Superior Court held that the tax was pre-empted, and the Washington Supreme Court affirmed.

_Held:_ The judgment is affirmed.

188 Wash. 2d 55, 392 P. 3d 1014, affirmed.

JUSTICE BREYER, joined by JUSTICE SOTOMAYOR and JUSTICE KAGAN, concluded that the 1855 treaty between the United States and the Yakama Nation pre-empted the State of Washington's fuel tax as applied to Cougar Den's importation of fuel by public highway. Pp. 4–18.

(a) The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute “taxes the importation of fuel, which is the transportation of fuel.” 188 Wash. 2d 55, 69, 392 P. 3d 1014, 1020. It added that “travel on public highways is directly at issue because the tax [is] an importation tax.” Id., at 67, 392 P. 3d, at 1019. The incidence of a tax is a question of state law, Oklahoma Tax Comm’n v. Chickasaw Nation, 515 U. S. 450, 461, and this Court is bound by the Washington Supreme Court’s interpretation of Washington law, Johnson v. United States, 559 U. S. 133, 138. Nor is there any reason to doubt that the Washington Supreme Court meant what it said when it interpreted the statute. In the statute’s own words, Washington “impose[s] upon motor vehicle fuel licensees,” including “licensed importer[s],” a tax for “each gallon of motor vehicle fuel” that “enters into this state,” but only “if … entry is” by means of “a railcar, trailer, truck, or other equipment suitable for ground transportation.” Wash. Rev. Code §§82.36.010(4), 82.36.020(1), (2), 82.36.026(3). Thus, Cougar Den owed the tax because Cougar Den traveled with fuel by public highway. See App. 10a–26a; App. to Pet. for Cert. 55a. Pp. 4–10.

(b) The State of Washington’s application of the tax to Cougar Den’s importation of fuel is pre-empted by the Yakama Nation’s reservation of “the right, in common with citizens of the United States, to travel upon all public highways.” This conclusion rests upon three considerations taken together. First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language now before the Court; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See United States v. Winans, 198 U. S. 371, 380–381; Seufert Brothers Co. v. United States, 249 U. S. 194, 196–198; Tulee v. Washington, 315 U. S. 681, 683–685; Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U. S. 658, 677–678. Thus, although the words “in common with” on their face could be read to permit application to the Yakamas of general legislation (like the legislation at issue here) that applies to all citizens, this Court has refused to read “in common with” in this way because that is not what the Yakamas understood the words to mean in 1855. See Winans, 198 U. S., at 379, 381; Seufert Brothers, 249 U. S., at 198–199; Tulee, 315 U. S., at 684; _Fishing Vessel_, 443 U. S., at 679, 684–685. Second, the historical record adopted by the agency and the courts below indicates that the treaty negotiations and the United States’ representatives’ statements to the Yakamas would have led the Yakamas to understand that the treaty’s protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is just what the treaty protects. Therefore, precedent tells the Court that the tax must be pre-empted. In _Tulee_, for example, the fishing right reserved by the Yakamas in the treaty was held to pre-empt the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. The Court concluded that “such exaction of fees as a prerequisite to the enjoyment of” a right reserved in the treaty “cannot be reconciled with a fair construction of the treaty.” Id., at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel. Pp. 10–18.

JUSTICE GORSUCH, joined by JUSTICE GINSBURG, concluded that the 1855 treaty guarantees tribal members the right to move their goods, including fuel, to and from market freely. When dealing with a tribal treaty, a court must “give effect to the terms as the Indians themselves would have understood them.” _Minnesota v. Mille Lacs Band of Chippewa Indians_, 526 U. S. 172, 196. The Yakamas’ understanding of the terms of the 1855 treaty can be found in a set of unchallenged factual findings in _Yakama Indian Nation v. Flores_, 955 F. Supp. 1229, which are binding here and sufficient to resolve this case. They provide “no evidence [suggesting] that the term ‘in common with’ placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads.” _Id._, at 1247. Instead, they suggest that the Yakamas understood the treaty’s right-to-travel provision to provide them “with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.” _Id._, at 1262. A wealth of historical evidence confirms this understanding. “Far-reaching travel was an intrinsinc ingredient in virtually every aspect of Yakama culture,” and travel for purposes of trade was so important to their “way of life that they could not have performed and functioned as a distinct culture” without it. _Id._, at 1238. Everyone then understood that the treaty would protect the Yakamas’ preexisting right to take goods to and from market freely throughout its traditional trading area. The State reads the treaty only as a promise to tribal members of the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied—millions of acres desperately wanted by the United States to settle the Washington Territory—was worth far more than an abject promise they would not be made prisoners on their reservation. This Court’s cases interpreting the treaty’s neighboring and parallel right-to-fish provision

BREYER, J., announced the judgment of the Court and delivered an opinion, in which SOTOMAYOR and KAGAN, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS, ALITO, and KAVANAUGH, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which THOMAS, J., joined.

Toxic Torts

Maritime products manufacturer has duty to warn that buyer’s required incorporation of third-party parts will likely render integrated product dangerous for intended use (Kavanaugh, J.)

Air & Liquid Systems Corp. v. Devries

U.S.Sup.Ct.; March 19, 2019; 17–1104

Petitioners produced equipment for three Navy ships. The equipment required asbestos insulation or asbestos parts to function as intended, but the manufacturers did not always incorporate the asbestos into their products. Instead, the manufacturers delivered much of the equipment to the Navy without asbestos, and the Navy later added the asbestos to the equipment. Two Navy veterans, Kenneth McAfee and John DeVries, were exposed to asbestos on the ships and developed cancer. They and their wives sued the manufacturers, alleging that the asbestos exposure caused the cancer and contending that the manufacturers were negligent in failing to warn about the dangers of asbestos in the integrated products. Raising the “bare-metal defense,” the manufacturers argued that they should not be liable for harms caused by later-added third-party parts. The District Court granted summary judgment to the manufacturers, but the Third Circuit, adopting a foreseeability approach, vacated and remanded.

Held: In the maritime tort context, a product manufacturer has a duty to warn when its product requires incorporation of a part, the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe that the product’s users will realize that danger. Pp. 4–11.

(a) Tort law imposes a duty to exercise reasonable care on those whose conduct presents a risk of harm to others. That includes a duty to warn when the manufacturer “knows or has reason to know” that its product “is or is likely to be dangerous for the use for which it is supplied” and “has no reason to believe” that the product’s users will realize that danger. 2 Restatement (Second) of Torts §388. Three approaches have emerged on how to apply that “duty to warn” principle when a manufacturer’s product requires later incorporation of a dangerous part in order for the integrated product to function as intended. The first—the foreseeability rule—provides that a manufacturer may be liable when it was foreseeable that its product would be used with another product or part, even if the manufacturer’s product did not require use or incorporation of that other product or part. The second—the bare-metal defense—provides that if a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses. A third approach, falling between those two, imposes on the manufacturer a duty to warn when its product requires incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses.

The third approach is most appropriate for this maritime context. The foreseeability rule would sweep too broadly, imposing a difficult and costly burden on manufacturers, while simultaneously overwarning users. The bare-metal defense ultimately goes too far in the other direction. After all, a manufacturer that supplies a product that is dangerous in and of itself and a manufacturer that supplies a product that requires incorporation of a part that the manufacturer knows or has reason to know is likely to make the integrated product dangerous for its intended uses both “know[w] or ha[ve] rea[son] to know” that the product “is or is likely to be dangerous for the use for which it is supplied.” And in the latter case, the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger, because the product manufacturer knows the nature of the ultimate integrated product. Requiring a warning in these circumstances will not impose a significant burden on manufacturers, who already have a duty to warn of the dangers of their own products. Nor will it result in substantial uncertainty about when product manufacturers must provide warnings, because the rule requires a manufacturer to warn only when its product requires a part in order for the integrated product to function as intended. And this Court is unaware of any substantial overwarning problems in those jurisdictions that have adopted the approach taken here. Requiring the product manufacturer to warn when its product requires incorporation of a part that makes the integrated product dangerous for its intended uses is especially appropriate in the context of maritime law, which has always recognized a “ ‘special solicitude for the welfare’ ” of sailors. American Export Lines, Inc. v. Alvez, 446 U. S. 274, 285. Pp. 4–10.

(b) The maritime tort rule adopted here encompasses all of the following circumstances, so long as the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe that the product’s users will realize that danger: (i) a manufacturer directs that the part be incorporated; (ii) a manufacturer itself makes the product with a part that the manufacturer knows will require replace-
ment with a similar part; or (iii) a product would be useless without the part. P. 10.

873 F. 3d 232, affirmed.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.
one narrow exception not involved in these cases) must be detained without a bond hearing until the question of their removal is resolved.

In these cases, the United States Court of Appeals for the Ninth Circuit held that this mandatory-detention requirement applies only if a covered alien is arrested by immigration officials as soon as he is released from jail. If the alien evades arrest for some short period of time—according to respondents, even 24 hours is too long—the mandatory-detention requirement is inapplicable, and the alien must have an opportunity to apply for release on bond or parole. Four other Circuits have rejected this interpretation of the statute, and we agree that the Ninth Circuit’s interpretation is wrong. We therefore reverse the judgments below and remand for further proceedings.

I

A

Under federal immigration law, aliens present in this country may be removed if they fall “within one or more … classes of deportable aliens.” 8 U. S. C. §1227(a). In these cases, we focus on two provisions governing the arrest, detention, and release of aliens who are believed to be subject to removal.

The first provision, §1226(a), applies to most such aliens, and it sets out the general rule regarding their arrest and detention pending a decision on removal. Section 1226(a) contains two sentences, one dealing with taking an alien into custody and one dealing with detention. The first sentence empowers the Secretary of Homeland Security to arrest and hold an alien “pending a decision on whether the alien is to be removed from the United States.” The second sentence generally gives the Secretary the discretion either to detain the alien or to release him on bond or parole. If the alien is

1. This provision states: “(a) Arrest, detention, and release
   “On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
   “(1) may continue to detain the arrested alien; and
   “(2) may release the alien on—
   “(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
   “(B) conditional parole; but
   “(3) may not provide the alien with work authorization (including an ‘employment authorized’ endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.”
2. We replace “Attorney General” with “Secretary” because Congress has empowered the Secretary to enforce the Immigration and Nationality Act, 8 U. S. C. §1101 et seq., though the Attorney General retains the authority to administer removal proceedings and decide relevant questions of law. See, e.g., 6 U. S. C. §§202(3), 251, 271(b), 542 note, 557; 8 U. S. C. §§1103(a)(1) and (g), 1551 note.
detained, he may seek review of his detention by an officer at the Department of Homeland Security and then by an immigration judge (both exercising power delegated by the Secretary), see 8 CFR §§236.1(c)(8) and (d)(1), 1003.19,1236.1(d)(1) (2018); and the alien may secure his release if he can convince the officer or immigration judge that he poses no flight risk and no danger to the community. See §§1003.19(a), 1236.1(d); Matter of Guerra, 24 L. & N. Dec. 37 (BIA 2006). But while 8 U. S. C. §1226(a) generally permits an alien to seek release in this way, that provision’s sentence on release states that all this is subject to an exception that is set out in §1226(c).

Section 1226(c) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and it sprang from a “concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.” Demore v. Kim, 538 U. S. 510, 513 (2003). To address this problem, Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.

Section 1226(c) consists of two paragraphs, one on the decision to take an alien into “[c]ustody” and another on the alien’s subsequent “[r]elease.” The first paragraph on custody sets out four categories of covered aliens, namely, those who are inadmissible or deportable on specified grounds. It then provides that the Secretary must take any alien falling into one of these categories “into custody” “when the alien is released” from criminal custody.

The second paragraph (on release from immigration custody) states that “an alien described in paragraph (1)” may be released “only if [the Secretary] decides” that release is “necessary to provide protection” for witnesses or others cooperating with a criminal investigation, or their relatives or associates. That exception is not implicated in the present cases.

The categories of predicates for mandatory detention identified in subparagraphs (A)–(D) generally involve the commission of crimes. As will become relevant to our analysis, however, some who satisfy subparagraph (D)—e.g., close relatives of terrorists and those who are thought likely to engage in terrorist activity, see 8 U. S. C. §1182(a)(3)(B)(i)(IX)—may never have been charged with any crime in this country. Still, since the vast majority of mandatory-detention cases do involve convictions, we follow the heading of subsection (c), as well as our cases and the courts below, in referring to aliens who satisfy subparagraphs (A)–(D) collectively as “criminal aliens.” The Board of Immigration Appeals has held that subsection (c)(2), which requires the detention of aliens “described in” subsection (c)(1), applies to all aliens who fall within subparagraphs (A)–(D), whether or not they were arrested immediately “when [they were] released” from criminal custody. Matter of Rojas, 23 L. & N. Dec. 117 (BIA 2001) (en banc).

B

Respondents in the two cases before us are aliens who were detained under §1226(c)(2)’s mandatory-detention requirement—and thus denied a bond hearing—pending a decision on their removal. See Preap v. Johnson, 831 F. 3d 1193 (CA9 2016); Khoury v. Asher, 667 Fed. Appx. 966(CA9 2016). Though all respondents had been convicted of criminal offenses covered in §§1226(c)(1)(A)–(D), none were arrested by immigration officials immediately after their release from criminal custody. Indeed, some were not arrested until several years later.

Respondent Mony Preap, the lead plaintiff in the case that bears his name, is a lawful permanent resident with two drug convictions that qualify him for mandatory detention under §1226(c). Though he was released from criminal custody in 2006, immigration officials did not detain him until 2013, when he was released from jail after an arrest for another offense. His co-plaintiffs Juan Lozano Magdaleno and Eduardo Vega Padilla were taken into immigration detention, respectively, 5 and 11 years after their release from custody for a §1226(c) predicate offense. Preap, Magdaleno, and Padilla filed habeas petitions and a class-action complaint alleging that because they were not arrested “immediately” after release from criminal custody, they are exempt from mandatory detention under §1226(c) and are entitled to a bond hearing to determine if they should be released pending a decision on their status.

Although the named plaintiffs in Preap were not taken into custody on immigration grounds until years after their release from criminal custody, the District Court certified a broad class comprising all aliens in California “who are or will be subjected to mandatory detention under 8 U. S. C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a [s]ection 1226(c)(1) offense.” 831 F. 3d, at 1198 (emphasis added). The District Court granted a preliminary injunction against the mandatory detention of the members of this class, holding that criminal aliens are exempt from mandatory detention under §1226(c) (and are thus entitled to a bond hearing) unless they are arrested “when [they are] released,” and no later.” Preap v. Johnson, 303 F. R. D. 566, 577 (ND Cal. 2014) (quoting 8 U. S. C. §1226(c)(1)). The Court of Appeals for the Ninth Circuit affirmed.

Khoury, the other case now before us, involves habeas petitions and a class-action complaint filed in the Western District of Washington. The District Court certified a class

3. The full text of §1226(c) is set out infra, at 10–11.
comprising all aliens in that district “who were subjected to mandatory detention under 8 U. S. C. §1226(c) even though they were not detained immediately upon their release from criminal custody.” 667 Fed. Appx., at 967. The District Court granted summary judgment for respondents, and the Ninth Circuit again affirmed, citing its decision on the same day in Preap.

Because Preap and Khouary created a split with four other Courts of Appeals, we granted certiorari to review the Ninth Circuit’s ruling that criminal aliens who are not arrested immediately upon release are thereby exempt from mandatory detention under §1226(c). 583 U. S. ___ (2018). We now reverse.

II

Before addressing the merits of the Court of Appeals’ interpretation, we resolve four questions regarding our jurisdiction to hear these cases.

The first potential hurdle concerns §1226(e), which states:

“The [Secretary’s] discretionary judgment regarding the application of [§1226] shall not be subject to review. No court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.” (Emphasis added.)

As we have held, this limitation applies only to “discretionary” decisions about the “application” of §1226 to particular cases. It does not block lawsuits over “the extent of the Government’s detention authority under the ‘statutory framework’ as a whole.” Jennings v. Rodriguez, 583 U. S. ___, ___, – ___, ___ (2018) (slip op., at 11–12) (quoting Demore, 538 U. S., at 517). And the general extent of the Government’s authority under §1226(c) is precisely the issue here. Respondents’ argument is not that the Government exercised its statutory authority in an unreasonable fashion. Instead, they dispute the extent of the statutory authority that the Government claims. Because this claim of authority does not constitute a mere “discretionary” “application” of the relevant statute, our review is not barred by §1226(e).

Nor are we stripped of jurisdiction by §1252(b)(9), which provides:

“Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [including §§1225 and 1226] shall be available only in judicial review of a final order under this section.” (Emphasis added.)

As in Jennings, respondents here “are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal [as opposed to the decision to deny them bond hearings]; and they are not even challenging any part of the process by which their removability will be determined. Under these circumstances,” we held in Jennings, see 583 U. S., at ___–___ (slip op., at 10–11), “§1252(b)(9) does not present a jurisdictional bar.”

The Government raised a third concern before the District Court in Preap: that under 8 U. S. C. §1252(f)(1), that court lacked jurisdiction to enter the requested injunction. As §1252(f)(1) cautions:

“Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of §§1221–1232 other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.”

Did the Preap court overstep this limit by granting injunctive relief for a class of aliens that includes some who have not yet faced—but merely “will face”—mandatory detention? The District Court said no, but we need not decide. Whether the Preap court had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs’ request for declaratory relief, and for independent reasons given below, we are ordering the dissolution of the injunction that the District Court ordered.

Finally, and again before the Preap District Court, the Government raised a fourth potential snag: mootness. Class actions are “[n]ormally … moot if no named class representative with an unexpired claim remain[s] at the time of class certification.” United States v. Sanchez-Gomez, 584 U. S. ___, ___ (2018) (slip op., at 4). But that general norm is no hurdle here.

The suggestion of mootness in these cases was based on the fact that by the time of class certification the named plaintiffs had obtained either cancellation of removal or bond hearings. See 831 F. 3d, at 1197–1198; Khouary v. Asher, 3 F. Supp. 3d 877, 879–880 (WD Wash. 2014). But those developments did not make the cases moot because at least one named plaintiff in both cases had obtained release on bond, as opposed to cancellation of removal, and that release had been granted following a preliminary injunction in a separate case. Unless that preliminary injunction was made permanent and that release had been granted following a preliminary injunction in a separate case. Unless that preliminary injunction was made permanent and was not disturbed on appeal, these individuals faced the threat of re-arrest and mandatory detention. And indeed, we later ordered that that injunction be dissolved. See Jennings, 583 U. S., at ___ (slip op., at 31). Thus, in both cases, there was at least one named plaintiff with a live claim when the class was certified.

Even if that had not been so, these cases would not be moot because the fact that a class “was not certified until after the named plaintiffs’ claims had become moot does not
deprive us of jurisdiction” when, as in these cases, the harms alleged are transitory enough to elude review. County of Riverside v. McLaughlin, 500 U. S. 44, 52 (1991) (affirming jurisdiction over a class action challenging a county’s failure to provide “prompt” determinations of probable cause for those subjected to warrantless arrest and detention). Respondents claim that they would be harmed by detention without a hearing pending a decision on their removal. Because this type of injury ends as soon as the decision on removal is made, it is transitory. So the fact that the named plaintiffs obtained some relief before class certification does not moot their claims.

III

Having assured ourselves of our jurisdiction, we turn to the merits. Respondents contend that they are not properly subject to §1226(c)’s mandatory-detention scheme, but instead are entitled to the bond hearings available to those held under the general arrest and release authority provided in §1226(a). Respondents’ primary textual argument turns on the interaction of paragraphs (1) and (2) of §1226(c). Recall that those paragraphs govern, respectively, the “[c]ustody” and “[r]elease” of criminal aliens guilty of a predicate offense. Paragraph (1) directs the Secretary to arrest any such alien “when the alien is released,” and paragraph (2) forbids the Secretary to release any “alien described in paragraph (1)” pending a determination on removal (with one exception not relevant here). Because the parties’ arguments about the meaning of §1226(c) require close attention to the statute’s terms and structure, we reproduce the provision in full below. But only the portions of the statute that we have highlighted are directly relevant to respondents’ argument. Section 1226(c) provides:

“(c) Detention of criminal aliens

(1) Custody

The [Secretary] shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The [Secretary] may release an alien described in paragraph (1) only if the [Secretary] decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.” (Emphasis added.)

Respondents argue that they are not subject to mandatory detention because they are not “described in” §1226(c)(1), even though they (and all the other members of the classes they represent) fall into at least one of the categories of aliens covered by subparagraphs (A)–(D) of that provision. An alien covered by these subparagraphs is not “described in” §1226(c)(1), respondents contend, unless the alien was also arrested “when [he or she was] released” from criminal custody. Indeed, respondents insist that the alien must have been arrested immediately after release. Since they and the other class members were not arrested immediately, respondents conclude, they are not “described in” §1226(c)(1). So to detain them, the Government must rely not on §1226(c) but on the general provisions of §1226(a). And thus, like others detained under §1226(a), they are owed bond hearings in which they can earn their release by proving that they pose no flight risk and no danger to others—or so they claim. But neither the statute’s text nor its structure supports this argument. In fact, both cut the other way.

A

First, respondents’ position runs aground on the plain text of §1226(c). Respondents are right that only an alien “described in paragraph (1)” faces mandatory detention, but they are wrong about which aliens are “described in” paragraph (1).

Paragraph (1) provides that the Secretary “shall take” into custody any “alien” having certain characteristics and that the Secretary must do this “when the alien is released” from criminal custody. The critical parts of the provision consist of a verb (“shall take”), an adverbial clause (“when ... released”), a noun (“alien”), and a series of adjectival clauses
("who ... is inadmissible," "who ... is deportable," etc.). As an initial matter, no one can deny that the adjectival clauses modify (and in that sense “describe[es]”) the noun “alien” or that the adverbial clause “when ... released” modifies the verb “shall take.” And since an adverb cannot modify a noun, the “when released” clause cannot modify “alien.” Again, what modifies (and in that sense “describe[s]”) the noun “alien” are the adjectival clauses that appear in subparagraphs (A)–(D).

Respondents and the dissent contend that this grammatical point is not the end of the matter—that an adverb can “describe” a person even though it cannot modify the noun used to denote that person. See post, at 5–6 (opinion of BREYER, J.). But our interpretation is not dependent on a rule of grammar. The preliminary point about grammar merely complements what is critical, and indeed conclusive in these cases: the particular meaning of the term “described” as it appears in §1226(c)(2). As we noted in Luna Torres v. Lynch, 578 U. S. ___, ___ (2016) (slip op., at 6), the term “describe” takes on different meanings indifferent contexts.” A leading definition of the term is “to communicate verbally ... an account of salient identifying features,” Webster’s Third New International Dictionary 610 (1976), and that is clearly the meaning of the term used in the phrase “an alien described in paragraph (1).” (Emphasis added.) This is clear from the fact that the indisputable job of the “describe” in paragraph (1) is to “identify” for the Secretary—to list the “salient ... features” by which she can pick out—which aliens she must arrest immediately “when [they are] released.”

And here is the crucial point: The “when ... released” clause could not possibly describe aliens in that sense; it plays no role in identifying for the Secretary which aliens she must immediately arrest. If it did, the directive in §1226(c)(1) would be nonsense. It would be ridiculous to read paragraph (1) as saying: “The Secretary must arrest, upon their release from jail, a particular subset of criminal aliens. Which ones? Only those who are arrested upon their release from jail.” Since it is the Secretary’s action that determines who is arrested upon release, “being arrested upon release” cannot be one of her criteria in figuring out whom to arrest. So it cannot “describe”—it cannot give the Secretary an “identifying feature[s]” of—the relevant class of aliens. On any other reading of paragraph(1), the command that paragraph (1) gives the Secretary would be downright incoherent.

Our reading is confirmed by Congress’s use of the definite article in “when the alien is released.” Because “[w]ords are to be given the meaning that proper grammar and usage would assign them,” A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012), the “rules of grammar govern” statutory interpretation “unless they contradict legislative intent or purpose,” ibid. (citing Costello v. INS, 376 U. S. 120, 122–126 (1964)). Here grammar and usage establish that “the” is “a function word ... indicating that a following noun or noun equivalent is definite or has been previously specified by context.” Merriam-Webster’s Collegiate Dictionary1294 (11th ed. 2005). See also Work v. United States ex rel. McAlester-Edwards Co., 262 U. S. 200, 208 (1923) (Congress’s “use of the definite article [in a reference to “the appraisement”] means an appraisement specifically provided for”). For “the alien”—in the clause “when the alien is released”—to have been previously specified, its scope must have been settled by the time the “when ... released” clause appears at the tail end of paragraph (1).

For these reasons, we hold that the scope of “the alien” is fixed by the predicate offenses identified in subparagraphs (A)–(D). And since only those subparagraphs settle who is “described in paragraph (1),” anyone who fits their description falls under paragraph (2)’s detention mandate—even if (as with respondents) the Secretary did not arrest them immediately “when” they were “released.”

B

In reaching the contrary conclusion, the Ninth Circuit thought that the very structure of §1226 favors respondents’ reading. In particular, the Ninth Circuit reasoned, each subsection’s arrest and release provisions must work together. Thus, aliens must be arrested under the general arrest authority in subsection (a) in order to get a bond hearing under subsection (a)’s release provision. And in order to face mandatory detention under subsection (c), criminal aliens must have been arrested under subsection (c). But since subsection (c) authorizes only immediate arrest, the argument continues, those arrested later fall under subsection (a), not (c). Accordingly, the court concluded, those arrested well after release escape subsection (c)’s detention mandate. See 831 F. 3d, at 1201–1203. But this argument misreads the structure of §1226; and in any event, the Ninth Circuit’s conclusion would not follow even if we granted all its premises about statutory structure.

I

Although the Ninth Circuit viewed subsections (a) and (c) as establishing separate sources of arrest and release authority, in fact subsection (c) is simply a limit on the authority conferred by subsection (a).

Recall that subsection (a) has two sentences that provide the Secretary with general discretion over the arrest and release of aliens, respectively. We read each of subsection (c)’s two provisions—paragraph (1) on arrest, and paragraph (2) on release—as modifying its counterpart sentence in subsection (a). In particular, subsection (a) creates authority for anyone’s arrest or release under §1226—and it gives the Secretary broad discretion as to both actions—while subsection (c)’s job is to subtract some of that discretion when it comes to the arrest and release of criminal aliens. Thus, subsection

5. For this reason, it is irrelevant that (as the dissent notes, see post, at 8) paragraph (2) applies to aliens described in “paragraph (1)” and not “subparagraphs (A)–(D).” These two phrases denote the same category, so nothing can be gleaned from Congress’s choice of one over the other.
(c)(1) limits subsection (a)’s first sentence by curbing the discretion to arrest: The Secretary must arrest those aliens guilty of a predicate offense. And subsection (c)(2) limits subsection (a)’s second sentence by cutting back the Secretary’s discretion over the decision to release: The Secretary may not release aliens “described in” subsection (c)(1)—that is, those guilty of a predicate offense. Accordingly, all the relevant detainees will have been arrested by authority that springs from subsection (a), and so, contrary to the Court of Appeals’ view, that fact alone will not spare them from subsection (c)(2)’s prohibition on release. This reading comports with the Government’s practice of applying to the arrests of all criminal aliens certain procedural requirements, such as the need for a warrant, that appear only in subsection (a). See Tr. of Oral Arg. 13–14.

The text of §1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c). The second sentence in subsection (a)—which generally authorizes the Secretary to release an alien pending removal proceedings—features an exception “as provided in subsection (c).” But if the Court of Appeals were right that subsection (c)(2)’s prohibition on release applies only to those arrested pursuant to subsection (c)(1), there would have been no need to specify that such aliens are exempt from subsection (a)’s release provision. This shows that it is possible for those arrested under subsection (a) to face mandatory detention under subsection (c). We draw a similar inference from the fact that subsection (c)(2), for its part, does not limit mandatory detention to those arrested “pursuant to” subsection (c)(1) or “under authority created by” subsection (c)(1)—but to anyone so much as “described in” subsection (c)(1). This choice of words marks a contrast with Congress’s reference—in the immediately preceding subsection—to actions by the Secretary that are “authorized under” subsection (a). See §1226(b). Cf. 18 U. S. C. §3326(b) (referring to “a person arrested under subsection (a)” (emphasis added)). These textual cues indicate that even if an alien was not arrested under authority bestowed by subsection (c)(1), he may face mandatory detention under subsection (c)(2).

But even if the Court of Appeals were right to reject this reading, the result below would be wrong. To see why, assume with the Court of Appeals that only someone arrested under authority created by §1226(c)(1)—rather than the more general §1226(a)—may be detained without a bond hearing. And assume that subsection (c)(1) requires immediate arrest. Even then, the Secretary’s failure to abide by this time limit would not cut off her power to arrest under subsection (c)(1). That is so because, as we have held time and again, an official’s crucial duties are better carried out late than never. See Sylvain v. Attorney General of U. S., 714 F. 3d 150, 158 (CA3 2013) (collecting cases). Or more precisely, a statutory rule that officials “shall” act within a specified time” does not by itself “preclud[e] action later.” Barnhart v. Peabody Coal Co., 537 U. S. 149, 158 (2003).

Especially relevant here is our decision in United States v. Montalvo-Murillo, 495 U. S. 711 (1990). There we held that “a provision that a detention hearing ‘shall be held immediately upon the [detainee’s] first appearance before the judicial officer’ did not bar detention after a tardy hearing.” Barnhart, 537 U. S., at 159 (quoting Montalvo-Murillo, 495 U. S., at 714). In that case, we refused to “bestow upon the defendant a windfall” and “visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the [statutory] strictures … occur[red].” Montalvo-Murillo, 495 U. S., at 720. Instead, we gave effect to the principle that “if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.” Barnhart, 537 U. S., at 159 (quoting United States v. James Daniel Good Real Property, 510 U. S. 43, 63 (1993)).

This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted §1226(c). Cf. Woodford v. Garceau, 538 U. S. 202, 209 (2003) (relying on the “legal backdrop” against which “Congress legislated” to clarify what Congress enacted). Indeed, we have held of a statute enacted just four years before §1226(c) that because of our case law at the time—never since abrogated—Congress was “presumably aware that we do not readily infer congressional intent to limit an agency’s power to get a mandatory job done merely from a specification to act by a certain time.” Barnhart, 537 U. S., at 160 (relying on Brock v. Pierce County, 476 U. S. 253 (1986)). Here this principle entails that even if subsection (c)(1) were the sole source of authority to arrest aliens without granting them hearings, that authority would not evaporate just because officials had transgressed subsection (c)(1)’s command to arrest aliens immediately “when … released.”

Respondents object that the rule invoked in Montalvo-Murillo and related cases does not apply here. In those cases, respondents argue, the governmental authority at issue would have disappeared entirely if time limits were enforced—whereas here the Secretary could still arrest aliens well after their release under the general language in §1226(a)

But the whole premise of respondents’ argument is that if the Secretary could no longer act under §1226(c), she would lose a specific power—the power to arrest and detain criminal aliens without a bond hearing. If that is so, then as in other cases, accepting respondents’ deadline-based argument would be inconsistent with “the design and function of the statute.” Montalvo-Murillo, 495 U. S., at 719. From Congress’s perspective, after all, it is irrelevant that the Secretary could go on detaining criminal aliens subject to a bond hearing. Congress enacted mandatory detention precisely out of concern that such individualized hearings could not be trusted to reveal which “deportable criminal aliens who are not detained” might “continue to engage in crime [or] fail
to appear for their removal hearings.” *Demore*, 538 U. S., at 513. And having thus required the Secretary to impose mandatory detention without bond hearings immediately, for safety’s sake, Congress could not have meant for judges to “enforce” this duty in case of delay by—of all things—forsaking its execution. Cf. *Montalvo-Murillo*, 495 U. S., at 720 (“The end of exacting compliance with the letter” of the Bail Reform Act’s requirement that a defendant receive a hearing immediately upon his first appearance before a judicial officer “cannot justify the means of exposing the public to an increased likelihood of violent crimes by persons on bail, an evil the statute aims to prevent”).

Especially hard to swallow is respondents’ insistence that for an alien to be subject to mandatory detention under §1226(c), the alien must be arrested on the day he walks out of jail (though respondents allow that it need not be at the jailhouse door—the “parking lot” or “bus stop” would do). Tr. of Oral Arg. 44. “Assessing the situation in realistic and practical terms, it is inevitable that” respondents’ unsparking deadline will often be missed for reasons beyond the Federal Government’s control. *Montalvo-Murillo*, 495 U. S., at 720. Cf. *Regions Hospital v. Shalala*, 522 U. S. 448, 459, n. 3 (1998) (“The Secretary’s failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that [she] lacked power to act beyond it”). To give just one example, state and local officials sometimes rebuff the Government’s request that they give notice when a criminal alien will be released. Indeed, over a span of less than three years (from January 2014 to September 2016), the Government recorded “a total of 21,205 declines [requests] in 567 counties in 48 states including the District of Columbia.” ICE, Fiscal Year 2016 ICE Enf. and Removal Operations Rep. 9. Nor was such local resistance unheard of when Congress enacted the language of §1226(c) in 1996. See S. Rep. No. 104–48, p. 28 (1995). Under these circumstances, it is hard to believe that Congress made the Secretary’s mandatory-detention authority vanish at the stroke of midnight after an alien’s release.

In short, the import of our case law is clear: Even if subsection (c) were the only font of authority to detain aliens without bond hearings, we could not read its “when … released” clause to defeat officials’ duty to impose such mandatory detention when it comes to aliens who are arrested well after their release.

IV

Respondents protest that reading §1226(c) in the manner set forth here would render key language superfluous, lead to anomalies, and violate the canon of constitutional avoidance. We answer these objections in turn.

A

According to respondents, the Government’s reading of §1226(c) flouts the interpretive canon against surplus-age—the idea that “every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.” *Scalia*, Reading Law, at 174. See *Kungys v. United States*, 485 U. S. 759, 778 (1988) (plurality opinion of *Scalia*, J.) (citing the “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”). Respondents’ surplus-age argument has two focal points.

First, respondents claim that if they face mandatory detention even though they were arrested well after their release, then “when … released” adds nothing to paragraph (1). In fact, however, it still has work to do. For one thing, it clarifies when the duty to arrest is triggered: upon release from criminal custody, not before such release or after the completion of noncustodial portions of a criminal sentence (such as a term of “parole, supervised release, or probation,” as the paragraph goes on to emphasize). Thus, paragraph (1) does not permit the Secretary to cut short an alien’s state prison sentence in order to usher him more easily right into immigration detention—much as another provision prevents officials from actually removing an alien from the country “until the alien is released from imprisonment.” 8 U. S. C. §1231(a) (4)(A). And from the other end, as paragraph (1)’s language makes clear, the Secretary need not wait for the sentencing court’s supervision over the alien to expire.

The “when … released” clause also serves another purpose: exhorting the Secretary to act quickly. And this point answers respondents’ second surplusage claim: that the “Transition Period Custody Rules” enacted along with§1226(c) would have been superfluous if §1226(c) did not call for immediate arrests, since those rules authorized delays in §1226(c)’s implementation while the Government expanded its capacities. See *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). This argument again confuses what the Secretary is obligated to do with the consequences that follow if the Secretary fails (for whatever reason) to fulfill that obligation. The transition rules delayed the onset of the Secretary’s obligation to begin making arrests as soon as covered aliens were released from criminal custody, and in that sense they were not superfluous.6 This is so even though,

6. The dissent asks why Congress would have felt the need to provide for a delay if it thought that either way, the Secretary would get to deny a hearing to aliens arrested well after release. *Post*, at 10; see also *post*, at 13–14. The answer is that Congress does not draft legislation *in the expectation* that the Executive will blow through the deadlines it sets. That is why Congress specifies any deadlines for executive duties at all; and here it explains why Congress furthermore provided that the deadline it set for this particular duty (to arrest criminal aliens *upon their release*) would not take effect right away.

In fact, if the dissent’s argument from the transition rules were sound—*i.e.*, if textual evidence that *Congress expects* the Executive to meet a deadline (once it officially takes effect) were proof that Congress wanted the deadline enforced *by courts*—then every case involving an express statutory deadline would be one in which Congress intended for courts to enforce the deadline. But this would include, by definition, all of the loss-of-authority cases we discussed above, see Part III–B–2, supra—a long line of precedent that the dissent does not question.
had the transition rules not been adopted, the Secretary’s failure to make an arrest immediately upon a covered alien’s release would not have exempted the alien from mandatory detention under §1226(c).

B
The Court of Appeals objected that the Government’s reading of §1226(c) would have the bizarre result that some aliens whom the Secretary need not arrest at all must nonetheless be detained without a hearing if they are arrested. 831 F. 3d, at 1201–1203. This rather complicated argument, as we understand it, proceeds as follows. Paragraph (2) requires the detention of aliens “described in paragraph (1).” While most of the aliens described there have been convicted of a criminal offense, this need not be true of aliens captured by subparagraph (D) in particular—which covers, for example, aliens who are close relatives of terrorists and those who are believed likely to commit a terrorist act. See §1182(a)(3)(B)(i)(IX). But if, as the Government maintains, any alien who falls under subparagraphs (A)–(D) is thereby ineligible for release from immigration custody, then the Secretary would be forbidden to release even those aliens who were never convicted or perhaps even charged with a crime, once she arrested them. Yet she would be free not to arrest them to begin with (or so the Court of Appeals assumed), since she is obligated to arrest aliens “when … released,” and there was no prior custody for these aliens to be “released” from. Therefore, the court concluded, the Government’s position has the absurd implication that aliens who were never charged with a crime need not be arrested pending a removal determination, but if they are arrested, they must be detained and cannot be released on bond or parole.

We agree that it would be very strange for Congress to forbid the release of aliens who need not be arrested in the first place, but the fact is that the Government’s reading (and ours) does not have that incongruous result. The real anomalies here would flow instead from the Court of Appeals’ interpretation.

To begin with the latter point: Under the Court of Appeals’ reading, the mandatory-detention scheme would be gentler on terrorists than it is on garden-variety offenders. To see why, recall first that subparagraphs (A)–(C) cover aliens who are inadmissible or deportable based on the commission of certain criminal offenses, and there is no dispute that the statute authorizes their mandatory detention when they are released from criminal custody. And the crimes covered by these subparagraphs include, for example, any drug offense by an adult punishable by more than one year of imprisonment, see §§1182(a)(2), 1226(c)(1)(A), as well as a variety of tax offenses, see §§1226(c)(1)(B), 1227(a)(2)(A)(iii); Kawashima v. Holder, 565 U. S. 478 (2012). But notice that aliens who fall within subparagraph (D), by contrast, may never have been arrested on criminal charges—which according to the court below would exempt them from mandatory detention. Yet this subparagraph covers the very sort of aliens for which Congress was most likely to have wanted to require mandatory detention—including those who are representatives of a terrorist group and those whom the Government has reasonable grounds to believe are likely to engage in terrorist activities. See §§1182(a)(3)(B)(i)(III), (IV), 1226(c)(1)(D). Thus, by the Court of Appeals’ logic, Congress chose to spare terrorist aliens from the rigors of mandatory detention—a mercy withheld from almost all drug offenders and tax cheats. See Brief for National Immigrant Justice Center as Amicus Curiae 7–8. That result would be incongruous.

Along similar lines, note that one §1226(c)(1) predicate reaches aliens who necessarily escape conviction: those “for whom immunity from criminal jurisdiction was exercised.” §1182(a)(2)(E)(ii). See §1226(c)(1)(A). And other predicates sweep in aliens whom there is no reason to expect police (as opposed to immigration officials) will have reason to arrest: e.g., the “spouse or child of an alien” who recently engaged in terrorist activity. §1182(a)(3)(B)(ii)(IX); see §1226(c)(1)(D). It would be pointless for Congress to have covered such aliens in subsections (c)(1)(A)–(D) if subsection (c)’s mandates applied only to those emerging from jail.

Thus, contrary to the Court of Appeals’ interpretation of the “when released” clause as limiting the class of aliens subject to mandatory detention, we read subsection (c)(1) to specify the timing of arrest (“when the alien is released”) only for the vast majority of cases; those involving criminal aliens who were once in criminal custody. The paragraph simply does not speak to the timeline for arresting the few who had no stint in jail. (And why should it? Presumably they—unlike those serving time—are to be detained as they come across the Government’s radar and any relevant evidentiary standards are satisfied.)

In short, we read the “when released” directive to apply when there is a release. In other situations, it is simply not relevant. It follows that both of subsection (c)’s mandates—for arrest and for release—apply to any alien linked with a predicate offense identified in subparagraphs (A)–(D), regardless of exactly when or even whether the alien was released from criminal custody.

C
Finally, respondents perch their reading of §1226(c)—unsteadily, as it turns out—on the canon of constitutional avoidance. This canon provides that “[w]hen ‘a serious doubt’ is
raised about the constitutionality of an act of Congress, ‘... this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’” Jennings, 583 U. S., at ___ (slip op., at 12) (quoting Crowell v. Benson, 285 U. S. 22, 62 (1932)).

Respondents say we should be uneasy about endorsing any reading of §1226(c) that would mandate arrest and detention years after aliens’ release from criminal custody—when many aliens will have developed strong ties to the country and a good chance of being allowed to stay if given a hearing. At that point, respondents argue, mandatory detention may be insufficiently linked to public benefits like protecting others against crime and ensuring that aliens will appear at their removal proceedings. In respondents’ view, detention in that scenario would raise constitutional doubts under Zadvydas v. Davis, 533 U. S. 678 (2001), which held that detention violates due process absent “adequate procedural protections” or “special justification[s]” sufficient to outweigh one’s “constitutionally protected interest in avoiding physical restraint,” id., at 690 (quoting Kansas v. Hendricks, 521 U. S. 346, 356 (1997)). Thus, respondents urge, we should adopt a reading of §1226(c)—their reading—that avoids this result.

The trouble with this argument is that constitutional avoidance “‘comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.’” Jennings, 583 U. S., at ___ (slip op., at 12). The canon “has no application” absent “ambiguity,” Warger v. Shauers, 574 U. S. 40, 50 (2014) (internal quotation marks omitted). See also Zadvydas, 533 U. S., at 696 (“Despite this constitutional problem, if Congress has made its intent in the statute clear, we must give effect to that intent” (internal quotation marks omitted)). Here the text of §1226 cuts clearly against respondents’ position, see Part III, supra, making constitutional avoidance irrelevant.

We emphasize that respondents’ arguments here have all been statutory. Even their constitutional concerns are offered as just another pillar in an argument for their preferred reading of the language of §1226(c)—an idle pillar here because the statute is clear. While respondents might have raised a head-on constitutional challenge to §1226(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.

I write separately to emphasize the narrowness of the issue before us and, in particular, to emphasize what this case is not about.

This case is not about whether a noncitizen may be detained during removal proceedings or before removal. Congress has expressly authorized the Executive Branch to detain noncitizens during their removal proceedings and before removal. 8 U. S. C. §§1226(a), (c), and 1231(a).

This case is also not about how long a noncitizen may be detained during removal proceedings or before removal. We have addressed that question in cases such as Zadvydas v. Davis, 533 U. S. 678 (2001), Clark v. Martinez, 543 U. S. 371 (2005), and Jennings v. Rodriguez, 583 U. S. ___ (2018).

This case is also not about whether Congress may mandate that the Executive Branch detain noncitizens during removal proceedings or before removal. This case is not about whether a noncitizen may be detained during removal proceedings or before removal. 8 U. S. C. §1226(c)(1).

The sole question before us is narrow: whether, under §1226, the Executive Branch’s mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to immediately detain the noncitizen when the noncitizen is released from criminal custody—for example, if the Executive Branch fails to immediately detain the noncitizen because of resource constraints or because the Executive Branch cannot immediately locate and apprehend the individual in question. No constitutional issue is presented. The issue before us is entirely statutory and requires our interpretation of the strict 1996 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546.

It would be odd, in my view, if the Act (1) mandated detention of particular noncitizens because the noncitizens posed such a serious risk of danger or flight that they must be detained during their removal proceedings, but (2) nonetheless allowed the noncitizens to remain free during their removal proceedings if the Executive Branch failed to immediately detain them upon their release from criminal custody. Not surprisingly, the Act does not require such an odd result. On the contrary, the relevant text of the Act is relatively

JUSTICE KAVANAUGH, concurring.
straightforward, as the Court explains. Interpreting that text, the Court correctly holds that the Executive Branch’s detention of the particular noncitizens here remained mandatory even though the Executive Branch did not immediately detain them. I agree with the Court’s careful statutory analysis, and I join the Court’s opinion in full.

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

I continue to believe that no court has jurisdiction to decide questions concerning the detention of aliens before final orders of removal have been entered. See Jennings v. Rodriguez, 583 U. S. ___, ___–___ (2018) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 1–11). By my count, Congress has erected at least three barriers to our review of the merits, and I also question whether Article III jurisdiction existed at the time of class certification. Nonetheless, because the Court has held that we have jurisdiction in cases like these, and because I largely agree with the Court’s resolution of the merits, I join all but Parts II and III–B–2 of the Court’s opinion.

I

Respondents consist of two classes of aliens who committed criminal offenses that require the Secretary of Homeland Security to detain them without a bond hearing under 8 U. S. C. §1226(c), but who were not detained immediately upon release from criminal custody. Respondents argued that, by failing to immediately detain them, the Secretary lost the authority to deny them a bond hearing when they were rearrested.

The first class action was brought in the Northern District of California and has three class representatives. One of the plaintiffs, Mony Preap, received cancellation of removal and was not in immigration custody at the time of certification. The other two, Eduardo Vega Padilla and Juan Lozano Magdaleno, had received bond hearings as required by a Ninth Circuit decision, Rodriguez v. Robbins, 715 F. 3d 1127, 1138 (2013); Padilla had been released, while Magdaleno was denied release. The District Court certified a class of all aliens in California who are or will be subjected to mandatory detention under §1226(c) unless it took the alien into custody immediately upon release. Respondents argued that, by failing to immediately detain them, the Secretary lost the authority to deny them a bond hearing when they were rearrested.

The second class action was brought in the Western District of Washington and also has three class representatives: Bassam Yusuf Khoury and Alvin Rodriguez Moya, who had been released on bond before class certification after their Rodriguez hearings, and Pablo Carrera Zavala, who was released before class certification because the Department of Homeland Security determined that he had not committed a predicate §1226(c)(1) offense. The District Court certified a class of all aliens in its judicial district who were not detained immediately upon their release from criminal custody but were subjected to mandatory detention under §1226(c). The court entered a declaratory judgment barring the Government from subjecting class members to detention under §1226(c) unless it took the alien into custody immediately upon release.

II

At least three statutory provisions limit judicial review here, and I am skeptical whether the District Courts had Article III jurisdiction to certify the classes.

A

First, §1252(b)(9) bars judicial review of “all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States,” except for review of “a final order” or other circumstances not present here. These cases raise questions of law or fact arising from removal proceedings—“[d]etention is necessarily a part of [the] deportation procedure” that culminates in the removal of the alien, Carlson v. Landon, 342 U. S. 524, 538 (1952)—and they do not come to us on review of final orders of removal. Thus, for the reasons I set forth in Jennings, supra, at ___, ___–___ (slip op., at 1–11), no court has jurisdiction over these class actions.

B

Second, §1226(c) provides that “[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.” (Emphasis added.) This provision “unequivocally deprives federal courts of jurisdiction to set aside ‘any action or decision’ by the [Secretary]” regarding detention, discretionary or otherwise. Demore v. Kim, 538 U. S. 510, 533 (2003) (O’Connor, J., concurring in part and concurring in judgment); see Jennings, supra, at ___, n. 6 (slip op., at 11, n. 6). The Court once again reads this language as permitting judicial review for challenges to the “statutory framework as a whole.” Ante, at 7 (internal quotation marks omitted). But the text of the statute contains no such exception. Accordingly, I continue to think that no court has jurisdiction over these kinds of actions.

C

Third, §1252(f)(1) deprives district courts of “jurisdiction or authority to enjoin or restrain the operation of §§1221–1232” other than with respect to the application of such provisions to an individual alien against whom proceedings under §§1221–1232 have been initiated.” The text of §1252(f)(1) explicitly prohibits the classwide injunctive relief ordered
by the Northern District of California in this instance, given that the class includes future, yet-to-be detained aliens against whom proceedings have not been initiated. See Reno v. American-Arab Anti-Discrimination Comm., 525 U. S. 471, 481 (1999) (explaining that §1252(f)(1) “prohibits federal courts from granting classwide injunctive relief against the operation of §§1221–1231”). The District Court relied on Rodriguez v. Hayes, 591 F. 3d 1105 (CA9 2010), which held that this provision does not affect authority to enjoin alleged violations of the specified statutes because those claims do not “seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct … not authorized by the statutes.” Id., at 1120. This reasoning is circular and unpersuasive. Many claims seeking to enjoin or restrain the operation of the relevant statutes will allege that the Executive’s action does not comply with the statutory grant of authority, but the text clearly bars jurisdiction to enter an injunction “[r]egardless of the nature of the action or claim.” Although the Court avoids deciding whether §1252(f)(1) prevented the District Court’s injunction here, ante, at 8, I would hold that it did.

D

Finally, I harbor two concerns about whether the class actions were moot at the time of certification. First, as the Court recognizes, class actions are ordinarily “moot if no named class representative with an unexpired claim remain[s] at the time of class certification.” United States v. Sanchez-Gomez, 584 U. S. ___, ___ (2018) (slip op., at 4); ante, at 9. At the time of class certification, all six of the named plaintiffs had received bond hearings or cancellation of removal. As I understand the plaintiffs’ arguments, that was the full relief that they sought: “individualized bond hearings where they may attempt to prove that their release would not create a risk of flight or danger to the public.” Motion for Class Certification in Preap v. Beers, No. 4:13–cv–5754 (ND Cal.), Doc. 8, p. 8; see Complaint for Injunctive and Declaratory Relief in Preap, supra, Doc. 1, p. 3 (seeking “immediate individualized bond hearings”); First Amended Class Action Complaint in Khoury v. Asher, No. 2:13–cv–1367 (WD Wash.), Doc. 19, p. 13 (requesting relief of “individualized bond hearings to all Plaintiffs”). The Court concludes that some of the named plaintiffs still faced the threat of rearrest and mandatory detention at the time of class certification because the bond hearings that they received were pro- vided as part of a preliminary injunction in a separate case that was later dissolved. But whether the plaintiffs actually faced that threat has not been addressed by the parties, and I question whether this future contingency was sufficiently imminent to support Article III jurisdiction.

If the threat of rearrest and mandatory detention was too speculative to support jurisdiction, I disagree with the Court that our jurisdiction would be saved by our precedent on transitory claims. Ante, at 9–10. We have held that a court has Article III jurisdiction to certify a class action when the named plaintiffs’ claims have become moot if the claim is “so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” United States Parole Comm’n v. Geraghty, 445 U. S. 388, 399 (1980). The “inherently transitory” exception is measured from the time that the complaint is filed to the court’s ruling on the motion for class certification. See Genesis HealthCare Corp. v. Symczyk, 569 U. S. 66, 75–77 (2013). In other words, the named plaintiff’s standing in a class action need not exist throughout the lifecycle of the entire lawsuit. Here, Members of the Court have recognized that aliens are held, on average, for one year, and sometimes longer. See Jennings, 583 U. S., at ___ (Breyer, J., dissenting) (slip op., at 3) (noting that detention for aliens is “often lengthy,” sometimes lasting years). I am not persuaded that the plaintiffs’ claims are so “inherently transitory” as to preclude a ruling on class certification, especially since both District Courts certified the classes here within a year of the filing of the complaints. Cf. County of Riverside v. McLaughlin, 500 U. S. 44, 47, 52 (1991) (finding jurisdiction over a class action that challenged a county’s failure to provide “prompt” probable-cause hearings within the 48-hour window for arraignments, as required by state law).

Because three statutes deprive courts of jurisdiction over respondents’ claims, I would have vacated the judgments below and remanded with instructions to dismiss the cases for lack of jurisdiction. But because the Court has held otherwise and I agree with the Court’s disposition of the merits, I concur in all but Parts II and III–B–2 of its opinion.

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

A provision of the Immigration and Nationality Act, 8 U. S. C. §1226(c), focuses upon potentially deportable noncitizens who have committed certain offenses or have ties to terrorism. It requires the Secretary of Homeland Security to take those aliens into custody “when … released” from prison and to hold them without a bail hearing until Government authorities decide whether to deport them. The question is whether this provision limits the class of persons in the “no-bail-hearing” category to only those aliens who were taken into custody “when … released” from prison, or whether it also places in that “no-bail-hearing” category those aliens who were taken into custody years or decades after their release from prison.

The critical statutory language is contained in paragraph (2) of this provision. That paragraph says (with one exception not relevant here) that “an alien described in paragraph (1)” must be held without a bail hearing. Here we must decide
what these words mean. Do the words “an alien described in paragraph (1)” refer only to those aliens whom the Secretary, following paragraph (1)’s instructions, has “take[n] into custody … when the alien is released” from prison? Or do these words refer instead to all aliens who have ever committed one of the offenses listed in paragraph (1), regardless of when these aliens were “released” from prison?

For present purposes, I accept the Court’s holding in Jennings v. Rodriguez, 583 U. S. __ (2018), that paragraph (2) forbids bail hearings for aliens “described in paragraph (1).” But see id., at ___ (Breyer, J., dissenting) (slip op., at 2) (interpreting paragraph (2) as not forbidding bail hearings, as the Constitution likely requires them); id., at ___ (majority opinion) (slip op., at 29) (declining to reach constitutional question). Here, however, the Court goes much further. The majority concludes that paragraph (2) forbids bail hearings for aliens regardless of whether they are taken into custody “when … released” from prison. Under the majority’s view, the statute forbids bail hearings even for aliens whom the Secretary has detained years or decades after their release from prison.

The language of the statute will not bear the broad interpretation the majority now adopts. Rather, the ordinary meaning of the statute’s language, the statute’s structure, and relevant canons of interpretation all argue convincingly to the contrary. I respectfully dissent.

I

A

The relevant statute, 8 U. S. C. §1226, is entitled “Apprehension and detention of aliens.” See Appendix A, infra. Its first subsection, subsection (a), is entitled “Arrest, detention, and release.” Subsection (a) sets forth the background rule. It gives the Secretary of Homeland Security (formerly the Attorney General) the authority to “arrest[t] and detain[ ]” an “alien … pending a decision on whether the alien is to be removed from the United States.” §1226(a). See ante, at 3, n. 2. It adds that the Secretary “may release the alien” on “bond” or “conditional parole.” §1226(a)(2). Federal regulations provide that a person detained under this subsection must receive a bail hearing. 8 CFR §§236.1(d)(1), 1236.1(d)(1) (2018). With respect to release, however, subsection (a) adds the words “except as provided in subsection (c).” 8 U. S. C. §1226(a).

The subsection containing the exception to which (a) refers—namely, subsection (c)—is entitled “Detention of criminal aliens.” It consists of two paragraphs.

Paragraph (1), entitled “Custody,” says that the Secretary “shall take into custody any alien who” is “inadmissible” or “deportable” (by reason of having committed certain offenses or having ties to terrorism) “when the alien is released,” presumably from local, state, or federal criminal custody. §1226(c)(1) (emphasis added). Because the relevant offenses are listed in four subparagraphs headed by the letters “A,” “B,” “C,” and “D,” I shall refer to the relevant aliens as “ABCD” aliens. Thus, for present purposes, paragraph (1) says that the Secretary “shall take into custody any” ABCD alien “when the alien is released” from criminal custody.

Paragraph (2), entitled “Release,” says that the Secretary “may release an alien described in paragraph (1) only if” the alien falls within a special category—not relevant here—related to witness protection. §1226(c)(2) (emphasis added). We held last Term in Jennings that paragraph (2) forbids a bail hearing for “an alien described in paragraph (1)” unless the witness protection exception applies. 583 U. S., at ___ (majority opinion) (slip op., at 20–22).

Here we focus on the meaning of a key phrase in paragraph (2): “an alien described in paragraph (1).” This is the phrase that identifies the aliens to whom paragraph (2) (and its “no-bail-hearing” requirement) applies. Does paragraph (1) “describe[e]” all ABCD aliens, even those whom the Secretary has “take[n] into custody” many years after their release from prison? Or does it “describe[e]” only those aliens whom the Secretary has “take[n] into custody … when the alien [was] released” from prison?

B

The issue may sound technical. But it is extremely important. That is because the Government’s reading of the statute—namely, that paragraph (2) forbids bail hearings for all ABCD aliens regardless of whether they were detained “when … released” from criminal custody—would significantly expand the Secretary’s authority to deny bail hearings. Under the Government’s view, the aliens subject to detention without a bail hearing may have been released from criminal custody years earlier, and may have established families and put down roots in a community. These aliens may then be detained for months, sometimes years, without the possibility of release; they may have been convicted of only minor crimes—for example, minor drug offenses, or crimes of “moral turpitude” such as illegally downloading music or possessing stolen bus transfers; and they sometimes may be innocent spouses or children of a suspect person. Moreover, for a high percentage of them, it will turn out after months of custody that they will not be removed from the country because they are eligible by statute to receive a form of relief from removal such as cancellation of removal. These are not mere hypotheticals. See Appendix B, infra. Thus, in terms of potential consequences and basic American legal traditions, see infra, at 11–12, the question before us is not a “narrow” one, ante, at 2 (KAVANAUGH, J., concurring).

Why would Congress have granted the Secretary such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-law traditions? See Jennings, supra, at ___–___ (Breyer, J., dissenting) (slip op., at 8–10). The answer is that Congress did not do so. Ordinary tools of statutory interpretation demonstrate that the authority Congress granted to the Secretary is far more limited.
II

The statute’s language, its structure, and relevant canons of interpretation make clear that the Secretary cannot hold an alien without a bail hearing unless the alien is “take[n] into custody … when the alien is released” from criminal custody. §1226(c)(1).

A

Consider the statute’s language. Paragraph (1) of subsection (c) provides that the Secretary “shall take into custody” any ABCD alien—that is, any alien who is “inadmissible” or “deportable” under the subparagraphs labeled “A,” “B,” “C,” and “D”—“when the alien is released” from, say, state or federal prison. Ibid. Paragraph (2), meanwhile, generally forbids a bail hearing for “an alien described in paragraph (1).” §1226(c)(2).

The key phrase in paragraph (2) is “an alien described in paragraph (1).” As a matter of ordinary meaning and usage, the words “take into custody … when the alien is released” in paragraph (1) form part of the description of the “alien”: An “alien described in paragraph (1)” is an ABCD alien whom the Secretary has “take[n] into custody … when the alien is released” from prison.

The majority emphasizes a grammatical point—namely, that ordinarily only adjectives or adjectival phrases “modify” nouns. Ante, at 12. But the statute does not use the word “modify.” It uses the word “described.” While the word “describe” will in some contexts refer only to the words that directly “modify” a noun, normally it has a broader meaning. Compare American Heritage Dictionary 490 (5th ed. 2011) (to “describe” is to “convey an idea or impression of”) and Webster’s Third New International Dictionary 610 (1986) (to “describe” is to “convey an image or notion of”) with P. Peters, The Cambridge Guide to English Usage 355 (2004) (defining a “modify[r]” as a word that “qualifies” a noun).

The common rules of grammar make the broad scope of the word “described” obvious. They demonstrate that a noun often is “described” by more than just the adjectives that modify it. Consider the following sentence: “The well-behaved child was taken by a generous couple to see Hamilton.” That sentence, written in the passive voice, describes the “child” not only as “well-behaved” but also as someone “taken” by a generous couple to see Hamilton. The description of the child would not differ were we to write the sentence in the active voice: “The generous couple took the well-behaved child to see Hamilton.” The action taken by the “generous couple” (“took … to see Hamilton”) still “describes” the “child,” even though these words do not “modify” the word “child.” That is because a person who has been subjected to an action can be described by that action no less than by an adjective. See Peters, supra, at 386 (describing such a person as someone “affected by the action”); B. Garner, The Chicago Guide to Grammar, Usage, and Punctuation 452 (2016) (describing such a person as someone who “is acted on by or receives the action”); see also R. Huddleston & G. Pullum, The Cambridge Grammar of the English Language 1436 (2002) (noting the “large-scale overlap” between adjectives and certain verb forms).

An example illustrates how these principles apply to the statute at issue here. Imagine the following cookbook recipe. Instruction (1) says: “(1) Remove the Angus steak from the grill when the steak is cooked to 120 degrees Fahrenheit.” Instruction (4) says: “(4) Let the steak described in Instruction (1) rest for ten minutes and then serve it.” What would we say of a chef who grilled an Angus steak to 185 degrees Fahrenheit, served it, and then appealed to these instructions—particularly the word “described” in Instruction (4)—as a justification? That he was not a good cook? That he had an odd sense of humor? Or simply that he did not understand the instructions? The chef would have no good textual defense: The steak “described in Instruction (1)” is not just an “Angus” steak, but an “Angus” steak that must be “remove[d] … when the steak is cooked to 120 degrees Fahrenheit.” By the same logic, the alien in paragraph (1) is “described” not only by the four clauses—A, B, C, and D—that directly modify the word “alien,” but also by the verb (“shall take”) and that verb’s modifier (“when the alien is released”).

The majority argues that “the crucial point” is that the phrase “when the alien is released” plays “no role in identifying for the Secretary which aliens she must immediately arrest.” Ante, at 13. That may be so. But why is that a “crucial point” in the majority’s favor? After all, in the example above, the words “remove … from the grill when the steak is cooked to 120 degrees Fahrenheit” do not tell our chef what kind of steak to cook in the first place. (The word “Angus” does that.) Even so, those words still “describe” the steak that must be served in Instruction (4). Why? Because by the time our chef gets to Instruction (4), the recipe contemplates that the action in Instruction (1) has been completed. At that point, the “steak described in Instruction (1)” is a steak that has been cooked in the manner mandated by Instruction (1).

The same is true of the two paragraphs before us. The key word “described” appears not in paragraph (1), but in paragraph (2). Paragraph (2) refers back to the entirety of paragraph (1). And because paragraph (2) is the release provision, it contemplates that the action mandated by paragraph (1)—namely, detention—has already occurred. Thus, the function of the phrase “an alien described in paragraph (1)” is not to describe who must be detained, but instead to describe who must be denied bail.

In short, the language demonstrates that an alien is “described in paragraph (1)” — and therefore subject to paragraph (2)’s bar on bail hearings—only if the alien is “take[n] into custody … when the alien is released.”

B

The statute’s structure and context support this reading of the phrase “an alien described in paragraph (1).”

First, “Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the
Thus, the second sentence of (a) applies only to those aliens who are detained following the rule in (a)’s first sentence. Parallel structure suggests that the same is true in (c): The second sentence of (c) applies only to those detained following the rule in (c)’s first sentence. Subsection (a)’s reference to (c) strengthens this structural inference: Subsection (a) says that its release rule applies “[e]xcept as provided in subsection (c)” —that is, except as provided in the whole of subsection (c), not simply paragraph (2) or the few lines the majority picks from (c)’s text.

Thus, the release rule in each subsection (the second sentence) applies only if the Secretary complies with the detention rule in that subsection (the first sentence). In light of “the parallel structures of these provisions,” it would “flout[t] the text” to find that an alien is subject to (c)’s release rule, which forbids release, without also finding that the alien was detained in accordance with (c)’s detention rule, which requires the alien to be detained “when … released.” *Chan v. Korean Air Lines, Ltd.*, 490 U. S. 122, 132 (1989).

The majority responds that subsections (a) and (c) do not “establish[h] separate sources of arrest and release authority,” and that (c) is merely “a limit” on the authority granted by (a). *Ante*, at 15. But even if (c) were treated as a “limit” on the authority granted by (a), the parallel structure of the statute would still point to the same conclusion: The Secretary must comply with the limit on detention in the first sentence of (c) in order to invoke the rule on release in the second sentence of (c).

*Third*, Congress’ enactment of a special “transition” statute strengthens the point. When Congress enacted subsection (c), it recognized that there might be “insufficient detention space” and “personnel” to carry out subsection (c)’s requirements. *IIRIRA*, §303(b)(2), 110 Stat.3009–586. It therefore authorized the Government to delay implementation of subsection (c)—initially for one year, then for a second year. *Ibid*.

If the majority were correct that the “when … released” provision does not set a time limit on the Secretary’s authority to deny bail hearings, then a special transition statute delaying implementation for one year would have been unnecessary. To avoid overcrowding, the Government simply could have delayed arresting aliens for 1, 2.5, or 10 years, as the majority believes it can do, and then deny them bail hearings. What need for a 1-year transition period? The majority responds that the transition statute still served a purpose: to “delay[ ] the onset of the Secretary’s obligation to begin making arrests.” *Ante*, at 21. But that just raises the question: Why would Congress have needed to “delay[ ] the onset of the Secretary’s obligation” if it thought that the Secretary could detain aliens without a bail hearing after a year-long delay? The majority offers no good answer. The transition statute therefore strongly suggests that Congress viewed the “when … released” provision as a constraint on the Secretary’s authority to deny a bail hearing.

The transition statute also supports this conclusion in another respect: It demonstrates that Congress anticipated that subsection (c) would apply only to aliens “released” from state or federal prison. As noted, clauses A, B, C, and D in paragraph (1) cover some aliens who have never been in criminal custody. *Supra*, at 4. Even the majority acknowledges that it would be bizarre if these aliens could be detained without a bail hearing. *Ante*, at 23. The transition statute confirms as much: It indicates that “the provisions of [subsection (c)] shall apply to individuals released after” the transition period concludes. *IIRIRA*, §303(b)(2), 110 Stat. 3009–586 (emphasis added). From this it follows that Congress saw paragraph (2) as forbidding bail hearings only for aliens who have been “released.” That, however, can be true only if the “when … released” provision limits the class of aliens subject to paragraph (2)’s “no-bail-hearing” requirement. The majority’s contrary reading, under which paragraph (2) applies “regardless of … whether the alien was released from criminal custody,” *ante*, at 25, conflicts with how Congress
itself described the scope of subsection (c) when it enacted the statute.

C

Even if statutory text and structure were not enough to resolve these cases, the Government’s reading would fail for another reason. A well-established canon of statutory interpretation provides that, “if fairly possible,” a statute must be construed “so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” United States v. Jin Fuey Moy, 241 U. S. 394, 401 (1916). See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U. S. 568, 575 (1988) (using word “serious” instead of “grave”). The Government’s reading of the statute, which the majority adopts, construes the statute in a way that creates serious constitutional problems. That reading would give the Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months or years. This possibility is not simply theoretical. See Appendix B, infra.

In Jennings, I explained why I believe the practice of indefinite detention without a bail hearing likely deprives a “person” of his or her “liberty … without due process of law.” U. S. Const., Amdt. 5. See 583 U. S., at ___ (dissenting opinion) (slip op., at 5). This practice runs counter to “those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of ” the Founders’ “ancestors.” Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 277 (1856). It runs counter to practices well established at the time of the American Revolution. Jennings, supra, at ___–___ (slip op., at 9–10). And it runs counter to common sense: Why would the law grant a bail hearing to a person accused of murder but deny it to a person who many years before committed a crime perhaps no greater than possessing a stolen bus transfer? See Appendix B, infra.

I explained much of the constitutional problem in my dissent in Jennings. Rather than repeat what I wrote there, I refer the reader to that opinion. See Jennings, supra, at ___ (slip op., at 1). I add only the obvious point that a bail hearing does not mean release on bail. It simply permits the person held to demonstrate that, if released, he will neither run away nor pose a threat. It is especially anomalous to take this opportunity away from an alien who committed a crime many years before and has since reformed, living productively in a community.

The majority’s reading also creates other anomalies. As I have said, by permitting the Secretary to hold aliens without a bail hearing even if they were not detained “when … released,” the majority’s reading would allow the Secretary to hold indefinitely without bail those who have never been to prison and who received only a fine or probation as punishment. Supra, at 4, 10–11. See, e.g., §1226(c)(1)(A) (incorporating §1182(a)(2), which covers controlled substance offenses for which the maximum penalty exceeds one year); Brief for Advancement Project et al. as Amici Curiae 19, 24, 29 (describing examples). That fact simply aggravates the constitutional problem.

III

Although the Court of Appeals correctly concluded that paragraph (2)’s prohibition on release applies only to an alien whom the Secretary “take[s] into custody … when the alien is released” from criminal custody, it also held that the phrase “when the alien is released” means that the Secretary must grant a bail hearing to any alien who is not “immediately detained” when released from criminal custody.” Preap v. Johnson, 831 F. 3d 1193, 1207 (CA9 2016). I disagree with the Court of Appeals as to the meaning of the phrase “when the alien is released.”

A

As an initial matter, the phrase “when the alien is released” imposes an enforceable statutory deadline. I cannot agree with JUSTICE ALITO, who writes for a plurality of the Court on this point, that our cases holding certain statutory deadlines unenforceable are applicable here. Ante, at 17. See, e.g., Barnhart v. Peabody Coal Co., 537 U. S. 149, 152 (2003) (holding that the Government’s untimeliness did not bar it from taking action beyond the statutory deadline); United States v. Montalvo-Murillo, 495 U. S. 711, 713–714 (1990) (holding that a provision requiring a detention hearing to “be held immediately” did not bar detention in the event of a late hearing); Brock v. Pierce County, 476 U. S. 253, 266 (1986) (holding that the Government’s failure to observe a 120-day statutory deadline did not deprive it of authority under the statute).

I disagree with the plurality on this point because our case law makes clear that a statutory deadline against the Government must be enforced at least in contexts where “other part[s]” of the relevant statutes indicate that the time limit must be enforced, Montalvo-Murillo, supra, at 717; see also Barnhart, supra, at 161, 163; Dolan v. United States, 560 U. S. 605, 613 (2010); where the statute “specif[ies] a consequence for noncompliance” with the time limit, Barnhart, supra, at 159 (quoting United States v. James Daniel Good Real Property, 510 U. S. 43, 63 (1993)); or where the harms caused by the Government’s delay are likely to be serious, see Dolan, supra, at 615–616; Montalvo-Murillo, supra, at 719–720.

Here, the special transition statute Congress enacted alongside subsection (c) makes clear that Congress expected that the mandate that an alien be detained “when … released” would be enforceable. Congress neither wished for nor expected the Secretary to detain aliens more than a year after their release from criminal custody. IIRIRA, §303(b)(2), 110 Stat. 3009–586. Why else would Congress have enacted a statute permitting the Government, due to “insufficient detention space and Immigration and Naturalization Service
personnel,” to delay implementation of the entirety of subsection (c) for one year? Ibid. As I have said, had Congress read the phrase “when the alien is released” as the plurality now reads it, the Government could have delayed implementation for as long as it liked without the need for any transition statute. Supra, at 10. The transition statute demonstrates that Congress viewed the phrase “when the alien is released” as imposing a deadline. Based on the transition statute, the Secretary may not delay detention under subsection (c) for longer than one year.

Moreover, the statute does “specify a consequence” for the Secretary’s failure to detain an alien “when the alien is released.” Barnhart, supra, at 159 (quoting James Daniel Good, supra, at 63). In that case, subsection (c) will not apply, and the Secretary must fall back on subsection (a), the default detention and release provision. Critically, subsection (a) does not guarantee release. Rather, it leaves much to the Government’s judgment: By regulation, aliens who are subject to subsection (a)’s default detention and release rules will simply receive a hearing at which they can attempt to demonstrate that, if released, they will not pose a risk of flight or a threat to the community. 8 CFR §§236.1(d)(1), 1236.1(d)(1).

Finally, I have already mentioned the many harms that could befall aliens whom the Secretary does not detain “when … released.” They range from long periods of detention, to detention years or even decades after the alien’s release from criminal custody, to the risk of splitting up families that are long established in a community. Supra, at 4. Thus, unlike some of our prior cases, the harm from a missed deadline hardly can be described as “insignificant.” Montalvo-Murillo, supra, at 719.

The plurality objects that “Congress could not have meant for judges to ‘enforce’” the mandatory detention requirement “in case of delay by—of all things— forbidding its execution.” Ante, at 19. But treating the “when the alien is released” clause as an enforceable limit does not prohibit the Secretary from detaining the aliens that subsection (c) requires her to detain. Rather, the Secretary’s failure to comply with the “when the alien is released” clause carries only one consequence: The Secretary cannot deny a bail hearing.

B

So what does the phrase “when the alien is released” mean? The word “when” can, but does not always, mean “[a]t the time that,” American Heritage Dictionary, at1971, or “just after the moment that,” Webster’s Third New International Dictionary, at 2602. But the word only “[s]ometimes implies suddenness.” 20 Oxford English Dictionary 209 (2d ed. 1989). It often admits of at least some temporal delay. A child who is told to “mow the lawn, please, when you get home from school” likely does not have to mow the lawn the second she comes into the house. She can do a few other things first.

Mindful of “the greater immigration-related expertise of the Executive Branch” and “the serious administrative needs and concerns inherent in the necessarily extensive[Government] efforts to enforce this complex statute,” I would interpret the word “when” in the same manner as we interpreted other parts of this statute in Zadvydas v. Davis, 533 U. S. 678, 700 (2001). The words “when the alien is released” require the Secretary to detain aliens under subsection (c) within a reasonable time after their release from criminal custody—presumptively no more than six months. If the Secretary does not do so, she must grant a bail hearing. This presumptive 6-month limit is consistent with how long the Government can detain certain aliens while they are awaiting removal from the country. Id., at 682, 701 (interpreting a different provision, §1231(a)(6)). To insist upon similar treatment in this context would give the Government sufficient time to detain aliens following their release from local, state, or federal criminal custody. It would also ensure that the Government does not fall outside the 1-year maximum dictated by the transition statute. See supra, at 10, 14.

IV

To reiterate: The question before us is not “narrow.” Ante, at 2 (KAVANAUGH, J., concurring). See supra, at 4. That is because we cannot interpret the words of this specific statute without also considering basic promises that America’s legal system has long made to all persons. In deciphering the intent of the Congress that wrote this statute, we must decide—in the face of what is, at worst, linguistic ambiguity—whether Congress intended that persons who have long since paid their debt to society would be deprived of their liberty for months or years without the possibility of bail. We cannot decide that question without bearing in mind basic American legal values: the Government’s duty not to deprive any “person” of “liberty” without “due process of law,” U. S. Const., Amdt. 5; the Nation’s original commitment to protect the “unalienable” right to “Liberty”; and, less abstractly and more directly, the longstanding right of virtually all persons to receive a bail hearing.

I would have thought that Congress meant to adhere to these values and did not intend to allow the Government to apprehend persons years after their release from prison and hold them indefinitely without a bail hearing. In my view, the Court should interpret the words of this statute to reflect Congress’ likely intent, an intent that is consistent with our basic values. To speak more technically, I believe that aliens are subject to paragraph (2)’s bar on release only if they are detained “when … released” from criminal custody. To speak less technically, I fear that the Court’s contrary interpretation will work serious harm to the principles for which American law has long stood.

For these reasons, with respect, I dissent.

[APPENDIXES A AND B DELETED]
WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER

v.

COUGAR DEN, INC.

No. 16–1498
In the Supreme Court of the United States
On Writ Of Certiorari To The Supreme Court Of Washington
Argued October 30, 2018
Filed March 19, 2019

JUSTICE BREYER announced the judgment of the Court, and delivered an opinion, in which JUSTICE SOTOMAYOR and JUSTICE KAGAN join.

The State of Washington imposes a tax upon fuel importers who travel by public highway. The question before us is whether an 1855 treaty between the United States and the Yakama Nation forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation. We conclude that it does, and we affirm the Washington Supreme Court’s similar decision.

I

A Washington statute applies to “motor vehicle fuel importer[s]” who bring large quantities of fuel into the State by “ground transportation” such as a “railcar, trailer, [or truck].” Wash. Rev. Code §§82.36.010(4), (12), (16) (2012). The statute requires each fuel importer to obtain a license, and it says that a fuel tax will be “levied and imposed upon motor vehicle fuel licensees” for “each gallon of motor vehicle fuel” that the licensee brings into the State. §§82.36.020(1), (2)(c). Licensed fuel importers who import fuel by ground transportation become liable to pay the tax as of the time the “fuel enters into this State.” §§82.36.020(2)(c); see also §§82.38.020(4), (12), (15), (26), 82.38.030(1), (7)(c)(ii) (equivalent regulation of diesel fuel importers).

But only those licensed fuel importers who import fuel by ground transportation are liable to pay the tax. §§82.36.026(3), 82.36.020(2)(c). For example, if a licensed fuel importer brings fuel into the State by pipeline, that fuel importer need not pay the tax. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, if a licensed fuel importer brings fuel into the State by vessel, that fuel importer need not pay the tax. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Instead, in each of those instances, the next purchaser or possessor of the fuel will pay the tax. §§82.36.020(2)(a), (b), (d). The only licensed fuel importers who must pay this tax are the fuel importers who bring fuel into the State by means of ground transportation.

B

The relevant treaty provides for the purchase by the United States of Yakama land. See Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Under the treaty, the Yakamas granted to the United States approximately 10 million acres of land in what is now the State of Washington, i.e., about one-fourth of the land that makes up the State today. Art. I, id., at 951–952; see also Brief for Respondent 4, 9. In return for this land, the United States paid the Yakamas $200,000, made improvements to the remaining Yakama land, such as building a hospital and schools for the Yakamas to use, and agreed to respect the Yakamas’ reservation of certain rights. Arts. III–V, 12 Stat. 952–953. Those reserved rights include “the right, in common with citizens of the United States, to travel upon all public highways,” “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory,” and other rights, such as the right to hunt, to gather roots and berries, and to pasture cattle on open and unclaimed land. Art. III, id., at 953.

C

Cougar Den, Inc., the respondent, is a wholesale fuel importer owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. App. to Pet. for Cert. 63a–64a; App. 99a. Cougar Den buys fuel in Oregon, trucks the fuel over public highways to the Yakama Reservation in Washington, and then sells the fuel to Yakama-owned retail gas stations located within the reservation. App. to Pet. for Cert. 50a, 55a. Cougar Den believes that Washington’s fuel import tax, as applied to Cougar Den’s activities, is pre-empted by the treaty. App. 15a. In particular, Cougar Den believes that requiring it to pay the tax would infringe the Yakamas’ reserved “right, in common with citizens of the United States, to travel upon all public highways.” Art. III, 12 Stat. 953.

In December 2013, the Washington State Department of Licensing (Department), believing that the state tax was not pre-empted by the treaty, assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees. App. to Pet. for Cert. 65a; App. 10a. Cougar Den appealed to higher authorities within the state agency. App. 15a. An Administrative Law Judge agreed with Cougar Den that the tax was pre-empted. App. to Brief in Opposition 14a. The Department’s Director, however, disagreed and overturned the ALJ’s order. App. to Pet. for Cert. 59a. A Washington Superior Court in turn disagreed with the director and held that the tax was pre-empted. Id., at 34a. The director appealed to the Washington Supreme Court. 188 Wash. 2d 55, 58, 392 P. 3d 1014, 1015 (2017). And that court, agreeing with Cougar Den, upheld the Superior Court’s determination of pre-emption. Id., at 69, 392 P. 3d, at 1020.
The Department filed a petition for certiorari asking us to review the State Supreme Court’s determination. And we agreed to do so.

II

A

The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute “taxes the importation of fuel, which is the transportation of fuel.” *Ibid.* It added that “travel on public highways is directly at issue because the tax [is] an importation tax.” *Id.*, at 67, 392 P. 3d, at 1019.

Nor is there any reason to doubt that the Washington Supreme Court means what it said when it interpreted the Washington statute. We read the statute the same way. In the statute’s own words, Washington “impose[s] upon motor vehicle fuel licensees,” including “licensed importer[s],” a tax for “each gallon of motor vehicle fuel” that “enters into this state,” but only “if … entry is” by means of “a railcar, trailer, truck, or other equipment suitable for ground transportation.” Wash. Rev. Code §§82.36.010(4), 82.36.020(1), (2), 82.36.026(3). As is true of most tax laws, the statute is long and complex, and it is easy to stumble over this technical language. But if you are able to walk slowly through its provisions, the statute is easily followed. We need take only five steps.

We start our journey at the beginning of the statute which first declares that “[t]here is hereby levied and imposed upon motor vehicle fuel licensees, other than motor vehicle fuel distributors, a tax at the rate … provided in [the statute] on each gallon of motor vehicle fuel.” §82.36.020(1). That is simple enough. Washington imposes a tax on a group of persons called “motor vehicle fuel licensees” for “each gallon of motor vehicle fuel.”

Who are the “motor vehicle fuel licensees” that Washington taxes? We take a second step to find out. As the definitions section of the statute explains, the “motor vehicle fuel licensees” upon whom the tax is imposed are “person[s] holding a … motor vehicle fuel importer, motor vehicle fuel exporter, motor vehicle fuel blender, motor vehicle distributor, or international fuel tax agreement license.” §82.36.010(12). This, too, is easy to grasp. Not everyone who possesses motor vehicle fuel owes the tax. Instead, only motor vehicle fuel importers (and other similar movers and shakers within the motor vehicle fuel industry) who are licensed by the State to deal in fuel, must pay the tax.

But must each of these motor vehicle fuel licensees pay the tax, so that the fuel is taxed as it passes from blender, to importer, to exporter, and so on? We take a third step, and learn that the answer is “no.” As the statute explains, “the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state.” §82.36.022. Reading that, we understand that only the first licensee who can be taxed, will be taxed.

So, we ask, who is the first taxable licensee? Who must actually pay this tax? We take a fourth step to find out. Logic tells us that the first licensee who can be taxed will likely be the licensee who brings fuel into the State. But, the statute tells us that a “licensed importer” is “liable for and [must] pay tax to the department” when “[m]otor vehicle fuel enters into this state if … [t]he entry is not by bulk transfer.” §§82.36.020(2)(c), 82.36.026(3) (emphasis added). That is, a licensed importer can only be the first taxable licensee (and therefore the licensee that must pay the tax) if the importer brings fuel into the State by a method other than “bulk transfer.”

But what is “bulk transfer”? What does it mean to say that licensed fuel importers need only pay the tax if they do not bring in fuel by “bulk transfer”? We take a fifth, and final, step to find out. “[B]ulk transfer,” the definitions section explains, “means a transfer of motor vehicle fuel by pipeline or vessel,” as opposed to “railcar, trailer, truck, or other equipment suitable for ground transportation.” §§82.36.010(3), (4). So, we learn that if the licensed fuel importer brings fuel into the State by ground transportation, then the fuel importer owes the tax. But if the licensed fuel importer brings fuel into the State by pipeline or vessel, then the importer will not be the first taxable person to possess the fuel, and he will not owe the tax.

In sum, Washington taxes travel by ground transportation with fuel. That feature sets the Washington statute apart from other statutes with which we are more familiar. It is not a tax on possession or importation. A statute that taxes possession would ordinarily require all people who own a good to pay the tax. A good example of that would be a State’s real estate property tax. That statute would require all homeowners to pay the tax, every year, regardless of the specifics of their situation. And a statute that taxes importation would ordinarily require all people who bring a good into the State to pay a tax. A good example of that would be a federal tax on newly manufactured cars. That statute would ordinarily require all people who bring a new car into the country to pay a tax. But Washington’s statute is different because it singles out ground transportation. That is, Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation.

The facts of this case provide a good example of the tax in operation. Each of the assessment orders that the Department sent to Cougar Den explained that Cougar Den owed the tax because Cougar Den traveled by high way. See App. 10a–26a; App. to Pet. for Cert. 55a. As the director explained, Cougar Den owed the tax because Cougar Den had caused fuel to enter “into this [S]tate at the Washington-Oregon boundary on the Highway 97 bridge” by means of a “tank truck” destined for “the Yakama Reservation.” *Ibid.* The director offers this explanation in addition to quoting the quantity of fuel that Cougar Den possessed because the element of travel by ground transportation is a necessary prerequisite to the imposition of the tax. Put another way, the State must
prove that Cougar Den traveled by highway in order to apply its tax.

B

We are not convinced by the arguments raised to the contrary. The Department claims, and THE CHIEF JUSTICE agrees, that the state tax has little or nothing to do with the treaty because it is not a tax on travel with fuel but rather a tax on the possession of fuel. See Brief for Petitioner 26–28; post, at 5 (dissenting opinion).

We cannot accept that characterization of the tax, however, for the Washington Supreme Court has authoritatively held that the statute is a tax on travel. The Washington Supreme Court held that the Washington law at issue here “taxes the importation of fuel, which is the transportation of fuel.” 188 Wash. 2d, at 69, 392 P. 3d, at 1020. It added that “travel on public highways is directly at issue because the tax [is] an importation tax.” Id., at 67, 392 P. 3d, at 1019. In so doing, the State Supreme Court heard, considered, and rejected the construction of the fuel tax that the Department advances here. See ibid., 392 P. 3d, at 1019 (“The Department argues, and the director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways . . . . The Department’s argument is unpersuasive . . . . Here, travel on public highways is directly at issue because the tax was an importation tax”). The incidence of a tax is a question of state law, Oklahoma Tax Comm’n v. Chickasaw Nation, 515 U. S. 450, 461 (1995), and this Court is bound by the Washington Supreme Court’s interpretation of Washington law, Johnson v. United States, 559 U. S. 133, 138 (2010). We decline the Department’s invitation to overstep the bounds of our authority and construe the tax to mean what the Washington Supreme Court has said it does not.

Nor would it make sense to construe the tax’s incidence differently. The Washington Supreme Court’s conclusion follows directly from its (and our) interpretation of how the tax operates. See supra, at 4–7. To be sure, it is generally true that fuel imported into the State by trucks driving the public highways can also be described as fuel that is possessed for the first time in the State. But to call the Washington statute a tax on “first possession” would give the law an over-inclusive label. As explained at length above, there are several ways in which a company could be a “first possessor” of fuel without incurring the tax. See ibid. For example, Cougar Den would not owe the tax had Cougar Den “first possessed” fuel by piping fuel from out of State into a Washington refinery. First possession is not taxed if the fuel is brought into the State by pipeline and bound for a refinery. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, Cougar Den would not owe the tax had Cougar Den “first possessed” fuel by bringing fuel into Washington through its waterways rather than its highways. First possession is not taxed if the fuel is brought into the State by vessel, §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Thus, it seems rather clear that the tax cannot accurately be described as a tax on the first possession of fuel.

But even if the contrary were true, the tax would still have the practical effect of burdening the Yakamas’ travel. Here, the Yakamas’ lone off-reservation act within the State is traveling along a public highway with fuel. The tax thus operates on the Yakamas exactly like a tax on transportation would: It falls upon them only because they happened to transport goods on a highway while en route to their reservation. And it is the practical effect of the state law that we have said makes the difference. We held, for instance, that the fishing rights reserved in the treaty pre-empted the State’s enforcement of a trespass law against Yakama fishermen crossing private land to access the river. See, e.g., United States v. Winans, 198 U. S. 371, 381 (1905). That was so even though the trespass law was not limited to those who trespass in order to fish but applied more broadly to any trespasser. Put another way, it mattered not that the tax was “on” trespassing rather than fishing because the tax operated upon the Yakamas when they were exercising their treaty-protected right. Ibid.; see also Tulee v. Washington, 315 U. S. 681, 685 (1942) (holding that the fishing rights reserved in the treaty pre-empted the State’s application of a fishing licensing fee to a Yakama fisherman, even though the fee also applied to types of fishing not practiced by the Yakamas). And this approach makes sense. When the Yakamas bargained in the treaty to protect their right to travel, they could only have cared about preventing the State from burdening their exercise of that right. To the Yakamas, it is thus irrelevant whether the State’s tax might apply to other activities beyond transportation. The only relevant question is whether the tax “act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve.” Tulee, 315 U. S., at 685. And the State’s tax here acted upon Cougar Den in exactly that way.

For the same reason, we are unpersuaded by the Department’s insistence that it adopted this tax after a District Court, applying this Court’s decision in Chickasaw Nation, barred the State from taxing the sale of fuel products on tribal land. See Brief for Petitioner 6–7; Squaxin Island Tribe v. Stephens, 400 F. Supp. 2d 1250, 1262 (WD Wash. 2005). Although a State “generally is free to amend its law to shift the tax’s legal incidence,” Chickasaw Nation, 515 U. S., at 460, it may not burden a treaty-protected right in the process, as the State has done here.

Thus, we must turn to the question whether this fuel tax, falling as it does upon members of the Tribe who travel on the public highways, violates the treaty.

III

A

In our view, the State of Washington’s application of the fuel tax to Cougar Den’s importation of fuel is pre-empted by the treaty’s reservation to the Yakama Nation of “the right, in common with citizens of the United States, to travel upon all
public highways.” We rest this conclusion upon three considerations taken together.

First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language before us; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See Winans, 198 U. S., at 380–381; Seufert Brothers Co. v. United States, 249 U. S. 194, 196–198 (1919); Tulee, 315 U. S., at 683–685; Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U. S. 658, 677–678 (1979).

The treaty language at issue in each of the four cases is similar, though not identical, to the language before us. The cases focus upon language that guarantees to the Yakamas “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.” Art. III, para. 2, 12 Stat. 953. Here, the language guarantees to the Yakamas “the right, in common with citizens of Cite as: 586 U. S. ___ (2019) 11 Opinion of the Court the United States, to travel upon all public highways.” Art. III, para. 1, ibid. The words “in common with” on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike. But this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855. See Winans, 198 U. S., at 379, 381; Seufert Brothers, 249 U. S., at 198–199; Tulee, 315 U. S., at 684; Fishing Vessel, 443 U. S., at 679, 684–685.

The cases base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. See, e.g., Winans, 198 U. S., at 380; Seufert Brothers, 249 U. S., at 198; Fishing Vessel, 443 U. S., at 667, n. 10. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. App. 65a; Fishing Vessel, 443 U. S., at 667, n. 10. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write. And many of the representations that the United States made about the treaty had no adequate translation in the Yakamas’ own language. App. 68a–69a.

Thus, in the year 1905, in Winans, this Court wrote that, to interpret the treaty, courts must focus upon the historical context in which it was written and signed. 198 U. S., at 381; see also Tulee, 315 U. S., at 684 (“It is our responsibility to see that the terms of the treaty are care-ried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council”); cf. Water Splash, Inc. v. Menon, 581 U. S. ___, ___ (2017) (slip op., at 8) (noting that, to ascertain the meaning of a treaty, courts “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties”) (internal quotation marks omitted).

The Court added, in light of the Yakamas’ understanding in respect to the reservation of fishing rights, the treaty words “in common with” do not limit the reservation’s scope to a right against discrimination. Winans, 198 U. S., at 380–381. Instead, as we explained in Tulee, Winans held that “Article III [of the treaty] conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their ‘usual and accustomed places’ in the ceded area.” Tulee, 315 U. S., at 684 (citing Winans, 198 U. S. 371; emphasis added). Also compare, e.g., Fishing Vessel, 443 U. S., at 677, n. 22 (“Whatever opportunities the treaties assure Indians with respect to fish are admittedly not ‘equal’ to, but are to some extent greater than, those afforded other citizens” (emphasis added)), with post, at 4 (KAVANAUGH, J., dissenting) (citing this same footnote in Fishing Vessel as support for the argument that the treaty guarantees the Yakamas only a right against discrimination). Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to “an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.” Winans, 198 U. S., at 380.

Second, the historical record adopted by the agency and the courts below indicates that the right to travel includes a right to travel with goods for sale or distribution. See App. to Pet. for Cert. 33a; App. 56a–74a. When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade. App. 65a–66a. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. Id., at 62a–63a. The Yakamas traveled to the nearby plains region to hunt buffalo. Id., at 61a. They traveled to the mountains to gather berries and roots. Ibid. The Yakamas’ religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. Id., at 61a–62a. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. Ibid.

The United States’ representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. Id., at 63a. They repeatedly assured the Yakamas that under the treaty the Yakamas would be able to travel outside their reservation on the roads that the United States built. Id., at 66a–67a; see also, e.g., id., at 66a (“[W]e give you the privilege of traveling over roads”). And the United States repeatedly assured the Yakamas that they could travel along the roads for trading purposes. Id., at 65a–67a. Isaac Stevens, the Governor of the Washington Territory, told the Yakamas, for example, that, under the terms of the treaty, “You will be allowed to go on the roads, to take your things to market, your horses and cattle.” App. To Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 68a (record of the treaty proceedings). He
added that the Yakamas “will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.” Ibid. Governor Stevens further urged the Yakamas to accept the United States’ proposals for reservation boundaries in part because the proposal put the Yakama Reservation in close proximity to public highways that would facilitate trade. He said, “You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market.” App. 66a. In a word, the treaty negotiations and the United States’ representatives’ statements to the Yakamas would have led the Yakamas to understand that the treaty’s protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. We consequently so construe the relevant treaty provision.

Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted. In Tulee, for example, we held that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. We concluded that “such exaction of fees as a prerequisite to the enjoyment of” a right reserved in the treaty “cannot be reconciled with a fair construction of the treaty.” Id., at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel.


B

Again, we are not convinced by the arguments raised to the contrary. THE CHIEF JUSTICE concedes that “the right to travel with goods is just an application of the Yakamas’ right to travel.” Post, at 2 (dissenting opinion); see also ibid. (“It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them.”). But he nevertheless insists that, because of the way in which the Washington statute taxes fuel, the statute does not interfere with the right to travel reserved by the Yakamas in the treaty. Post, at 3.

First, THE CHIEF JUSTICE finds it significant that “[t]he tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled.” Ibid., see also ibid. (“The tax before us does not resemble a blockade or a toll”). But that argument fails on its own terms. A toll on highway travel is no less a toll when the toll varies based on the number of axels on a vehicle traveling the highway, or on the number of people traveling in the vehicle. We cannot, therefore, see why the number of gallons of fuel that the vehicle carries should make all the difference. Put another way, the fact that a tax on travel varies based on the features of that travel does not mean that the tax is not a tax on travel.

Second, THE CHIEF JUSTICE argues that it “makes no sense,” for example, to hold that “a tax on certain luxury goods” that is assessed the first time the goods are possessed in Washington cannot apply to a Yakama member “who buys” a mink coat “over the state line in Portland and then drives back to the reservation,” but the tax can apply to a Yakama member who “buys a mink coat at an off-reservation store in Washington.” Post, at 4. The short, conclusive answer to this argument is that there is a treaty that forbids taxing Yakama travel on highways with goods (e.g., fuel, or even furs) for market; and there is no treaty that forbids taxing Yakama off-reservation purchases of goods. Indeed, if our precedents supported THE CHIEF JUSTICE’s rule, then our fishing rights cases would have turned on whether Washington also taxed fish purchased in the grocery store. Compare, e.g., Tulee, 315 U. S., at 682, n. 1 (holding that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law which prohibited “‘catch[ing] … fish for food’” without having purchased a license). But in those cases, we did not look to whether fish were taxed elsewhere in Washington. That is because the treaty does not protect the Yakamas from state sales taxes imposed on the off-reservation sale of goods. Instead, the treaty protects the Yakamas’ right to travel the public highways without paying state taxes on that activity, much like the treaty protects the Yakamas’ right to fish without paying state taxes on that activity.

Third, THE CHIEF JUSTICE argues that only a law that “punished or charged the Yakamas” for an “integral feature” of a treaty right could be pre-empted by the treaty. Post, at 6. But that is true of the Washington statute at issue here. The treaty protects the right to travel with goods, see supra, at 10–14, and the Washington statute taxes travel with goods, see supra, at 4–7. Therefore, the statute charges the Yakamas for an “integral feature” of a treaty right. But even if the statute indirectly burdened a treaty right, under our precedents, the statute would still be pre-empted. One of the Washington statutes at issue in Winans was not a fishing regulation, but instead a trespassing statute. That trespassing statute indirectly burdened the right to fish by preventing the Yakamas from crossing privately owned land so that the Yakamas could reach their traditional fishing places and camp on that private property during the fishing season. See 198 U. S., at 380–381. It cannot be true that a law prohibiting trespassing imposed a burden on the right to fish that is “integral” enough to be pre-empted by the treaty, while a law taxing goods carried to the reservation on the public highway im-
poses a burden on the right to travel that is too attenuated to be pre-empted by the treaty.

C

Although we hold that the treaty protects the right to travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. To the contrary, we stated in *Tulee* that, although the treaty “forecloses the [S]tate from charging the Indians a fee of the kind in question here,” the State retained the “power to impose on Indians, equally with others, such restrictions of a purely regulatory nature … as are necessary for the conservation of fish.” 315 U. S., at 684. Indeed, it was crucial to our decision in *Tulee* that, although the licensing fees at issue were “regulatory as well as revenue producing,” “their regulatory purpose could be accomplished otherwise,” and “the imposition of license fees [was] not indispensable to the effectiveness of a state conservation program.” *Id.*, at 685. See also *Puyallup Tribe v. Department of Game of Wash.*, 391 U. S. 392, 402, n. 14 (1968) (“As to a ‘regulation’ concerning the time and manner of fishing outside the reservation (as opposed to a ‘tax’), we said that the power of the State was to be measured by whether it was ‘necessary for the conservation of fish’” (quoting *Tulee*, 315 U. S., at 684)).

Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member’s exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 20a–21a, 31a–32a. Governor Stevens explained, at length, the United States’ awareness of crimes committed by United States citizens who settled amongst the Yakamas, and the United States’ intention to enact laws that would restrain both the United States citizens and the Yakamas alike for the safety of both groups. See *id.*, at 31a.

Nor do we here interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation). Unlike the tax at issue here, which applies explicitly to transport by “railcar, trailer, truck, or other equipment suitable for ground transportation,” see *supra*, at 6, a sales or use tax normally applies irrespective of transport or its means. Here, however, we deal with a tax applicable simply to importation by ground transportation. Moreover, it is a tax designed to secure revenue that, as far as the record shows here, the State might obtain in other ways.

IV

To summarize, our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. See *supra*, at 14–18. Second, the treaty protects the Yakamas’ right to travel on the public highway with goods for sale. See *supra*, at 10–14. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See *supra*, at 4–10. For these three reasons, Washington’s fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Therefore, the judgment of the Supreme Court of Washington is affirmed.

It is so ordered.

**JUSTICE GORSUCH**, with whom **JUSTICE GINSBURG** joins, concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy “the right, in common with citizens of the United States, to travel upon all public highways.” *Id.* Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty’s original meaning. *Eastern Airlines, Inc. v. Floyd*, 499 U. S. 530, 534–535 (1991). When we’re dealing with a tribal treaty, too, we must “give effect to the terms as the Indians themselves would have understood them.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations “English words were translated into Chinook jargon … although that was not the primary language” of the Tribe. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U. S. negotiators wrote the treaty in English—a language that the Yakamas couldn’t read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas’ understanding of the treaty’s terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas’ challenge to certain restrictions on their logging operations. *Id.*, at 1231. The state Superior Court relied on these factual findings in this case and held
Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court’s estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. Post, at 1–2 (KAVANAUGH, J., dissenting). But that is not how the Yakamas understood the treaty’s terms. To the Yakamas, the phrase “‘in common with’ … imply[ed] that the Indian and non-Indian use [would] be joint but [did] not imply that the Indian use [would] be in any way restricted.” Yakama Indian Nation, 955 F. Supp., at 1265. In fact, “[i]n the Yakama language, the term ‘in common with’ … suggest[ed] public use or general use without restriction.” Ibid. So “[t]he most the Indians would have understood … of the term[s] ‘in common with’ and ‘public’ was that they would share the use of the road with whites.” Ibid. Significantly, there is “no evidence [to] suggest[ ] that the term ‘in common with’ placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads.” Id., at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them “with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods.” Id., at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty’s terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encouragements on the ability of tribal members to bring their goods to and from market. And by everyone’s admission, the state tax at issue here isn’t about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The Yakama Indian Nation decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. “Prior to and at the time the treaty was negotiated,” the Yakamas “engaged in a system of trade and exchange with other plateau tribes” and tribes “of the Northwest coast and plains of Montana and Wyoming.” Ibid. This system came with no restrictions; the Yakamas enjoyed “free and open access to trade networks in order to maintain their system of trade and exchange.” Id., at 1263. They traveled to Oregon and maybe even to California to trade “fir trees, lava rocks, horses, and various species of salmon.” Id., at 1262–1263. This extensive travel “was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes.” Id., at 1262. Indeed, “far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture.” Id., at 1238. Travel for purposes of trade was so important to the ‘Yakamas’ way of life that they could not have performed and functioned as a distinct culture … without extensive travel.” Ibid. (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas’ preexisting right to take goods to and from market freely throughout their traditional trading area. “At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to … trade.” Id., at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would “‘be allowed to go on the roads to take[their] things to market.’” Id., at 1244 (emphasis deleted). Governor Stevens called this the “‘same libert[y]’” to travel with goods free of restriction “‘outside the reservation’” that the Tribe would enjoy within the new reservation’s boundaries. Ibid. Indeed, the U. S. representatives’ “statements regarding the Yakama’s use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors.” Id., at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yakamas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U. S. treaty negotiators were “under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory.” Id., at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed “to obtain title to Indian lands” to place these settlements on a more lawful footing. Ibid. The government itself also wanted to build “wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades.” Ibid. So “obtaining Indian lands east of the Cascades became a central objective” for the government’s own needs. Id., at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty’s neighboring and parallel right-to-fish provision further confirm this understanding. The treaty “secure[s] … the right of taking fish at all usual and accustomed places, in common with citizens of the Terri-
tory.” Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953 (emphasis added). Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an “impotent” construction on the treaty. United States v. Winans, 198 U. S. 371, 380 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws “maybe both convenient and, in [their] general impact, fair,” this Court observed, they act “upon the Indians as a charge for exercising the very right their ancestors intended to reserve.” Tulee v. Washington, 315 U. S. 681, 685 (1942).

Interpreting the same treaty right in Winans, we held that, despite arguments otherwise, “the phrase ‘in common with citizens of the Territory’” confers “upon the Yak[a]mas continuing rights, beyond those which other citizens may enjoy, to fish at their ‘usual and accustomed places.’” Tulee, 315 U. S., at 684 (citing Winans, 198 U. S., at 371; emphasis added).

Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe “free access” from local roads to the public highways, but indicates that tribal members are to use those highways “in common with” non-Indians. On the State’s account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free along local roads to the highways but the latter language as authorizing taxes on the Yakamas’ goods once they arrive there. See also post, at 3 (KAVANAUGH, J., dissenting).

The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yakamas’ understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won’t work, the State offers another. It admits that the Yakamas personally may have a right to travel on the highway free of most restrictions on their movement. See also post, at 3 (ROBERTS, C. J., dissenting) (acknowledging that the treaty prohibits the State from “charg[ing] ... a toll” on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn’t offend that right. It doesn’t, we are told, because the “object” of the State’s tax isn’t travel but the possession of a good; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than somewhere else is neither here nor there.

And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a “mink coat” in a Washington store would have to pay the State’s sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See post, at 2–7.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to give full effect to the treaty’s terms and the Yakamas’ original understanding of them. After all and as we’ve seen, the treaty doesn’t just guarantee tribal members the right to travel on the highways free of most restrictions on their movement; it also guarantees tribal members the right to move goods freely to and from market using those highways. And it’s impossible to transport goods without possessing them. So a tax that falls on the Yakamas’ possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the “possessions” of a good, the State might just as easily revive the fishing license fee Tulee struck down simply by calling it a fee on the “possessions” of fish. That, of course, would be ridiculous. The Yakamas’ right to fish includes the right to possess the fish they catch—just like their right to move goods on the highways embraces the right to possess them there. Nor does the State’s reply solve the problem. It accepts, as it must, that possessing fish is “integral” to the right to fish. Post, at 6, n. 2 (ROBERTS, C. J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and binding findings before us establishing that the treaty also guarantees a right to move (and so possess) goods freely as they travel to and from market. Ibid.

What about the supposed “mink coat” anomaly? Under the terms of the treaty before us, it’s true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—that is the treaty right the Yakamas reserved. And it’s easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case, Washington would have no basis to tax the Yakamas’ transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas’ conduct would take place outside
of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington’s highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also post, at 7–10 (ROBERTS, C. J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas themselves enjoy a right to travel free of at least some nondiscriminatory state regulations, this “problem” inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See post, at 3 (KAVANAUGH, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State’s parade of horribles isn’t really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its “in common with” language also indicates that tribal members knew they would have to “share the use of the road with whites” and accept regulations designed to allow the two groups’ safe coexistence. Yakama Indian Nation, 955 F. Supp., at 1265. Indeed, the Yakamas expected laws designed to “protect[]” their ability to travel safely alongside non-Indians on the highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State’s hypothetical parade of horribles has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn’t so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington’s ability to regulate the transportation of diseased apples from Oregon. See also post, at 10 (ROBERTS, C. J., dissenting). But if bad apples prove to be a public menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways.

The only thing that Washington may not do is reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might windup impairing the interests of “tribal members across the country.” See post, at 10 (ROBERTS, C. J., dissenting). But our decision today is based on unchallenged factual findings about how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.
But the mere fact that a state law has an effect on the Yakamas while they are exercising a treaty right does not establish that the law impermissibly burdens the right itself. And the right to travel with goods is just an application of the Yakamas’ right to travel. It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them. It is not an additional right to possess whatever goods they wish on the highway, immune from regulation and taxation. Under our precedents, a state law violates a treaty right only if the law imposes liability upon the Yakamas “for exercising the very right their ancestors intended to reserve.” Tulee v. Washington, 315 U. S. 681, 685 (1942). Because Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State’s method of administering its fuel tax is consistent with the treaty. I respectfully dissent from the contrary conclusion of the plurality and concurrence.1

We have held on three prior occasions that a nondiscriminatory state law violated a right the Yakamas reserved in the 1855 treaty. All three cases involved the “right of taking fish at all usual and accustomed places, in common with citizens of the Territory.” Art. III, 12 Stat. 953. In United States v. Want, 198 U. S. 371 (1905), and later again in Seufert Brothers Co. v. United States, 249 U. S. 194 (1919), we held that state trespass law could not be used to prevent tribe members from traveling to a fishing site. And in Tulee v. Washington, we held that Washington could not punish a Yakama member for fishing without a license. We concluded that the license law was preempted because the required fee “act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve”—the right to fish. 315 U. S., at 685.

These three cases found a violation of the treaty when the challenged action—application of trespass law and enforcement of a license requirement—actually blocked the Yakamas from fishing at traditional locations. Applying the reasoning of those decisions to the Yakamas’ right to travel, it follows that a State could not bar Yakama members from traveling on a public highway, or charge them a toll to do so. Nothing of the sort is at issue here. The tax before us does not resemble a blockade or a toll. It is a tax on a product imported into the State, not a tax on highway travel. The statute says as much: “There is hereby levied and imposed … a tax … on each gallon of motor vehicle fuel.” Wash. Rev. Code §82.36.020(1) (2012) (emphasis added). It is difficult to imagine how the legislature could more clearly identify the object of the tax. The tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled. It is imposed on the owner of the fuel, not the driver or owner of the vehicle—separate entities in this case. And it is imposed at the same rate on fuel that enters the State by methods other than a public highway—whether private road, rail, barge, or pipeline. §§82.36.010(4), 020(1), (2). Had Cougar Den filled up its trucks at a refinery or pipeline terminal in Washington, rather than trucking fuel in from Oregon, there would be no dispute that it was subject to the exact same tax. See §§82.36.020(2)(a), (b)(ii). Washington is taxing the fuel that Cougar Den imports, not Cougar Den’s travel on the highway; it is not charging the Yakamas “for exercising the very right their ancestors intended to reserve.” Tulee, 315 U. S., at 685.

It makes no difference that Washington happens to impose that charge when Cougar Den’s drivers cross into Washington on a public highway. The time and place of the imposition of the tax does not change what is taxed, and thus what activity—possession of goods or travel—is burdened. Say Washington imposes a tax on certain luxury goods, assessed upon first possession of the goods by a retail customer. A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax. Yet, as the plurality acknowledges, under its view a tribal member who buys the same coat right over the state line in Portland and then drives back to the reservation will owe no tax—all because of a reserved right to travel on the public highways. Ante, at 15. That makes no sense. The tax charges individuals for possessing expensive furs. It in no way burdens highway travel.

The plurality devotes five pages to planting trees in hopes of obscuring the forest: to delving into irrelevancies about how the tax is assessed or collected, instead of the substance of what is taxed. However assessed or collected, the tax on 10,000 gallons of fuel is the same whether the tanker carries it travels three miles in Washington or three hundred. The tax varies only with the amount of fuel. Why? Because the tax is on fuel, not travel. If two tankers travel 200 miles together from the same starting point to the same destination—one empty, one full of fuel—the full tanker will pay the fuel tax, the empty tanker will pay nothing. Their travel has been identical, but only the full one pays tax. Why? Because the tax is on fuel, not travel. The tax is on the owner of the fuel, not the owner of the vehicle. Why? You get the point.

The plurality responds that, even though the tax is calculated per gallon of fuel, it remains a tax on travel because it taxes a “feature” of travel. Ante, at 15. It is of course true that tanker trucks can be seen from time to time on the highways, but that hardly makes them a regular “feature” of travel, like the plurality’s examples of axels or passengers. And we know that Washington is not taxing the gas insofar as it is a feature of Cougar Den’s travel, because Washington imposes the exact same tax on gas that is not in transit on the highways.

Rather than grappling with the substance of the tax, the plurality fixates on variations in the time and place of its assessment. The plurality thinks it significant that Washington does not impose the tax at the moment of entry on fuel that enters the State by pipeline or by a barge bound for a refinery.

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1. There is something of an optical illusion in this case that may subtly distort analysis. It comes from the fact that the tax here happens to be on motor fuel. There is no claim, however, that the tax inhibits the treaty right to travel because of the link between motor fuel and highway travel. The question presented must be analyzed as if the tax were imposed on goods of any sort.
but instead when a tanker truck withdraws the fuel from the refinery or pipeline terminal. This may demonstrate that the tax is not on first possession of fuel in the State, as the plurality stresses, but it hardly demonstrates that the tax is not on possession of fuel at all. Regardless of how fuel enters the State, someone will eventually pay a per-gallon charge for possessing it. Washington simply assesses the fuel tax in each case upon the wholesaler. See 188 Wash. 2d 55, 60, 392 P. 3d 1014, 1016 (2017). This variation does not indicate, as the plurality suggests, that the fuel tax is somehow targeted at highway travel.

The plurality also says that it is bound by the Washington Supreme Court’s references to the tax as an “importation tax” and tax on “the importation of fuel,” ante, at 7 (quoting 188 Wash. 2d, at 67, 69, 392 P. 3d, at 1019, 1020), but these two references to the point at which the tax is assessed are not authoritative constructions of the object of the tax. The state court did not reject Washington’s argument that this is a tax on fuel; instead, like the plurality today, it ignored that argument and concluded that the tax was invalid simply because Washington imposed it while Cougar Den was traveling on the highway. In any event, the state court more often referred to the tax as a “tax on fuels” or “fuel tax[ ].” Id., at 58–61, 392 P. 3d, at 1015–1016.

After the five pages arguing that a tax expressly labeled as on “motor vehicle fuel” is actually a tax on something else, the plurality concludes … it doesn’t matter. As the plurality puts it at page nine of its opinion, “even if” the tax is on fuel and not travel, it is preempted because it has “the practical effect of burdening” the Yakamas’ right to travel on the highways. The plurality’s rule—that States may not enforce general legislation that has an effect on the Yakamas while they are traveling—has no basis in our precedents, which invalidated laws that punished or charged the Yakamas simply for exercising their reserved rights. The plurality is, of course, correct that the trespass law in Winans did not target fishing, but it effectively made illegal the very act of fishing at a traditional location. Here, it is the possession of commercial quantities of fuel that exposes the Yakamas to liability, not travel itself or any integral feature of travel.

The concurrence reaches the same result as the plurality, but on different grounds. Rather than holding that the treaty preempts any law that burdens the Yakamas while traveling on the highways, the concurrence reasons that the fuel tax is preempted because it regulates the possession of goods, and the Yakamas’ right to travel includes the right to travel with goods. Ante, at 7–8. But the right to travel with goods is just an application of the right to travel. It means the Yakamas enjoy the same privileges whether they travel with goods or without. It does not provide the Yakamas with an additional right to carry any and all goods on the highways, tax free, in any manner they wish.2 The concurrence purports to find this additional right in the record of the treaty negotiations, but the record shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded. They did not, and did not intend to, insulate the goods they carried from all regulation and taxation.

Nothing in the State of the power to regulate when necessary “to prevent danger to health or safety occasioned by a tribe member’s exercise of treaty rights.” Ante, at 17. This escape hatch ensures, the plurality suggests, that the treaty will not preempt essential regulations that burden highway travel. Ante, at 9–10. I am not so confident.

First, by its own terms, the plurality’s health and safety exception is limited to laws that regulate dangers “occasioned by” a Yakama’s travel. That would seem to allow speed limits and other rules of the road. But a law against possession of drugs or illegal firearms—the dangers of which have nothing to do with travel—does not address a health or safety risk “occasioned by” highway driving. I do not see how, under the plurality’s rule or the concurrence’s, a Washington police officer could burden a Yakama’s travel by pulling him over on suspicion of carrying such contraband on the highway.

But the more fundamental problem is that this Court has never recognized a health and safety exception to reserved treaty rights, and the plurality today mentions the exception only in passing. Importantly, our precedents—all of which concern hunting and fishing rights—acknowledge the authority of the States to regulate Indians’ exercise of their reserved rights only in the interest of conservation. See Tulee, 315 U. S., at 684 (“[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions … as are necessary for the conservation of fish … .”); see also Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U. S. 172, 205 (1999) (“We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.”); Confederated Tribes of Colville Reservation v. Anderson, 903 F. Supp. 2d 1187, 1197 (ED Wash. 2011) (“Notably absent from the binding Supreme Court and Ninth Circuit cases dealing with state regulation of

2. The plurality simply assumes that the right to travel with goods is an additional, substantive right when it reasons that the fuel tax is preempted because it taxes an “integral feature” of travel with goods.

Ante, at 16. The concurrence makes the same assumption when it compares the fuel tax to a tax on “possession” of fish” Ante, at 8. That tax would be preempted because “taking possession of fish” is just another way of describing the act of fishing. But possession of a tanker full of fuel is not an integral feature of travel, which is the relevant activity protected by the treaty.
‘in common’ usufructuary rights is any reference to a state’s exercise of its public-safety police power.”). Indeed, this Court had previously assured the Yakamas that “treaty fishermen are immune from all regulation save that required for conservation.” Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U. S. 658, 682 (1979) (emphasis added). Adapted to the travel right, the conservation exception would presumably protect regulations that preserve the subject of the Yakamas’ right by maintaining safe and orderly travel on the highways. But many regulations that burden highway travel (such as emissions standards, noise restrictions, or the plurality’s hypothetical ban on the importation of plutonium) do not fit that description.

The need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence. Today’s decision digs such a deep hole that the future promises a lot of backing and filling. Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights as the plurality does, and adopt a broad health and safety exception to deal with the inevitable fallout. Hard to say, because no party or amicus has addressed the question.

The plurality’s response to this important issue is the following, portentous sentence: “The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety.” Ante, at 17. A lot of weight on two words, “may not.” The plurality cites assurances from the territorial Governor of Washington that the United States would make laws to prevent “bad white men” from harming the Yakamas, and that the United States expected the Yakamas to exercise similar restraint in return. Ante, at 18. What this has to do with health and safety regulations affecting the highways (or fishing or hunting) is not clear.

In the meantime, do not assume today’s decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular “usual and accustomed places.” I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas’ right to travel may undermine rights that the Yakamas and other tribes really did reserve.

The concurrence does not mention the plurality’s possible health and safety exception, but observes that the Yakamas expected to follow laws that “facilitate the safe use of the roads by Indians and non-Indians alike.” Ante, at 11. The State is therefore wrong, the concurrence says, to contend that a decision exempting Cougar Den’s fuel from taxation would call into question speed limits and reckless driving laws. But that is not the State’s principal argument. The State acknowledges that laws facilitating safe travel on the highways would fall within the long-recognized conservation exception. See Tr. of Oral Arg. 12–13. The problem is that today’s ruling for Cougar Den preempts the enforcement of any regulation of goods on the highway that does not concern travel safety—such as a prohibition on the possession of potentially contaminated apples taken from a quarantined area (a matter of vital concern in Washington). See id., at 13; Brief for Petitioner 44.

The concurrence says not to worry, the apples could be regulated and inspected where they are grown, or when they arrive at a market. Or, if the Yakamas are taking the apples back to the reservation, perhaps the Federal Government or the Tribe itself could address the problem there. Ante, at 10. What the concurrence does not say is that the State could regulate the contraband apples on the highway. And there is no reason offered why other contraband should be treated any differently.

Surely the concurrence does not mean to suggest that the parties to the 1855 treaty intended to confer on the Tribe the right to travel with illegal goods, free of any regulation. But if that is not the logical consequence of the decision today, the plurality and the concurrence should explain why. It is the least they should do.

I respectfully dissent.

**JUSTICE KAVANAUGH, with whom JUSTICE THOMAS joins, dissenting.**

The text of the 1855 treaty between the United States and the Yakama Tribe affords the Tribe a “right, in common with citizens of the United States, to travel upon all public highways.” Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. The treaty’s “in common with” language means what it says. The treaty recognizes tribal members’ right to travel on reservation public highways on equal terms with other U. S. citizens. Under the text of the treaty, the tribal members, like other U. S. citizens, therefore still remain subject to nondiscriminatory state highway regulations—that is, to regulations that apply equally to tribal members and other U. S. citizens. See Mescalero Apache Tribe v. Jones, 411 U. S. 145, 148–149 (1973). That includes, for example, speed limits, truck restrictions, and reckless driving laws.

The Washington law at issue here imposes a nondiscriminatory fuel tax. THE CHIEF JUSTICE concludes that the fuel tax is not a highway regulation and, for that reason, he says that the fuel tax does not infringe the Tribe’s treaty right to travel on the public highways. I agree with THE CHIEF JUSTICE and join his dissent.

Even if the fuel tax is a highway regulation, it is a nondiscriminatory highway regulation. For that reason as well, the fuel tax does not infringe the Tribe’s treaty right to travel on the public highways on equal terms with other U. S. citizens.

The plurality, as well as the concurrence in the judgment, suggests that the treaty, if construed that way, would not have been important to the Yakamas. For that reason, the plurality and the concurrence would not adhere to that textual meaning
and would interpret “in common with” other U. S. citizens to mean, in essence, “exempt from regulations that apply to” other U. S. citizens.

I respectfully disagree with that analysis. The treaty right to travel on the public highways “in common with”—that is, on equal terms with—other U. S. citizens was important to the Yakama tribal members at the time the treaty was signed. That is because, as of 1855, States and the Federal Government sometimes required tribal members to seek permission before leaving their reservations or even prohibited tribal members from leaving their reservations altogether. See, e.g., Treaty Between the United States of America and the Utah Indians, Art. VII, Dec. 30, 1849, 9 Stat 985; Mo. Rev. Stat., ch. 80, §10(1845). The Yakamas needed to travel to sell their goods and trade for other goods. As a result, those kinds of laws would have devastated the Yakamas’ way of life. Importantly, the terms of the 1855 treaty made crystal clear that those kinds of travel restrictions could not be imposed on the Yakamas.

In particular, the treaty afforded Yakama tribal members two relevant rights. First was “free access” on roads from the reservation to “the nearest public highway.” Art. III, 12 Stat. 953. Second was a right to travel “in common with” other U. S. citizens on “all public highways.” Ibid. The right to free access from the reservation to public highways, combined with the right to travel off reservation on public highways, facilitated the Yakama tribal members’ extensive trading network.

In determining the meaning of the “in common with” language, we must recognize that the treaty used different language in defining (1) the right to “free access,” which applies only on roads connecting the reservation to the off-reservation public highways, and (2) the right to travel “in common with” other U. S. citizens, which applies on those off-reservation public highways. The approach of the plurality and the concurrence would collapse that distinction between the “free access” and “in common with” language and thereby depart from the text of the treaty. I would stick with the text. The treaty’s “in common with” language—both at the time the treaty was signed and now—means what it says: the right for Yakama tribal members to travel on public highways on equal terms with other U. S. citizens.

To be sure, the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas. As a matter of separation of powers, however, courts are bound by the text of the treaty. See Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U. S. 753, 774 (1985). It is for Congress and the President, not the courts, to update a law and provide additional compensation or benefits to tribes beyond those provided by an old law. And since 1855, and especially since 1968, Congress has in fact taken many steps to assist tribes through a variety of significant legislative measures. In short, lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.

What about precedent? It is true that some of our older precedents interpreted similar “in common with” treaty language regarding fishing rights to grant tribal members an exemption from certain fishing regulations, even when the fishing regulations were nondiscriminatory. But as we explained in the most recent of those fishing cases, those nondiscriminatory fishing regulations had the effect of preventing the Tribes from catching a fair share of the fish in the relevant area. In other words, the fishing regulations at issue were discriminatory in effect even though nondiscriminatory on their face. See Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U. S. 658, 676, n. 22 (1979).

That rationale for departing from the treaty text in the narrow context of the fishing cases does not apply in the highway context. Facial nondiscriminatory highway regulations—such as speed limits, truck restrictions, and reckless driving laws—are also nondiscriminatory in effect, as relevant here. They do not deprive tribal members of use of the public highways or deprive tribal members of a fair share of the public highways.

Washington’s facially nondiscriminatory fuel tax is likewise nondiscriminatory in effect. The Washington fuel tax therefore does not violate the key principle articulated in the fishing cases. I would adhere to the text of the treaty and hold that the tribal members, like other citizens of the State of Washington, are subject to the nondiscriminatory fuel tax.

The Court (via the plurality opinion and the concurrence) disagrees. The Court relies on the fishing cases and fashions a new right for Yakama tribal members to disregard even nondiscriminatory highway regulations, such as the Washington fuel tax and perhaps also Washington’s similarly structured cigarette tax. The Court’s newly created right will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses, including by businesses run by members of the many other tribes in the State of Washington. As a result, the State of Washington (along with other States) stands to lose millions of dollars annually in tax revenue, which will necessarily mean fewer services or increased taxes for other citizens and tribes in the State.

In addition, the Court’s newly created right—if applied across the board—would seem to afford Yakama tribal members an exemption from all manner of highway regulations, ranging from speed limits to truck restrictions to reckless driving laws. No doubt because of those negative real-world consequences, the Court simultaneously fashions a new health and safety exception. But neither the right nor the exception comes from the text of the treaty. As THE CHIEF JUSTICE explains, the Court’s “need for the health and safety exception, of course, follows from the overly expansive

3. *I understand both the plurality opinion and the concurrence to approve of a health and safety exception. 6 WASHINGTON STATE DEPT. OF LICENSING v. COUGAR DEN, INC. KAVANAUGH, J., dissenting
interpretation of the treaty right adopted by the plurality and concurrence.” Ante, at 8.

I share THE CHIEF JUSTICE’s concern that the Court’s new right for tribal members to disregard even nondiscriminatory highway regulations and the Court’s new exception to that right for health and safety regulations could generate significant uncertainty and unnecessary litigation for States and tribes. THE CHIEF JUSTICE says it well: The Court “digs such a deep hole that the future promises a lot of back- ing and filling.” Ibid.

Instead of judicially creating a new a textual right for tribal members to disregard nondiscriminatory highway regulations and then backfilling by judicially creating a new a textual exception to that right for health and safety regulations, I would adhere to the text of the treaty and leave it to Congress, if it chooses, to provide additional benefits for the Yakamas. In my respectful view, even when we interpret any ambiguities in the treaty in favor of the Tribe, the treaty phrase “in common with” cannot properly be read to exempt tribal members from nondiscriminatory highway regulations.

In sum, under the treaty, Washington’s nondiscriminatory fuel tax may be imposed on Yakama tribal members just as it may be imposed on other citizens and tribes in the State of Washington. I respectfully dissent.

Cite as 19 C.D.O.S. 2412

AIR AND LIQUID SYSTEMS CORP., ET AL., PETITIONERS
v.
ROBERTA G. DEVRIES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, ET AL.

No. 17–1104
In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals
For The Third Circuit
Argued October 10, 2018
Filed March 19, 2019

JUSTICE KAVANAUGH delivered the opinion of the Court.

In maritime tort cases, we act as a common-law court, subject to any controlling statutes enacted by Congress. See Exxon Shipping Co. v. Baker, 554 U. S. 471, 507–508 (2008). This maritime tort case raises a question about the scope of a manufacturer’s duty to warn. The manufacturers here produced equipment such as pumps, blowers, and turbines for three Navy ships. The equipment required asbestos insulation or asbestos parts in order to function as intended. When used on the ships, the equipment released asbestos fibers into the air. Two Navy veterans who were exposed to asbestos on the ships developed cancer and later died. The veterans’ families sued the equipment manufacturers, claiming that the manufacturers were negligent in failing to warn of the dangers of asbestos.

The plaintiffs contend that a manufacturer has a duty to warn when the manufacturer’s product requires incorporation of a part (here, asbestos) that the manufacturer knows is likely to make the integrated product dangerous for its intended uses. The manufacturers respond that they had no duty to warn because they did not themselves incorporate the asbestos into their equipment; rather, the Navy added the asbestos to the equipment after the equipment was already on board the ships.

We agree with the plaintiffs. In the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger. The District Court did not apply that test when granting summary judgment to the defendant manufacturers. Although we do not agree with all of the reasoning of the U.
S. Court of Appeals for the Third Circuit, we affirm its judgment requiring the District Court to reconsider its prior grants of summary judgment to the defendant manufacturers.

I

Kenneth McAfee served in the U.S. Navy for more than 20 years. As relevant here, McAfee worked on the U.S.S. Wananassa from 1977 to 1980 and then on the U.S. S. Commodore from 1982 to 1986. John DeVries served in the U.S. Navy from 1957 to 1960. He worked on the U.S.S. Turnor.

Those ships were outfitted with equipment such as pumps, blowers, and turbines. That equipment required asbestos insulation or asbestos parts in order to function as intended. When used as intended, that equipment can cause the release of asbestos fibers into the air. If inhaled or ingested, those fibers may cause various illnesses.

Five businesses—Air and Liquid Systems, CBS, Foster Wheeler, Ingersoll Rand, and General Electric—produced some of the equipment that was used on the ships. Although the equipment required asbestos insulation or asbestos parts in order to function as intended, those businesses did not always incorporate the asbestos into their products. Instead, the businesses delivered much of the equipment to the Navy without asbestos. The equipment was delivered in a condition known as “bare-metal.” In those situations, the Navy later added the asbestos to the equipment.¹

McAfee and DeVries allege that their exposure to the asbestos caused them to develop cancer. They and their wives sued the equipment manufacturers in Pennsylvania state court. (McAfee and DeVries later died during the course of the ongoing litigation.) The plaintiffs did not sue the Navy because they apparently believed the Navy was immune. See Feres v. United States, 340 U.S. 135 (1950). The plaintiffs also could not recover much from the manufacturers of the asbestos insulation and asbestos parts because those manufacturers had gone bankrupt. As to the manufacturers of the equipment—such as the pumps, blowers, and turbines—the plaintiffs claimed that those manufacturers negligently failed to warn them of the dangers of asbestos in the integrated products. If the manufacturers had provided warnings, the workers on the ships presumably could have worn respiratory masks and thereby avoided the danger.

Invoking federal maritime jurisdiction, the manufacturers removed the cases to federal court. The manufacturers then moved for summary judgment on the ground that manufacturers should not be liable for harms caused by later-added third-party parts. That defense is known as the “bare-metal defense.”

The District Court granted the manufacturers’ motions for summary judgment. The U.S. Court of Appeals for the Third Circuit vacated and remanded. In re Asbestos Prods. Liability Litigation, 873 F. 3d 232, 241 (2017). The Third Circuit held that “a manufacturer of a bare-metal product may be held liable for a plaintiff ’s injuries suffered from later-added asbestos-containing materials” if the manufacturer could foresee that the product would be used with the later-added asbestos-containing materials. Id., at 240.


II

Article III of the Constitution grants the federal courts jurisdiction over maritime cases. Under 28 U.S. C. §1333, the federal courts have “original jurisdiction, exclusive of the courts of the States, of … [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”


This is a maritime tort case. The plaintiffs allege that the defendant equipment manufacturers were negligent in failing to warn about the dangers of asbestos. “The general maritime law has recognized the tort of negligence for more than a century ….” Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U. S. 811, 820 (2001); see also Kermarec v. Compagnie Generale Transatlantique, 358 U. S. 625, 631–632 (1959). Maritime law has likewise recognized common-law principles of products liability for decades. See East River S. Corp., 476 U. S., at 865.

In this negligence case, we must decide whether a manufacturer has a duty to warn when the manufacturer’s product requires later incorporation of a dangerous part—here, asbestos—in order for the integrated product to function as intended.

We start with basic tort-law principles. Tort law imposes “a duty to exercise reasonable care” on those whose conduct presents a risk of harm to others. 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm §7, p. 77 (2005). For the manufacturer of a product, the general duty of care includes a duty to warn when the manufacturer “knows or has reason to know” that its product “is or is likely to be dangerous for the use for which it is supplied” and the manufacturer “has no reason to believe” that the product’s us-

¹. Sometimes, the equipment manufacturers themselves added the asbestos to the equipment. Even in those situations, however, the Navy later replaced the asbestos parts with third-party asbestos parts.
ers will realize that danger. 2 Restatement (Second) of Torts §388, p. 301 (1963–1964).

In tort cases, the federal and state courts have not reached consensus on how to apply that general tort-law “duty to warn” principle when the manufacturer’s product requires later incorporation of a dangerous part in order for the integrated product to function as intended. Three approaches have emerged.

The first approach is the more plaintiff-friendly foreseeability rule that the Third Circuit adopted in this case: A manufacturer may be liable when it was foreseeable that the manufacturer’s product would be used with another product or part, even if the manufacturer’s product did not require use or incorporation of that other product or part. See, e.g., 873 F. 3d, at 240; Kochera v. Foster Wheeler, LLC, 2015 WL 5584749, *4 (SD Ill., Sept. 23, 2015); Chicano v. General Elec. Co., 2004 WL 2250990, *9 (ED Pa., Oct. 5, 2004); McKenzie v. A. W. Chesterson Co., 277 Ore. App. 728, 749–750, 373 P. 3d 150, 162 (2016).

The second approach is the more defendant-friendly bare-metal defense that the manufacturers urge here: If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses. See, e.g., Lindstrom, 424 F. 3d, at 492, 495–497; Evans v. CBS Corp., 230 F. Supp. 3d 397, 403–405 (Del. 2017); Cabasug v. Crane Co., 989 F. Supp. 2d 1027, 1041 (Haw. 2013).

The third approach falls between those two approaches. Under the third approach, foreseeability that the product may be used with another product or part that is likely to be dangerous is not enough to trigger a duty to warn. But a manufacturer does have a duty to warn when its product requires incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses. Under that approach, the manufacturer may be liable even when the manufacturer does not itself incorporate the required part into the product. See, e.g., Quirin v. Lorillard Tobacco Co., 17 F. Supp. 3d 760, 769–770 (ND Ill. 2014); In re New York City Asbestos Litigation, 27 N. Y. 3d 765, 793–794, 59 N. E. 3d 458, 474 (2016); May v. Air & Liquid Systems Corp., 446 Md. 1, 29, 129 A. 3d 984, 1000 (2015).

We conclude that the third approach is the most appropriate for this maritime tort context.

To begin, we agree with the manufacturers that a rule of mere foreseeability would sweep too broadly. See generally 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm §7, Comment j, at 82; 2 Restatement (Second) of Torts §395, Comment j, at 330. Many products can foreseeably be used in numerous ways with numerous other products and parts. Requiring a product manufacturer to imagine and warn about all of those possible uses—with massive liability looming for failure to correctly predict how its product might be used with other products or parts—would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users. In light of that uncertainty and unfairness, we reject the foreseeability approach for this maritime context.

That said, we agree with the plaintiffs that the bare-metal defense ultimately goes too far in the other direction. In urging the bare-metal defense, the manufacturers contend that a business generally has “no duty” to “control the conduct of a third person as to prevent him from causing physical harm to another.” Id., §315, at 122. That is true, but it is also beside the point here. After all, when a manufacturer’s product is dangerous in and of itself, the manufacturer “knows or has reason to know” that the product “is or is likely to be dangerous for the use for which it is supplied.” Id., §388, at 301. The same holds true, we conclude, when the manufacturer’s product requires incorporation of a part that the manufacturer knows or has reason to know is likely to make the integrated product dangerous for its intended uses. As a matter of maritime tort law, we find no persuasive reason to distinguish those two similar situations for purposes of a manufacturer’s duty to warn. See Restatement (Third) of Torts: Products Liability §2, Comment j, p. 30 (1997) (“[W]arnings also may be needed to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product”).

Importantly, the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product. See generally G. Calabresi, The Costs of Accidents 311–318 (1970). The product manufacturer knows the nature of the ultimate integrated product and is typically more aware of the risks associated with that integrated product. By contrast, a parts manufacturer may be aware only that its part could conceivably be used in any number of ways in any number of products. A parts manufacturer may not always be aware that its part will be used in a way that poses a risk of danger.2

To be sure, as the manufacturers correctly point out, issuing a warning costs time and money. But the burden usually is not significant. Manufacturers already have a duty to warn of the dangers of their own products. That duty typically imposes a light burden on manufacturers. See, e.g., Davis v. Wyeth Labs., Inc., 399 F. 2d 121, 131 (CA9 1968); Butler v. L. Sonneborn Sons, Inc., 296 F. 2d 623, 625–626 (CA2 1961); Ross Labs. v. Thies, 725 P. 2d 1076, 1079 (Alaska 1986); Moran v. Faberge, Inc., 273 Md. 538, 543–544, 332 A. 2d 11, 15 (1975). Requiring a manufacturer to also warn when the manufacturer knows or has reason to know that a required later-added part is likely to make the integrated product dangerous for its intended uses should not meaningfully add to that burden.

2. We do not rule out the possibility that, in certain circumstances, the parts manufacturer may also have a duty to warn.
The manufacturers also contend that requiring a warning even when they have not themselves incorporated the part into the product will lead to uncertainty about when product manufacturers must provide warnings. But the manufacturers have not pointed to any substantial confusion in those jurisdictions that have adopted this approach. And the rule that we adopt here is tightly cabined. The rule does not require that manufacturers warn in cases of mere foreseeability. The rule requires that manufacturers warn only when their product requires a part in order for the integrated product to function as intended.

The manufacturers further assert that requiring a warning in these circumstances will lead to excessive warning of consumers. Again, however, we are not aware of substantial overwarning problems in those jurisdictions that have adopted this approach. And because the rule we adopt here applies only in certain narrow circumstances, it will not require a plethora of new warnings.

Requiring the product manufacturer to warn when its product requires incorporation of a part that makes the integrated product dangerous for its intended uses—and not just when the manufacturer itself incorporates the part into the product—is especially appropriate in the maritime context. Maritime law has always recognized a “special solicitude for the welfare” of those who undertake to “venture upon hazardous and unpredictable sea voyages.” American Export Lines, Inc. v. Alvéc, 446 U. S. 274, 285 (1980) (internal quotation marks omitted). The plaintiffs in this case are the families of veterans who served in the U. S. Navy. Maritime law’s longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances. See Yamaha Motor Corp., U. S. A. v. Calhoun, 516 U. S. 199, 213 (1996); Miles, 498 U. S., at 36; Moragne v. States Marine Lines, Inc., 398 U. S. 375, 387 (1970).

For those reasons, we conclude as follows: In the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger. The District Court should evaluate the evidence under that rule. Although we do not agree with all of the reasoning of the Third Circuit, we affirm its judgment requiring the District Court to reconsider its prior grants of summary judgment to the defendant manufacturers.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Decades ago, many of the defendants before us sold “bare metal” products to the Navy. Things like the turbines used to propel its ships. Did these manufacturers have to warn users about the dangers of asbestos that someone else later chose to add to or wrap around their products as insulation?

Start with a couple of things we can all agree on. First, everyone accepts that, under traditional tort principles, the manufacturers who actually supplied the later-added asbestos had to warn about its known dangers. Second, everyone agrees that the court of appeals erred when it came to analyzing the duties of the bare metal defendants. The court of appeals held that the bare metal manufacturers had a duty to warn because they could have “foreseen” the possibility that others would later use asbestos in conjunction with their products. Today, the Court rightly rejects this “foreseeability” standard, succinctly explaining that “[r]equire[d] a product manufacturer to imagine and warn about all of those possible uses—with massive liability looming for failure to correctly predict how its product might be used with other products or parts—would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users.” Ante, at 7.

Our disagreement arises only in what comes next. Immediately after rejecting the court of appeals’ approach, the Court proceeds to devise its own way of holding the bare metal manufacturers responsible for later-added asbestos. In the Court’s judgment, the bare metal defendants had a duty to warn about the dangers of asbestos introduced by others so long as they (i) produced a product that “require[d] incor-
poration of asbestos, (ii) “kn[ew] or ha[dd] reason to know” that the “integrated product” would be dangerous, and (iii) had “no reason to believe” that users would realize that danger. Ante, at 9–10. The Court’s new three-part standard surely represents an improvement over the court of appeals’ unadorned “foreseeability” offering. But, respectfully, it seems to me to suffer from many of the same defects the Court itself has identified.

In the first place, neither of these standards enjoys meaningful roots in the common law. The common law has long taught that a manufacturer has no “duty to warn or instruct about another manufacturer’s products, though those products might be used in connection with the manufacturer’s own products.” Firestone Steel Prods. Co. v. Barajas, 927 S. W. 2d 608, 703–706, 715 (CA5 1993); 703–704 (CA8 1993); 494–497 (2014). Ining This Form of Guilt by Association, 37 Am. J. Trial Advocacy 489, 514–515 (1995); 530 N. W. 2d 510, 514–515 (1995); 391 F. 3d 701, 715 (CA8 1993). The traditional common law rule better accords, too, with consumer expectations. A home chef who buys a butcher’s knife may expect to read warnings about the dangers of knives but not about the dangers of undercooked meat. Likewise, a purchaser of gasoline may expect to see warnings at the pump about its flammability but not about the dangers of recklessly driving a car. As the Court today recognizes, encouraging manufacturers to offer warnings about other people’s products risks long, duplicative, fine print, and conflicting warnings that will leave consumers less sure about which to take seriously and more likely to disregard them all. In the words of the California Supreme Court, consumer welfare is not well “served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell.” O’Neill v. Crane Co., 53 Cal. 4th 335, 343, 266 P. 3d 987, 991 (2012); see also Cotton v. Buckeye Gas Prods. Co., 840 F. 2d 935, 938 (CADC 1988) (“The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print”).

The traditional tort rule bears yet another virtue: It is simple to apply. The traditional rule affords manufacturers fair notice of their legal duties, lets injured consumers know whom to sue, and ensures courts will treat like cases alike. By contrast, when liability depends on the application of opaque or multifactor standards like the one proposed below or the one announced today, “equality of treatment” becomes harder to ensure across cases; “predictability is destroyed” for innovators, investors, and consumers alike; and “judicial courage is impaired” as the ability (and temptation) to fit the law to the case, rather than the case to the law, grows. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989).

Just consider some of the uncertainties each part of the Court’s new three-part test is sure to invite:


dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs. See S. Shavell, Economic Analysis of Accident Law 17 (1987); G. Calabresi, The Costs of Accidents 135, and n. 1 (1970); Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U. S. 315, 324 (1964).%}

5. See also Restatement (Third) of Torts: Products Liability §5, Comment a, p. 131 (1997) (“If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground” that others “utiliz[e] the component in a manner that renders the integrated product defective”); Edwards v. Honeywell, Inc., 50 F. 3d 484, 490 (CA7 1995) (placing liability on a defendant who is not “in the best position to prevent a particular class of accidents” may “dilute the incentives of other potential defendants” who should be the first “line of defense”); National Union Fire Ins. Co. of Pittsburgh v. Riggs Nat. Bank of Washington, D. C., 5 F. 3d 554, 557 (CADC 1993) (Silberman, J., concurring) (“Placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures” that will “have the greatest marginal effect on preventing the loss”).
(i) When does a customer’s side-by-side use of two products qualify as “incorporation” of the products? Does hanging asbestos on the outside of a boiler count, or must asbestos be placed inside a product? And when is incorporation of a dangerous third-party product “required” as opposed to just optimal or preferred? What if a potential substitute existed, but it was less effective or more costly (surely alternatives to asbestos insulation have existed for a long time)? And what if the third-party product becomes less advantageous over time due to advancing technology (as asbestos did)? When does the defendant’s duty to warn end?

(ii) What will qualify as an “integrated product”? In the past, we’ve suggested that a “product” is whatever assemblage of parts is “placed in the stream of commerce by the manufacturer,” and we’ve stressed the importance of maintaining the “distinction between the components added to a product by a manufacturer before the product’s sale … and those items added” later by someone else. *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U. S. 875, 883–884 (1997). The Court’s new standard blurs that distinction, but it is unclear how far it goes. The Court suggests a turbine and separately installed insulation may now qualify as a single “integrated product.” But what about other parts connected to the turbine? Does even the propeller qualify as part of the final “integrated product” too, so that its manufacturer also bears a duty to warn about the dangers of asbestos hung around the turbine? For that matter, why isn’t the entire ship an “integrated product,” with a corresponding duty for all the manufacturers who contributed parts to warn about the dangers of all the other parts? And when exactly is a manufacturer supposed to “know or have reason to know” that some supplement to its product has now made a resulting “integrated product” dangerous? How much cost and effort must manufacturers expend to discover and understand the risks associated with third-party products others may be “incorporating” with their products?

(iii) If a defendant reasonably expects that the manufacturer of a third-party product will comply with its own duty to warn, is that sufficient “reason to believe” that users will “realize” the danger to absolve the defendant of responsibility? Or does a defendant have to assume that the third-party manufacturer will behave negligently in rendering its own warnings? Or that users won’t bother to read the warnings others offer? And what if the defendants here understood that the Navy itself would warn sailors about the need for proper handling of asbestos—did they still have to provide their own warnings?

6. See App. 40 (affidavit of retired Rear Admiral Roger B. Horne stating that “the Navy chose to control and make personnel aware of the hazards of asbestos exposures through . . . military specifications and personnel training”).
cases, courts remain free to use the more sensible and historically proven common law rule. And given that, “unlike state courts, we have little … experience in the development of new common-law rules of tort,” Saratoga, 520 U. S., at 886 (Scalia, J., dissenting), that is a liberty they may be wise to exercise. 7

7. As the Court notes, some of the defendants sold the Navy products that were not “bare metal” but contained asbestos at the time of sale. Ante, at 3, n. 1. We can all agree that those defendants had a duty to warn users about the known dangers of asbestos. And there’s a colorable argument that their responsibility didn’t end when the Navy, as part of routine upkeep, swapped out the original asbestos parts for replacements supplied by others. Under traditional tort principles, the seller of a defective, “unreasonably dangerous” product may be liable to an injured user if the product “is expected to and does reach the user … without substantial change in the condition in which it is sold.” 2 Restatement (Second) of Torts §402A(1)(b), pp. 347–348 (1963–1964). And replacing worn-out parts every now and then with equivalently dangerous third-party parts may not qualify as a “substantial change” if the replacement part does “no more than perpetuate” problems latent in the original. Sage v. Fairchild-Swearingen Corp., 70 N. Y. 2d 579, 584–587, 517 N. E. 2d 1304, 1306–1308 (1987); see, e.g., Whelan v. Armstrong Int’l Inc., 455 N. J. Super. 569, 597–598, 190 A. 3d 1090, 1106–1107 (App. Div. 2018). Of course, the defendants’ original failure to warn might not be the legal cause of any harm if the use of the replacement part was unforeseeable, or if an intervening action severed the connection between the original sale and the injurious use. For example, if the replacement part itself posed the danger—or if, by the time the original part wore out, safer alternatives had become available. The Court’s new standard, however, does not address these defendants separately, but focuses on the bare metal defendants.
The Salvation Army is an evangelical ministry founded in 1865 by William Booth, a former Methodist minister. The Salvation Army’s religious tenets differed from traditional Methodism in rejecting the importance of sacraments and emphasizing strong central governance. To that end, Booth—“General” of the Salvation Army—adopted the military-style hierarchy of the British Army under which ranked officers were the equivalent of ministers. In keeping with Protestantism’s nineteenth century “camp revival,” Booth took his ministry to the streets and began establishing mission centers catering to London’s poor.

What started as a single ministry in the East End of London spread to the shores of the United States in 1880 and now operates in more than 80 countries through 16,000 evangelical centers and 3,000 social welfare institutions worldwide. The Salvation Army describes itself as “an evangelical part of the universal Christian church,” whose professed mission is “to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination.” Here in the United States, the Salvation Army operates through 501(c)(3) nonprofit corporations. In 2012 and 2013, direct public donations made up the lion’s share of the Salvation Army’s total revenue; sales to the public comprised fifteen percent.

Ann Garcia’s relationship with the Salvation Army dates to 1999, when she began attending religious services at the Estrella Mountain Corps in Avondale, Arizona. In 2002, the Corps hired Garcia to work as an assistant to the pastor, a position she held until July 2010, when Arlene and Dionisio Torres became the new pastors. No longer in need of an assistant, Arlene Torres reassigned Garcia to the position of social services coordinator in January 2011. In that role, Garcia aided clients under the supervision of Arlene Torres. In late 2011, Garcia and her husband “left the Church” and stopped attending the Salvation Army’s religious services, but Garcia continued her work as social services coordinator. Afterward, her relationship with Torres began to deteriorate.

Tensions reached new heights in July 2013, when a client filed a lengthy complaint against Garcia, claiming that she “refused to provide help to [the client’s] family.” After Torres informed Garcia that a complaint had been lodged, Garcia demanded to see it. Torres refused, claiming that the complaint was confidential. Three days later, Garcia filed an internal grievance of her own against Torres, claiming that she “fe[lt] discriminated against and excluded and isolated” at work ever since leaving the church. The specter of the undisclosed client grievance continued to disturb Garcia. She would go on to submit complaints to the EEOC and Arizona state authorities for religious discrimination and retaliation.

Following a lengthy period of medical leave due to fibromyalgia, the Salvation Army fired Garcia after she failed to report to work despite being cleared by her doctor. Garcia then filed a second complaint with the EEOC and state

1. Unless otherwise indicated, the following historical context is gleaned from the record. Otherwise—and purely for background purposes—we take judicial notice of certain historical facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); see Singh v. Ashcroft, 393 F.3d 903, 905 (9th Cir. 2004).


5. Protestantism, supra note 2.


7. William Booth, supra note 3.

8. Salvation Army, supra note 4.

9. We take judicial notice of the Salvation Army’s nonprofit status, as reflected in the publicly available IRS determination letters at Docket Entry No. 45. See Fed. R. Evid. 201(b); Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (“We may take judicial notice of records and reports of administrative bodies.” (internal quotation marks omitted)).
authorities alleging that, by declining to disclose the client complaint, the Salvation Army failed to accommodate her disability.

Garcia’s EEOC charges were dismissed, and right-to-sue letters issued. Garcia subsequently brought two lawsuits against the Salvation Army: one under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, et seq., and another under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112, et seq., which were consolidated. In sum, Garcia alleged that the Salvation Army subjected her to a hostile work environment because she stopped attending religious services and retaliated against her for filing an internal grievance complaining of religion-based mistreatment. The resulting stress precipitated health problems that the Salvation Army failed to accommodate.

The district judge (Campbell, J.) granted summary judgment to the Salvation Army, holding that Title VII’s religious organization exemption (ROE) protects the Salvation Army from suit, even if it failed to timely assert the defense. Garcia v. Salvation Army, 2016 WL 4732845, at *4 (D. Ariz. Sept. 12, 2016). He reasoned that the ROE is jurisdictional—a matter of courts’ Article III power to hear cases and controversies—and cannot be forfeited. Id. The district judge also dismissed Garcia’s ADA claims on the merits. Id. at *5–6.

Garcia appeals, raising two legal questions regarding the application and scope of the ROE. First, whether the ROE is jurisdictional, depriving federal courts of subject matter jurisdiction when invoked. And second, whether the ROE extends beyond hiring and firing decisions to hostile work environment and retaliation claims. She also challenges the district judge’s dismissal of her ADA claims (to which the ROE does not apply). We first address the application of the ROE before turning to the merits of the ADA claim.

**DISCUSSION**

**TITLE VII CLAIMS**

A. The ROE Applies to the Salvation Army

The ROE provides that Title VII’s protections against discrimination

shall not apply to an employer with respect to … a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a). The entity seeking the benefit of the statute bears the burden of proving it is exempt. EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993).

In applying the ROE, we determine whether an institution’s “purpose and character are primarily religious” by weighing “[a]ll significant religious and secular character-
ics.” EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988). It does not suffice that an institution be “merely ‘affiliated’ with a religious organization.” Id. at 617. Although we construe the ROE narrowly, often the organization seeking the exemption is “clearly” religious. Id. at 618.

This is such a case. See, e.g., Rev. Rul. 59-129, 1959-1 C.B. 58 (noting that the Salvation Army is a “church” under the Internal Revenue Code); Schleicher v. Salvation Army, 518 F.3d 472, 478 (7th Cir. 2008) (“The Salvation Army, which has existed in the United States since 1880, is acknowledged to be a completely legitimate church ….”); McClure v. Salvation Army, 460 F.2d 553, 554 (5th Cir. 1972) (“The Salvation Army is a church ….”). The Salvation Army holds regular religious services. It offers social services to customers regardless of their religion “to reach new populations and spread the gospel.” Indeed, the Salvation Army’s mission statement describes it as

an evangelical part of the universal Christian church. Its message is based on the Bible. Its ministry is motivated by the love of God. Its mission is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination.10


Garcia argues that the Salvation Army does not qualify for the ROE because it does not satisfy the fourth factor of a four-part test discussed in Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam), which asks whether an entity “engage[s] primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” Garcia contends this factor is not satisfied because the Salvation Army generates a large-dollar amount of sales revenue, even though that amount constitutes a small portion (fifteen percent) of its total income. Moreover, in 2012, 82 cents of every dollar spent by the Salvation Army went toward its program services. These considerations aside, the concurring opinions of Judges O’Scannlain and Kleinfeld, who wrote separately on how to evaluate the fourth Spencer factor, support the Salvation Army’s entitlement to ROE protection. Under Judge O’Scannlain’s approach, the ROE applies if the first three factors identified in the per curiam opinion are satisfied and the organization is a nonprofit. Spencer, 633 F.3d

at 734 (O’Scannlain, J., concurring). The Salvation Army easily satisfies that test. While Judge Kleinfeld would alternatively ask how the organization charges for its services, he cites the Salvation Army as a group that satisfies this criterion because it “gives its homeless shelter and soup kitchen services away, or charges nominal fees.” Id. at 747 (Kleinfeld, J., concurring).

B. The ROE Reaches Claims for Retaliation and Hostile Work Environment

Even assuming the ROE applies to the Salvation Army, Garcia argues that it does not reach her claims for retaliation and hostile work environment. In her view, the ROE applies only to hiring and firing decisions. Although we have not addressed this question, other courts have held that the ROE extends to both retaliation and hostile work environment claims. See, e.g., Kennedy v. St. Joseph’s Ministries, Inc., 657 F.3d 189, 192–94 (4th Cir. 2011); Saeemodar. v. Mercy Health Servs., 456 F. Supp. 2d 1021, 1040–41 (N.D. Iowa 2006); Lown, 393 F. Supp. 2d at 254; Hopkins v. Women’s Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174, 180 (D.D.C. 2002); Aguillard v. La. Coll., 341 F. Supp. 3d 642, 647–48, 652 (W.D. La. 2018); Clark, 2008 WL 11375384, at *1. We agree.

First, the ROE’s text reaches beyond hiring and firing. Congress “painted with a broader brush, exempting religious organizations from the entire subchapter of Title VII with respect to the employment of persons of a particular religion.” Kennedy, 657 F.3d at 194 (internal quotation marks omitted) (emphasis added). The “entire subchapter” of Title VII includes protections against retaliation and discriminatory harassment amounting to a hostile work environment. See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a). And “employment” encompasses “the breadth of the relationship between the employer and employee,” not just hiring and firing. Kennedy, 657 F.3d at 193 (deriving term’s definition from settled common-law meaning); see Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992) (setting out common-law factors for evaluating an employment relationship, including all aspects of employer’s control over employee’s actions); cf. 20 C.F.R. § 404.1007(a) (“In general, you are a common-law employee if the person you work for may tell you what to do and how, when, and where to do it.”).

Limiting “employment” to hiring and firing decisions is also inconsistent with the term’s use throughout Title VII. For example, Section 2000e-2(a)(1) defines “unlawful employment practice” as “to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.” There, “employment” … encompasses more than hiring or firing; if the term were so limited, the second clause would be superfluous.” Kennedy, 657 F.3d at 193. We agree that “‘employment,’ as used throughout Title VII, simply covers a much broader understanding than mere hiring and firing.” Id. Indeed, Garcia conceded at oral argument that a protected organization may lawfully demote an employee based on religious preference. Accepting as much upends her theory that the ROE covers only hiring-and-firing decisions.

In a final effort to avoid the ROE’s reach, Garcia maintains that she has not pleaded a cause of action labeled “religious discrimination.” Even so, the complaint centers around religious discrimination. Specifically, the first sentence of Count 1 (retaliation) alleges that the Salvation Army subjected Garcia to “discrimination based on religion.” The complaint then goes on to specify alleged incidents of mistreatment and concludes that they all occurred “after [Garcia] engaged in protected activity by filing an internal grievance from what [she] believe[s] was discrimination based on religion.” Id. Count 2 (hostile work environment) simply repleads all the allegations in Count 1.

It is true, as Garcia notes, that Title VII treats workplace discrimination and retaliation claims in separate provisions. See 42 U.S.C. §§ 2000e-2(a), 2000e-3(a). Yet both types of claims require a nexus to discrimination. See id. Because the ROE permits religious organizations to discriminate based on religion, retaliation claims based on religious discrimination fail against protected organizations because the practice “opposed” is not “unlawful.” See id. § 2000e-3(a). Likewise, hostile work environment claims must involve status-based harassment, id. § 2000e-2(a)(1); Meritor Sav. Bank, FSB v. 11

11. Garcia relies on EEOC v. Pacific Press Publishing Association, 676 F.2d 1272 (9th Cir. 1982), abrogated on other grounds as recognized by Am. Friends Serv. Comm. Corp. v. Thornburg, 951 F.2d 957, 960 (9th Cir. 1991), for the proposition that Congress did not intend the ROE to cover retaliation claims. Pacific Press, however, dealt with sex-based Title VII claims against a religious publisher. Id. at 1274. The plaintiff there claimed that her employer paid her less than her male coworkers and retaliated against her when she filed charges. Id. The employer sought to avoid liability on the grounds that the employee’s act of filing a lawsuit violated its religious tenets. See id. at 1275. There, we held that religious employers facing sex-, race-, and national origin-based claims are not immune from liability for “retalatory actions against employees who exercise their rights under the statute.” See id. at 1276. We did not hold that religion-based retaliation claims are beyond the reach of the ROE. Id.


13. Indeed, Garcia’s internal grievance took issue with her treatment “ever since [she and her husband] left the church.” And Garcia’s EEOC charge—for which she checked the form’s “religious discrimination” and “retaliation” boxes—states, “Ever[,] since I left the Church my immediate supervisor … has been subjecting me to disparate treatment.”
Vinson, 477 U.S. 57, 63–64 (1986), and fail against protected organizations where the alleged harassment is based on religion.

C. The ROE Bars García’s Claims

The Salvation Army failed to raise the ROE as an affirmative defense in its responsive pleading, which would normally result in forfeiture. See Fed. R. Civ. P. 12(h)(1)–(2). The district judge, however, held that the ROE is jurisdictional, and as such, the defense cannot be relinquished. See Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”) (emphasis added).

I. The ROE is Nonjurisdictional and Subject to Forfeiture

In Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006), the Supreme Court established the “bright line” rule that “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” Three factors guide our analysis. See Leeson v. Transamerica Disability Income Plan, 671 F.3d 969, 976–77 (9th Cir. 2012). First is whether the provision is “clearly labeled jurisdictional.” Id. at 976 (quotation marks omitted). Second is whether the provision is “located in a jurisdiction-granting provision.” Id. at 976–77. Third is whether some “other reasons necessitate[] that the provision be construed as jurisdictional.” Id. at 977.

The ROE is not labeled jurisdictional. See 42 U.S.C. § 2000e-1(a). It does not use the term “jurisdiction” nor speak in jurisdictional terms about the power of United States courts to hear cases under Title VII. Compare id. with 28 U.S.C. §§ 1345, 1348, 1350. Rather, it appears in a separate provision from that establishing federal courts’ jurisdiction over Title VII claims, which militates against classifying it as jurisdictional. See 42 U.S.C. § 2000e-5(f)(3) (conferring jurisdiction over Title VII claims to federal district courts). Put otherwise, the ROE limits entitlement to relief in a narrow class of cases, not “the authority of federal courts to adjudicate claims under [Title VII].” Leeson, 671 F.3d at 978. The district judge erred by ranking the ROE jurisdictional where Congress did not. See Arbaugh, 546 U.S. at 516.

The Salvation Army maintains that a claim cannot possibly arise under Title VII where Congress has mandated Title VII “shall not apply.” But that is precisely the consequence of Arbaugh. Title VII imposes no liability on employers with fewer than 15 employees. See 42 U.S.C. § 2000e(b). Yet the defendant in Arbaugh—an employer with fewer than 15 employees—forfeited this argument by failing to raise it until after trial. Arbaugh, 546 U.S. at 503–04, 510, 516. The employer was held liable, even though Congress did not intend Title VII to reach it. Id. at 516. Such is the consequence of failing to raise a nonjurisdictional defense. See id. at 510–11.

Our decision in United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015), provides a useful analog. There, we held that the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, which limits conduct covered by the Sherman Act, is nonjurisdictional. Hui Hsiung, 778 F.3d at 752–53. Section 4 of the Sherman Act confers upon federal district courts jurisdiction “to prevent and restrain violations of sections 1 to 7 of this title.” 15 U.S.C. § 4. The FTAIA, like the ROE, provides that “[s]ections 1 to 7 of this title shall not apply,” unless certain conditions are satisfied. Id. § 6a (emphasis added). Nevertheless, we held that the impact of the FTAIA on Sherman Act claims “is a merits question, not a jurisdictional one.” Hui Hsiung, 778 F.3d at 752. As the Supreme Court has explained, “to ask what conduct [a statute] reaches is to ask what conduct [the statute] prohibits, which is a merits question.” Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247, 254 (2010). The ROE, like the FTAIA, “removes conduct from [Title VII’s] reach,” bearing on the question of “what conduct [Title VII] prohibits;” not the power of courts to hear a case. Hui Hsiung, 778 F.3d at 752 (internal quotation marks and alterations omitted).

Indeed, the Seventh Circuit has held that Title VII’s domestic-work requirement, embodied in Section 2000e-1(a) alongside the ROE, is nonjurisdictional, as it “appears outside of the statute’s jurisdictional provision” and “[t]here is no other reason to believe that Congress intended to ‘rank’ the restrictions as jurisdictional.” Rabe v. United Air Lines, Inc., 636 F.3d 866, 869 (7th Cir. 2011); see also Maguire v. Marquette Univ., 814 F.2d 1213, 1216 (7th Cir. 1987) (application of 42 U.S.C. § 2000e-2(e)(1), permitting educational institutions “to hire and employ employees of a particular religion” under certain circumstances, is not a question of subject matter jurisdiction). And the only court to expressly address whether the ROE itself is jurisdictional found that it is not. See Smith v. Angel Food Ministries, Inc., 2008 WL 5115037, at *4 (M.D. Ga. Dec. 4, 2008), on reconsideration 611 F. Supp. 2d 1346 (M.D. Ga. 2009).

We recognize that a number of courts have suggested that the ROE can never be waived or forfeited. See, e.g., Hall v. Baptist Mem’l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000); Ark Encounter, LLC v. Parkinson, 152 F. Supp. 3d 880, 915 n.25 (E.D. Ky. 2016); Saemnodarae, 456 F. Supp. 2d at 1038–39; Siegel v. Truett-McConnell Coll., Inc., 13 F. Supp. 2d 1335, 1345 (N.D. Ga. 1994). These cases, like the district court’s opinion below, can be traced to the Third Circuit’s decision in Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991), where a Catholic school invoked the ROE after declining to rehire a Protestant teacher. The teacher argued that the school “waived” the ROE, because it knew she was Protestant when it hired her. Id. at 951. Little held that the ROE was not “a privilege or interest” that could be waived but rather “a decision by Congress that the government interest in eliminating

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1. “[F]orfeiture is the failure to make the timely assertion of a right[,] waiver is the intentional relinquishment or abandonment of a known right.” Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 17 n.1 (2017) (quoting United States v. Olano, 507 U.S. 725, 733 (1993)). Thus, the case before us concerns a procedural forfeiture.
religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention,” meaning that “no act by Little or the Parish could expand the statute’s scope.” Id. Other courts subsequently concluded that the ROE “cannot be waived by either party.” E.g., Hall, 215 F.3d at 625.

Little is inapposite because it concerned the validity of an implied waiver defense based on an organization’s pre-suit conduct—not a procedural forfeiture. See Little, 929 F.2d at 951. A statutory defense is not unrelinquisable per se simply because it embodies Congress’s intent to limit a class of claims. To the contrary, even where Congress has mandated that a statute “shall not apply” under certain circumstances, we have routinely applied forfeiture principles. See, e.g., Magana v. Commonwealth of the Northern Mariana Islands, 107 F.3d 1436, 1445 (9th Cir. 1997) (failure to plead FLSA exemption can result in forfeiture); Brennan v. Valley Tow- ing Co., Inc., 515 F.2d 100, 104 (9th Cir. 1975) (same). See generally 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1271 (3d ed. 2004) (collecting cases). We see no reason to treat the ROE differently.

2. Absent Prejudice, the ROE May Be First Raised at Summary Judgment

Although statutory exemptions are not among the affirmative defenses enumerated in Rule 8(c), see Fed. R. Civ. P. 8(c), we have explained that they must be raised in a party’s “initial responsive pleading.” See Magana, 107 F.3d at 1445. Accordingly, the Salvation Army was required to plead the ROE as an affirmative defense. Cf. Oden v. Okribbeha County, 246 F.3d 458, 466–67 (5th Cir. 2001) (holding that Title VII’s personal-staff exception must be pleaded as an affirmative defense). This makes sense given that the defendant “bear[s] the burden of proving [it is exempt],” Kamehameha, 990 F.2d at 460, and the facts necessary to invoke the exemption are “outside of the plaintiff’s prima facie case,” Wright & Miller, supra, § 1271.

The Salvation Army did not raise the ROE in its answer but insists that it pleaded enough to put Garcia on notice. First, it pleaded that Garcia failed to state a claim upon which relief can be granted, a defense which may be raised up and until the close of trial. Fed. R. Civ. P. 12(h)(2). But simply stating that the plaintiff failed to state a claim is insufficient to provide notice of a specific affirmative defense. See Simmons v. Navajo County, 609 F.3d 1011, 1023 (9th Cir. 2010) (“The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.”) (quoting Wyshak v. City Nat’l Bank, 607 F.2d 824, 827 (9th Cir. 1979))); abrogated in part by Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc). And independent of Rule 12(b)(6), Rule 8(c) requires that “[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.” Fed. R. Civ. P. 8(c).

The Salvation Army also pleaded “that any adverse employment actions taken against plaintiff were taken for law-ful, legitimate, non-retaliatory, and non-discriminatory rea-sons.” On its face, this defense does not refer to the ROE but rather the standard for rebutting a prima facie claim of discrimination on the merits. See Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1094 (9th Cir. 2005). Thus, the Salvation Army failed to timely raise the ROE.

Even so, “[i]n the absence of a showing of prejudice … an affirmative defense may be raised for the first time at summary judgment.” Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993). There is no prejudice to a plaintiff where an “affirmative defense would have been dispositive” if asserted “when the action was filed.” Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001). Rather, a party must point to a “tangible way in which it was prejudiced by the delay.” See Ledo Fin. Corp. v. Summers, 122 F.3d 825, 827 (9th Cir. 1997).

The only prejudice Garcia asserts is that she was denied discovery to test the Salvation Army’s defense. But as a former member of the Salvation Army’s congregation, Garcia was intimately familiar with its religious focus and mission. See, e.g., ER 133–34 (deposition excerpts describing Garcia’s participation in religious services); ER 633 (Garcia’s opposition to motion for summary judgment indicating “[s] he believed she would be working in an environment that was respectful, [c]haritable and encouraging and above all Christ-[like]”). And the Salvation Army’s status as a non-profit corporation is public, along with its yearly financial reports. Absent prejudice, the Salvation Army permissibly invoked the ROE at summary judgment, and it applies to foreclose Garcia’s Title VII claims.

ADA Claim

The district court properly granted the Salvation Army summary judgment on Garcia’s ADA claim. We begin by briefly recounting the underlying circumstances. Following a period of leave under the Family and Medical Leave Act of 1993 (“FMLA”) from October to December 2013, Garcia sought additional personal leave, explaining that she “ha[d] been advised not to return to a stressful working environment for health reasons.” The Salvation Army responded by asking her to provide medical documentation “outlining working restrictions and estimated date of return to full duty.” Garcia complied, and her request was granted. The Salvation Army repeatedly extended Garcia’s leave through May 5, 2014.

On May 5, 2014, Garcia informed the Salvation Army that her doctor had cleared her to return to work on May 26, “without restrictions.” But Garcia said she would not return to work because she was “not ready to go back into the exact same working environment which [her] doctors ha[d] ad-vised against” and “[i]t is clear that she could not work in an environment which was stressful” (emphasis in original), and “[i]t is clear that she could not work in an environment which was stressful” (emphasis in original). The Salvation Army informed Garcia that she was required to return to work by May 5, at which point Garcia filed the complaint. See Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1094 (9th Cir. 2005). Thus, the Salvation Army failed to timely raise the ROE.

On July 20, 2013, Garcia filed a complaint against the Salvation Army. She alleged, inter alia, that her ADA claim. We begin by briefly recounting the underlying circumstances. Following a period of leave under the Family and Medical Leave Act of 1993 (“FMLA”) from October to December 2013, Garcia sought additional personal leave, explaining that she “ha[d] been advised not to return to a stressful working environment for health reasons.” The Salvation Army responded by asking her to provide medical documentation “outlining working restrictions and estimated date of return to full duty.” Garcia complied, and her request was granted. The Salvation Army repeatedly extended Garcia’s leave through May 5, 2014.

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tion Army declined and demanded medical evidence supporting her disability and proposed accommodation.

This time, Garcia did not submit the requested medical information. As a result, the Salvation Army made clear that Garcia’s continued absence was not excused, “jeopardizing [her] continued employment.” Even so, on June 17, 2014, the Salvation Army provided a summary of the client complaint but explained that Garcia would “need a doctor’s note to allow us to assess your accommodation request and your continued absence.” Garcia disputed the summary of the complaint and reiterated her request for a copy. She did not report to work. On July 10, 2014, the Salvation Army terminated Garcia’s employment due to unexcused absence.

“The ADA prohibits discrimination ‘against a qualified individual on the basis of disability in regard to … job training[,] and other terms, conditions, and privileges of employment.’” EEOC v. UPS Supply Chain Sols., 620 F.3d 1103, 1110 (9th Cir. 2010) (quoting 42 U.S.C. § 12112(a)). “[D]iscrimination includes an employer’s not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified … employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.” U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 396 (2002) (emphasis and quotation marks omitted). An “interactive process” is required upon a request for an accommodation. UPS Supply Chain, 620 F.3d at 1110 (quoting Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002)).

“To be entitled to the interactive process that leads to a reasonable accommodation, an employee must have a ‘disability’ within the meaning of the ADA.” Becerril v. Pima Cty. Assessor’s Office, 587 F.3d 1162, 1164 (9th Cir. 2009) (per curiam). A doctor’s release to work without restrictions supports a finding that a person no longer suffers from a “disability.” See, e.g., Rivera v. FedEx Corp., 2013 WL 6672401, at *4 (N.D. Cal. Dec. 18, 2013) (plaintiff failed to demonstrate disability where cleared by doctor without restrictions); cf. Stevenson v. Abbott Labs., 639 F. App’x 473, 474 (9th Cir. 2016) (“[A]fter Plaintiff was released to work, she was not disabled.”). Moreover, an employer “do[es] not have a duty under the ADA … to engage in further interactive processes … in the absence of” requested medical evidence. See Allen v. Pac. Bell, 348 F.3d 1113, 1115 (9th Cir. 2003) (per curiam).

First, Garcia claims that the Salvation Army failed to interact with her in good faith to arrive at a reasonable accommodation in the months leading up to May 26, 2014, the day Garcia was slated to return to work. The record does not support this assertion. To the contrary, each step of the way, the Salvation Army extended Garcia’s leave. This was the only accommodation requested by Garcia and documented by her physician. At no time before her doctor’s unconditional release did Garcia indicate that she desired to return to work on a modified basis. Accordingly, no reasonable jury could find that the Salvation Army failed to engage in an interactive process with Garcia from the time of her leave up and until the time she was cleared for work.

Garcia next alleges that the Salvation Army refused to negotiate in good faith after Garcia insisted on receiving a copy of the secret customer complaint rather than a summary. This request, however, only came after Garcia was cleared for work “without restrictions.” Garcia cannot show that she suffered from a disability at that time, and she failed to provide supporting medical documentation despite multiple requests. The Salvation Army was not required to continue an interactive process in the absence of medical evidence. See Allen, 348 F.3d at 1115.

Moreover, even after the Salvation Army provided a summary of the client complaint as requested, Garcia protested and demanded to see the original complaint. This only underscores that Garcia’s requested “accommodation” is not cognizable under the ADA. A “reasonable accommodation” includes “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.” 29 C.F.R. § 1630.2(o)(1) (ii). Obtaining a copy of a year-old client complaint is unrelated to the “essential functions” of Garcia’s former position. See Gonzagowski v. Widnall, 115 F.3d 744, 747–48 (10th Cir. 1997) (“While specific stressors in a work environment may in some cases be legitimate targets of accommodation, it is unreasonable to require an employer to create a work environment free of stress and criticism.”).

Finally, Garcia argues that the Salvation Army failed to interact in good faith because it had decided to eliminate her position rather than negotiate with her. This allegation, however, is derived from a draft letter to Garcia dated May 27, 2014, which was never used or sent. To the contrary, the Salvation Army continued Garcia’s leave until July 10, 2014, when she was finally terminated. Regardless, as discussed, the Salvation Army was under no obligation to engage in an interactive process in the absence of a disability. For these reasons, Garcia fails to make out a claim under the ADA.

CONCLUSION

We hold that the ROE is nonjurisdictional and subject to procedural forfeiture. Absent prejudice resulting from the Salvation Army’s failure to timely raise the defense, however, the ROE forecloses Garcia’s Title VII claims for retaliation and hostile work environment. Garcia’s ADA claim fails on the merits. The judgment of the district court is therefore AFFIRMED.
Cite as 19 C.D.O.S. 2425

VHT, INC., a Delaware corporation,
Plaintiff-Appellee/Cross-Appellant,
v. 
ZILLOW GROUP, INC., a Washington corporation; ZILLOW, INC., a Washington corporation, Defendants-
Appellants/Cross-Appellees.

Nos. 17-35587, 17-35588
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:15-cv-01096-JLR
Appeal from the United States District Court for the Western
District of Washington James L. Robart, Senior District
Judge, Presiding
Argued and Submitted August 28, 2018
Seattle, Washington
Filed March 15, 2019
Before: M. Margaret McKeown, William A. Fletcher, and
Ronald M. Gould, Circuit Judges.
Opinion by Judge McKeown

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OPINION

McKEOWN, Circuit Judge:

Zillow, an online real estate marketplace, has become a popular website for homeowners and others to check estimated valuations of their property, look for houses and condominiums for sale and rent, and see photographs of a wide range of properties. Thousands of those copyrighted photos come from VHT, the largest professional real estate photography studio in the country.

The copyright claims on appeal concern Zillow’s use of VHT’s photos on two parts of Zillow’s website: the “Listing Platform” and “Digs.” The Listing Platform is the core of the website, featuring photos and information about real estate properties, both on and off the market. Zillow claims that the site includes “most homes in America.” Digs features photos of artfully-designed rooms in some of those properties and is geared toward home improvement and remodeling. Zillow tags photos on the Listing Platform so that Digs users can search the database by various criteria, like room type, style, cost, and color.

Real estate brokers, listing services, and agents hire VHT to take professional photos of new listings for marketing purposes. A VHT photographer takes the photos and sends them to the company’s studio for touch-up, where they are saved to VHT’s electronic photo database, and then delivered to the client for use under license. Each license agreement between VHT and its clients differs slightly, but each contract generally grants the requesting client the right to use the photos in the sale or marketing of the featured property. Zillow receives these photos and other data in feeds from various real estate-related sources.

In 2015, VHT sued Zillow Group, Inc., and Zillow, Inc., (collectively “Zillow”) for copyright infringement, alleging that Zillow’s use of photos on the Listing Platform and Digs exceeded the scope of VHT’s licenses to brokers, agents, and listing services who provided those photos to Zillow. The district court granted partial summary judgment on a limited set of claims, while other claims advanced to trial. The jury found in favor of VHT on most remaining claims, awarding over $8.27 million in damages. The district court partially granted Zillow’s post-trial motion for judgment notwithstanding the verdict, reversing in part the jury verdict and reducing total damages to approximately $4 million.

The parties cross-appealed issues stemming from partial summary judgment, the jury verdict, and judgment notwithstanding the verdict. We affirm in part and reverse in part.

1. In connection with these proceedings, we received amicus curiae briefs from a broad array of interested parties, including nonprofit groups and associations representing a diverse set of industry, technology, and artistic interests. The briefs were helpful to our understanding of the implications of this case from various points of view. We thank
To simplify and make sense of the various claims, this opinion does not split out the appeal and cross-appeal as was done in the briefing to the court. Instead, the opinion separately addresses liability for each of the categories of photos at issue, followed by a discussion of damages. In view of the multiple theories of liability and categories of photos, following is an overview of the opinion.

I. DIRECT INFRINGEMENT

A. Direct Infringement—Listing Platform Photos

1. Jury Verdict—Direct Infringement

2. Summary Judgment—Fair Use Searchable Photos
   a. Background on Fair Use
   b. Evolution of Search Engine Cases
   c. Application of Fair Use Principles

B. Direct Infringement—Digs Photos

1. Background

II. SECONDARY INFRINGEMENT—DIGS

A. Contributory Liability

B. Vicarious Liability

III. DAMAGES

A. Compilation

B. Willfulness

IV. CONCLUSION

ANALYSIS

The heart of this dispute is Zillow’s copyright liability for use of VHT photos. VHT argues that Zillow directly infringed its copyrighted photos, both those on the Listing Platform and Digs. VHT also argues that Zillow indirectly infringed through use of the photos on Digs. These claims pertain to different images, focus on different features of Zillow’s website, and have different procedural postures, so we consider the various categories of photos separately.

I. DIRECT INFRINGEMENT

VHT’s key claim is that Zillow is directly liable for infringing VHT’s copyright on photos that were posted on the Listing Platform and Digs. To prevail on a claim of direct copyright infringement, VHT must establish “ownership of the allegedly infringed material” and that Zillow “violate[d] at least one exclusive right granted to”

VHT under 17 U.S.C. § 106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001). It is undisputed that VHT is the copyright holder of the allegedly infringed photos and therefore has the exclusive right to reproduce, adapt, and display them. 2 17 U.S.C. § 106.

VHT must also establish causation, which is commonly referred to as the “volitional-conduct requirement.” See Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 657, 666 (9th Cir. 2017). As we set out in Giganews—decided on the first day of the VHT/Zillow trial and the closest circuit precedent on point—“volition in this context does not really mean an act of willing or choosing or an act of deciding”; rather, “it simply stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts.” Id. (internal citations omitted). Stated differently, “direct liability must be premised on conduct that can reasonably be described as the direct cause of the infringement.” Id. (citation omitted). This prerequisite takes on greater importance in cases involving automated systems, like the Zillow website.

In addressing this concept, Justice Scalia noted that “[e]very Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted [the volitional-conduct] rule.” Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 453 (2014) (Scalia, J., dissenting). He went on to explain that while “most direct-infringement cases” do not present this issue, “it comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system… Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers.” Id. at 454–55 (internal citations omitted).

Giganews, Aereo, and out-of-circuit precedent counsel that direct copyright liability for website owners arises when they are actively involved in the infringement. “[T]he distinction between active and passive participation” in the alleged infringement “is central” to the legal analysis. Giganews, 847 F.3d at 667 (quoting Fox Broad. Co. v. Dish Network LLC, 160 F. Supp. 3d 1139, 1160 (C.D. Cal. 2015)).

That “direct” infringement requires “active” involvement is hardly surprising, given the correlation between the words “active” and “direct.” As the Fourth Circuit held, “[t]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.” CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004). By contrast, activities that fall on the other side of the line, such as “automatic copying, storage, and transmission of copyrighted materials, when instigated by others, do[] not render an [Internet service provider] strictly liable for copyright infringement[].” Giganews, 847 F.3d at 670 (quoting CoStar, 373 F.3d at 555).

In other words, to demonstrate volitional conduct, a party like VHT must provide some “evidence showing [the alleged infringer] exercised control (other than by general operation of its website); selected any material for upload, download, transmission, or storage; or instigated any copying, storage, or distribution” of its photos. Id. at 666, 670. VHT failed to satisfy that burden with respect to either the photos on the Listing Platform or on Digs.

2. VHT does not appeal the district court’s finding that there was insufficient evidence that Zillow violated VHT’s distribution rights.

3. Although the majority opinion in Aereo does not reference the volitional-conduct requirement, Justice Scalia’s dissent offers instructive background on the doctrine. In Giganews, we embraced the principle and held that it is “consistent with the Aereo majority opinion,” which left the requirement “intact.” 847 F.3d at 666–67.
A. Direct Infringement—Listing Platform

Photos

VHT asserted that Zillow directly infringed the photos displayed on the Listing Platform after a real estate property was sold because VHT’s license agreements only authorized use of those photos in relation to the sale of the property. This claim, involving 54,257 non-searchable photos, was resolved on summary judgment. The Listing Platform is the core of Zillow’s online real estate marketplace. It features photos and information about properties, which Zillow receives through digital feeds from real estate agents, brokerages, and multiple listing services, among others (collectively “feed providers”).

Zillow has agreements with its feed providers granting it an express license to use, copy, distribute, publicly display, and create derivative works from the feed data on its websites. Feed providers represent that they “ha[ve] all necessary rights and authority to enter into” the agreements, and that “Zillow’s exercise of the rights granted [t]hereunder will not violate the intellectual property rights, or any other rights of any third party.”

These agreements provide Zillow with either “evergreen” or “deciduous” rights in the photos provided through the feeds. An evergreen right permits use of a photo without any time restriction, “on and in connection with the operation, marketing and promotion of the web sites and other properties, owned, operated or powered by Zillow or its authorized licensees.” By contrast, a deciduous right is temporally limited: Zillow may use the photo when the real-estate listing for its corresponding property is active, but once the listing is removed (for example, when the property sells), the photo must be taken down from Zillow’s websites. To treat each photo consistently with its deciduous or evergreen designation, Zillow developed automated “trumping” rules to determine which photos to display on the Listing Platform.

VHT argues that Zillow “designed its system to . . . cause[] the reproduction, display, and adaptation of VHT photographs post-sale on the Listing Platform,” and “chose to simply ignore VHT’s notices that post-sale use was beyond the scope of VHT’s licenses.” The district court granted summary judgment to Zillow, concluding that it did not engage in volitional conduct and therefore did not directly infringe VHT’s copyrights in 54,257 photos by displaying them on the Listing Platform after a real estate property was sold.

On de novo review, we agree with the district court’s analysis and affirm. Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003). Although the district court did not have the benefit of Giganews at the time of summary judgment, its careful reasoning was prescient in invoking the same principles.

Zillow did not engage in volitional conduct necessary to support a finding of direct liability. The content of the Listing Platform is populated with data submitted by third-party sources that attest to the permissible use of that data, and Zillow’s system for managing photos on the Listing Platform was constructed in a copyright-protective way. The feed providers themselves select and upload every photo, along with the evergreen or deciduous designations, that wind up on the Listing Platform. As a result, the photos on the Listing Platform were not “selected” by Zillow. See Giganews, 847 F.3d at 670. Nor did Zillow “exercise[] control” over these photos beyond the “general operation of [its website].” Id. Zillow required feed providers to certify the extent of their rights to use each photo. Consistent with these designations, Zillow’s system classified each photo as deciduous or evergreen and programmed its automated systems to treat each photo consistently with that scope of use certified to by the third party.

Further, when multiple versions of the same photo were submitted through the various feeds, Zillow invoked its copyright-protective “trumping” rules. For example, one rule might prefer a photo provided by an agent over one provided by a multiple listing service, and another might prefer a local broker to an international one. Zillow used a rule that gave preference to photos with evergreen rights over photos with deciduous rights in the same image. As the district court recognized, “trumping” is a reasonable way to design a system to manage multiple versions of the same photo when the authorized use varies across versions. These rules, along with other features of the system, facilitate keeping the photos with evergreen rights on the website and removing the photos with deciduous rights once a property has sold. Thus, Zillow actively designed its system to avoid and eliminate copyright infringement.

Notably, VHT’s argument is primarily cast in terms of Zillow facilitating or enabling infringement by VHT’s clients that are Zillow’s feed providers. But this type of claim more properly falls in the category of secondary infringement, a claim not advanced by VHT with respect to the Listing Platform photos.

VHT also asserts that Zillow failed to remove photos once it received notice that infringing content was on the Listing Platform, a conscious choice that amounts to volitional conduct on Zillow’s part. This claim is unavailing because, once VHT put Zillow on notice of claimed infringement, Zillow took affirmative action to address the claims. Additionally, VHT’s assertion that it “repeatedly notified Zillow that it was infringing” is unsupported in the record.

In July 2014, VHT sent Zillow a takedown notice letter with a list of thousands of allegedly infringing photos by residential street address (but not by web address). Zillow promptly requested all executed license agreements between VHT and the feed providers who had provided photos to Zillow, as well as license agreements between VHT and its photographers, so that Zillow could evaluate whether VHT possessed exclusive rights to the photos on the Listing Platform. VHT responded with an unsigned form contract, which it stated was used with many feed providers, but which was not tied to any specific photos on Zillow’s website. Zillow again reiterated its need to see the specific contracts governing the contested photos. Instead of responding with the contracts, VHT filed suit. Zillow’s reasonable response to VHT’s
single formal inquiry (supplemented in a follow-on email) can hardly be characterized as rising to the level of volitional conduct or turning a blind eye.

In sum, VHT failed to “provide[] … evidence showing [Zillow] exercised control (other than by general operation of [its website]); selected any material for upload, download, transmission, or storage; or instigated any copying, storage, or distribution” of these photos. See Giganews, 847 F.3d at 670; see also CoStar, 373 F.3d at 555. Thus, we affirm the district court and conclude Zillow did not directly infringe VHT’s copyrights in photos displayed on the Listing Platform post-sale.

B. Direct Infringement—Digs Photos

VHT also claimed that Zillow directly infringed thousands of photos used on Digs. The jury concluded that Zillow directly infringed 28,125 photos and rejected its fair use defense. Following trial, the district court granted in substantial part Zillow’s motion for judgment notwithstanding the verdict on the ground that insufficient evidence supported Zillow’s direct infringement of 22,109 photos that were not displayed on Digs and 2,093 photos that were displayed but not searchable on Digs.

By contrast, the court upheld the jury’s determination that Zillow directly infringed a set of 3,921 images that were selected and tagged by Zillow moderators for searchable functionality and displayed on Digs. Zillow does not appeal this ruling. However, Zillow argues that fair use insulates it from liability as to this subset of photos. The jury was instructed not to consider this legal theory as to these photos because the district court had determined pretrial that, as a matter of law, the searchability function did not constitute fair use. It is that summary judgment ruling that Zillow challenges on appeal. Because we agree with the district court that the fair use defense does not absolve Zillow of direct liability for these searchable photos, this portion of the jury verdict remains intact.

The following chart clarifies the status of the Digs photos relevant to the direct infringement claims.

<table>
<thead>
<tr>
<th>Photos</th>
<th>Jury Verdict</th>
<th>Post-Trial Determination</th>
<th>Party Bringing Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>22,109 not displayed</td>
<td>Direct infringement</td>
<td>Overturned jury verdict</td>
<td>VHT</td>
</tr>
<tr>
<td>2,094 displayed, not searchable</td>
<td>Direct infringement</td>
<td>Overturned jury verdict (except 1 email photo)</td>
<td>VHT</td>
</tr>
</tbody>
</table>

4. The displayed but non-searchable set includes 2,094 photos. The district court affirmed the jury verdict with respect to one of those photos, which Zillow also distributed via email.

5. Searchable photos numbered 1,694; 20,415 photos were not searchable.

1. Jury Verdict—Direct Infringement

VHT’s claim that Zillow directly infringed photos on Digs went to the jury. The jury verdict form was framed in general terms, asking only whether “VHT has proven its direct copyright infringement claim as to one or more of the VHT Photos[.]” The jury answered “yes,” and was asked to specify how many VHT photos were directly infringed. The jury answered “28,125”—in other words, all of them. However, the jury was not asked to specify which copyright rights—display, reproduction, or adaptation—were infringed. Following trial, Zillow moved for judgment notwithstanding the verdict or for a new trial. The task fell to the district court to examine the evidence as to each right.

On de novo review, “we apply the same standard used by the district court in evaluating the jury’s verdict” and uphold the verdict unless “the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict.” Wallace v. City of San Diego, 479 F.3d 616, 624 (9th Cir. 2007); Fed. R. Civ. P. 50(a). Specifically, we “ask[] whether the verdict is supported by substantial evidence,” “which is evidence adequate to support the jury’s conclusion, even if it is also possible to draw a contrary conclusion.” Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 984, 991 (9th Cir. 2017) (quotation and citation omitted). Given the sanctity of the jury process, we undertake this review with special care and reluctance to overturn a verdict. However, because the verdict here did not meet this standard, we affirm the district court’s grant of Zillow’s motion for judgment notwithstanding the verdict with respect to direct infringement of 22,109 non-displayed photos and 2,093 displayed but not searchable photos.

We first consider display rights. As background for our analysis, it is useful to consider the direct infringement by Zillow that the district court upheld and that Zillow did not appeal. The district court found substantial evidence that Zillow directly infringed VHT’s display rights in 3,921 photos displayed on Digs that Zillow moderators selected and tagged for searchable functionality. Based on testimony, charts, and statistics, the court found that “the jury could have reasonably concluded that users accessed those images through Digs’s
search function.” The court went on to reason that “the jury could have reasonably concluded that Zillow’s moderation efforts, which rendered those images searchable, proximately caused the copying.” Put differently, active conduct by Zillow met the volitional-conduct requirement for direct infringement. Zillow does not appeal this ruling upholding the jury’s verdict as to the 3,921 displayed, searchable photos.

On appeal, VHT attempts to shoehorn an additional 1,694 photos into this category. This effort falls flat both as a factual and legal matter because substantial evidence does not support direct infringement of VHT’s display rights in the 1,694 searchable images that were not displayed.

VHT posits that the jury could have found that these photos were displayed because of circumstantial evidence and because Zillow failed to record whether they were displayed. Not so. This argument is foreclosed by the parties’ stipulated spreadsheet that categorized each photo. The column labeled “DISPLAYED” included an entry for “Y” (yes) or “N” (no). The jury was instructed to “treat every fact on this spreadsheet as proven,” so VHT cannot recast the facts retroactively and now claim that 1,694 searchable images stipulated as “N[OT] DISPLAYED” were in fact displayed or made available for display. Up is not down.

VHT’s contention that the jury could have reasonably inferred that Zillow made “available for public display” all 22,109 “N[OT] DISPLAYED” images similarly fails. This theory presumes that the Copyright Act’s display right encompasses an exclusive right to “make available for display,” a position neither supported by the statute nor embraced by this court. See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007) (“[B]ased on the plain language of the statute, a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory.”); 17 U.S.C. § 101 (“To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.”). To be sure, the Copyright Office notes that the outer limits of the public display right have yet to be defined. U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 47–51 (Feb. 2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf.

What is most important here, though, is that VHT’s argument comes too late. The jury was never instructed on the “made available” theory, nor did VHT raise this issue in its proposed jury instructions or in objections to the final instructions. See Sinclair v. Long Island R.R., 985 F.2d 74, 78 (2d Cir. 1993) (“the verdict … cannot be sustained on a theory that was never presented to the jury”); Ramona Equip. Rental, Inc. ex rel. U.S. v. Carolina Cas. Ins. Co., 755 F.3d 1063, 1070 (9th Cir. 2014) (an argument raised for first time in a post-trial motion is waived). For these reasons, substantial evidence did not support a finding of direct infringement of VHT’s public display rights in these 22,109 photos.

Zillow also did not violate VHT’s display rights in 2,093 displayed, non-searchable photos. These are photos that Digs users copied to “personal boards” and “Implicit Digs,” but which Zillow did not add to the searchable set.

A “personal board” is a bespoke digital bulletin board of images that a user saves or uploads from the Listing Platform. Users can also upload their own images. These boards are typically private, though users can share a link to their boards. When a user saves a copy of an image with evergreen rights to a personal board, that image automatically joins a queue for review by a Zillow moderator. The moderator then decides whether to designate the photo for tagging so that it can be searchable on Digs, and thus select it for public display. Not all photos that are in the queue for moderation are reviewed. Additionally, in some instances, a user starts but does not finish the process of saving an image to this board. Beginning in 2014, Zillow programmed these “clicked to save” images—called “Implicit Digs”—to enter the queue for moderator review in the same manner as if the photo had been saved to a personal board.

According to VHT, the jury could have found that Zillow “caused the [2,093] images to be displayed … by subjecting the non-searchable VHT Photos to the potential for moderation.” This argument defies logic because the only display that occurred was triggered by the user. Any potential for future display is purely speculative. As the district court explained, the possibility that images might be moderated and tagged—conduct that is volitional—is not sufficient “to transform Zillow from a ‘passive host’ to a ‘direct[] cause’ of the display of VHT’s images.”

Next, we consider VHT’s exclusive reproduction and adaption rights in the 2,093 displayed, non-searchable photos. The Copyright Act grants copyright holders the exclusive right “to reproduce the copyrighted work in copies or phonorecords.” 17 U.S.C. § 106(1). Direct infringement of the reproduction right “requires copying by the defendant, … which [requires] that the defendant cause the copying.” Fox Broad. Co., Inc. v. Dish Network LLC, 747 F.3d 1060, 1067 (9th Cir. 2014) (quotation and citation omitted). The adaptation right is the exclusive right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2). Following Giganews, we conclude that Zillow’s automated processes storing or caching VHT’s photos are insufficiently volitional to establish that Zillow directly infringed VHT’s reproduction and adaption rights in these non-searchable photos. Unlike photos that Zillow curated, selected, and tagged for searchable functionality—activities that amount to volitional conduct establishing direct liability—these 2,093 photos were copied to “personal boards” and “Implicit Digs” based on user actions, not the conduct of Zillow or its moderators.

Any volitional conduct with respect to these photos was taken by the users, not Zillow. Users, not Zillow, “select[ed]”
images to add to their personal boards and “instigate[d]” the automatic caching process by saving a particular image. See Giganews, 847 F.3d at 670. This arrangement is important because courts have found no direct liability where an online system “responds automatically to users’ input … without intervening conduct” by the website owner. CoStar, 373 F.3d at 550; see also Giganews, 847 F.3d at 670. Under these conditions, courts have analogized online facilities, like Internet service providers, to a copy machine owner, who is not liable “when a customer duplicates an infringing work.” CoStar, 373 F.3d at 550.

Additionally, Zillow’s behind-the-scenes technical work on Digs photos is not evidence that Zillow “selected any material for upload, download, transmission, or storage.” Giganews, 847 F.3d at 670. Zillow produced cached copies of these Digs images, a process that automatically trims or pads images whose height and width did not match the target resolution, for the purposes of accelerating website speed. This activity does not amount to volitional conduct. Nor can Zillow’s promotion of Digs, including encouraging users to share photos through its site, be seen as “instigat[ing]” user copying. Id.

Zillow’s conduct with respect to these photos amounts to, at most, passive participation in the alleged infringement of reproduction and adaption rights and is not sufficient to cross the volitional-conduct line. As in cases involving Internet service providers, Zillow “affords its [users] an Internet-based facility on which to post materials, but the materials posted are of a type and kind selected by the [user] and at a time initiated by the [user].” CoStar, 373 F.3d at 555. Zillow did not directly infringe VHT’s reproduction and adaptation rights in the 2,093 displayed, non-searchable photos.7

* * *

In sum, VHT did not present substantial evidence that Zillow, through the Digs platform, directly infringed its display, reproduction, or adaption rights in 22,109 not displayed photos and 2,093 displayed but non-searchable photos. We affirm the district court’s grant of judgment notwithstanding the verdict as to these photos. We now turn to Zillow’s fair use defense to direct infringement of 3,921 displayed, searchable photos.

2. Summary Judgment—Fair Use re Searchable Photos

Zillow does not appeal the jury’s finding of direct infringement with respect to the 3,921 displayed, searchable photos, but does assert a fair use defense for those photos. Zillow contends that Digs’ searchable functionality constitutes fair use, which the district court rejected as a matter of law at summary judgment.

We recount the somewhat unusual history of the fair use issue in the proceedings below. On summary judgment, the district court rejected Zillow’s argument that “the images that it has made searchable on Digs” are protected by fair use and instead “conclude[d] as a matter of law that Digs’ searchable functionality does not constitute a fair use.” At trial, the jury was generally instructed to consider the fair use defense as to all VHT photos used on Digs that it found Zillow had directly or indirectly infringed. However, this set of photos was carved out for separate treatment. The jury considered only whether “reproduction, cropping, and scaling” of these photos constituted fair use because the court instructed the jury that the court “ha[d] determined, and you are to take as proven, that the Digs searchable functionality does not constitute fair use.” After finding that Zillow directly infringed all 28,125 VHT photos used on Digs, the jury rejected Zillow’s fair use affirmative defense for all photos.

The district court upheld the jury’s fair use verdict, which Zillow does not appeal. Rather, Zillow’s appeal reaches back to the district court’s summary judgment ruling to argue that the Digs’ searchable functionality is fair use as a matter of law, and, as a result, Zillow bears no liability for the 3,921 searchable and displayed photos. We review de novo the district court’s grant of summary judgment to VHT on this mixed question of law and fact. Kelly, 336 F.3d at 817.

a. Background on Fair Use

Protection of copyrighted works is not absolute. “The fair use defense permits the use of copyrighted works without the copyright owner’s consent under certain situations.” Amazon, 508 F.3d at 1163. Fair use both fosters innovation and encourages iteration on others’ ideas, “thus providing a necessary counterbalance to the copyright law’s goal of protecting creators’ work product.” Id.; see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–76 (1994). Fair use also aligns with copyright’s larger purpose “[t]o promote the Progress of Science and useful Arts,’ … and to serve ‘the welfare of the public.’” Amazon, 508 F.3d at 1163 (quoting U.S. Const. art. I, § 8, cl. 8, and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 n.10 (1984)).

Fittingly enough, a case involving a biography of George Washington serves as a foundational source of fair use in American law. Folsom v. Marsh, 9 F. Cas. 342 (D. Mass. 1841) (No. 4901). Justice Story’s narrative description of copyright doctrine in that case “distilled the essence of law and methodology from the earlier cases” and provided the conceptual basis for the judge-made fair use doctrine. Campbell, 510 U.S. at 576. Although the 1976 Copyright Act codified those principles, it did little to elaborate on Justice Story’s description or to clarify application of the factors. With minimal guidance or elucidation, Congress set forth four factors for courts to consider when determining whether the use of a copyrighted work is a “fair use”:

7. The same analysis applies to any potential violation of VHT’s exclusive reproduction and adaption rights in the 22,109 photos that were not displayed.
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.


Given license to apply these factors flexibly and to consider them in their totality, courts have been bedeviled by the fair use inquiry. See Campbell, 510 U.S. at 577–78. Fair use has been called “the most troublesome [doctrine] in the whole law of copyright” and commentators have criticized the factors as “billowing white goo.” Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1170–71 (9th Cir. 2012) (citations and quotations omitted). In a (still ongoing) effort to adapt the fair use analysis to a myriad of circumstances, courts have embellished and supplemented the factors. For example, the concept of “transformativeness” is found nowhere in the statute, but appeared for the first time in the Supreme Court in Campbell, where the Court endeavored to refine and crystallize the first statutory factor: the “purpose and character of the use.” 510 U.S. at 579. The animating purpose of the first factor is to determine,

in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation … or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”

Id. (citations omitted). Because transformation advances copyright’s core goals, “the more transformative the new work, the less will be the significance of other factors.” Id. Likewise, despite the absence of a textual hook, public purpose also has been read into the statute. See Amazon, 508 F.3d at 1166; Kelly, 336 F.3d at 820. While we can discern certain animating principles bridging cases in this area, the doctrine has hardly followed a straight, or even slightly curved, line.

The focus of the parties’ debate here is whether Zillow’s tagging of 3,921 VHT photos for searchable functionality on Digs was transformative and thus supported a finding of fair use. The purpose of Digs is to permit users to search for certain attributes or features, such as a marble countertop or hardwood floor, and view photos of rooms with those attributes or features. These photos are either uploaded by users to Digs, or selected manually or electronically by Zillow. Zillow then tags the photos to make them searchable. Of course, tagging makes it possible for a user’s keyword search to produce relevant results. Zillow refers to these tagged photos as “searchable images” or components of the “searchable set.” VHT’s 3,921 photos are in the searchable set.

Zillow contends that Digs is effectively a search engine, which makes its use of VHT’s photos transformative, and therefore fair use. VHT responds that this is not fair use because Digs is not a search engine and the tagging for searchable functionality is not transformative. Dueling “search engine” characterizations do not resolve fair use here. Instead, we step back and assess the question holistically, as we have been instructed to do by the statute and the Supreme Court. We consider the reality of what is happening rather than resorting to labels. To do that, it is helpful to recount the history of the search engine cases.

b. Evolution of Search Engine Cases

Over the past two decades, search engines have emerged as a significant technology that may qualify as a transformative fair use, making images and information that would otherwise be protected by copyright searchable on the web. See Amazon, 508 F.3d at 1166–67; Kelly, 336 F.3d at 818–22. In assessing fair use in the context of search engines, courts have relied heavily on the first fair use factor, and in particular “whether and to what extent the new work is transformative.” Campbell, 510 U.S. at 579 (citation and quotation omitted); see also Amazon, 508 F.3d at 1164 (explaining the Kelly court relied “primarily” on the first fair use factor when conducting its analysis); Authors Guild v. Google, Inc., 804 F.3d 202, 220–221, 223 (2d Cir. 2015) (offering a relatively abbreviated consideration of the remaining three fair use factors, all of which were informed by its analysis of the first factor).

In an early opinion applying fair use principles in the digital age, we held that the now-defunct search engine Arriba’s creation and use of thumbnail versions of a professional photographer’s copyrighted images was fair use because the “smaller, lower-resolution images … served an entirely different function than [the] original images.” Kelly, 336 F.3d at 815, 818. The original images served an artistic or aesthetic purpose. Id. at 819. By contrast, the thumbnail images, which were provided in response to a user’s search query, were incorporated into the search engine’s overall function “to help index and improve access to images on the internet and their related web sites.” Id. at 818. Investing the images with a new purpose made Arriba’s use transformative, not superseding. Indeed, the thumbnail versions could not supersede the
original use because the thumbnails were grainy and low-resolution when enlarged. *Id.* Additionally, Arriba’s use of the thumbnail images “promote[d] the goals of the Copyright Act and the fair use exception” because they “benefit[ed] the public by enhancing information-gathering techniques on the internet.” *Id.* at 820. Just as *Campbell* had drawn out the principle of transformation from the first statutory factor, we drew out the principle of public benefit.

Building on our reasoning in *Kelly*, in *Amazon* we held that Google’s use of thumbnail images in its search engine is “highly transformative” and thus fair use. 508 F.3d at 1163–65. As in *Kelly*, we concluded that “a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.” *Id.* at 1165. On a scale much greater than the search engine at issue in *Kelly*, Google “improve[s] access to images on the internet and their related web sites” by “index[ing]” the internet and linking to the original source image generated in the search results. *Kelly*, 336 F.3d at 815–16, 818. By using the thumbnail images in service of the search engine, Google “transforms the image,” which might have been created for an “entertainment, aesthetic, or informative function,” “into a pointer directing a user to a source of information.” *Amazon*, 508 F.3d at 1165. As a result of the new function that the image serves, Google’s use of the entire image in its search engine results “does not diminish the transformative nature of [its] use.” *Id.* And, further developing the public benefit principle from *Kelly*, we emphasized that Google’s search engine both “promotes the purposes of copyright and serves the interests of the public,” which significantly outweighed the superseding or commercial uses of the search engine, and strongly supported finding fair use. *Id.* at 1166.

More recently, the Second Circuit considered whether fair use protected the Google Books search engine, which employs digital, machine-readable copies of millions of copyright-protected books scanned by Google. *Authors Guild*, 804 F.3d at 207–08.9 The Google Books search engine enables a full text search, which makes possible searching for a specific term, and then provides “snippets,” or a part of a page, for users to read. *Id.* at 208–09, 216–17. The court held that both functions involve a “highly transformative purpose of identifying books of interest to the searcher.” *Id.* at 218. The search function “augments public knowledge by making available information about Plaintiffs’ books without providing the public with a substantial substitute.” *Id.* at 207. And the search engine makes possible a new type of research known as “text mining” or “data mining,” whereby users can search across the corpus of books to determine the frequency of specified terms across time. *Id.* at 209, 217. Additionally, the “snippet” view provides context for users to assess if a book is relevant to them, without providing so much context as to supersede the original. *Id.* at 218. To boot, Google often provides a link to a page where the entire book can be found at a library or purchased. *Id.* at 209. Concluding that Google’s commercial motivation did not significantly outweigh these transformative uses, the court held that the first factor strongly supported a finding of fair use. *Id.* at 219.

What we divine from these cases is that the label “search engine” is not a talismanic term that serves as an on-off switch as to fair use. Rather, these cases teach the importance of considering the details and function of a website’s operation in making a fair use determination. We now examine Digs with those lessons in mind.

c. Application of Fair Use Principles

As noted, the first factor assesses the character of the use, including whether it is commercial in nature, and, critically, whether it is “transformative.” There is no dispute that Zillow’s use is for commercial purposes, a factor we cannot ignore. To determine if that use is transformative, we consider whether and to what extent it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message[.]” *Campbell*, 510 U.S. at 579. Though we agree that Digs is a type of search engine because it offers searchable functionality, it is qualitatively different than Google and other open-universe search engines, as well as different than the Google Books search engine.

Most simply, a search engine is a software program that enables information retrieval by helping users find information through the use of keyword queries. But not all search engines are created equal. The search engines commonly used for day-to-day research are internet-wide search engines, like Google, Yahoo, or Bing. These search engines are programs powered by algorithms that search or “crawl” the web. A search engine like Google then indexes websites, stores them on a database, and runs users’ search queries against it. Search results are typically a mix of images and text, which include hyperlinks to sources of that content elsewhere on the web. *Amazon*, 508 F.3d at 1155.

Unlike the internet-wide search engines considered in *Amazon* and *Kelly*, Digs is a closed-universe search engine that does not “crawl” the web. Users can run searches on the “searchable set” of images within Digs’ walled garden, which includes VHT photos. The search results do not direct users to the original sources of the photos, such as VHT’s website. Rather, they link to other pages within Zillow’s website and, in some cases, to third-party merchants that sell items similar to those featured in the photo.

That Digs makes these images searchable does not fundamentally change their original purpose when produced by VHT: to artfully depict rooms and properties. Additionally, Digs displays the entire VHT image, not merely a thumbnail. Unlike in *Amazon*, the new image does not serve a “different function” than the old one. *Amazon*, 508 F.3d at 1165. Zillow’s use preserves the photos’ “inherent character.” *Monge*, 688 F.3d at 1176. And Zillow “simply supersed[es] [VHT’s]

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9. The Google Books search engine also featured millions of public domain texts. For obvious reasons, fair use was not at issue with those works.

Comparing Digs to the Google Books search engine further drives home this analysis. We agree with the Second Circuit’s observation that the copyright dispute over the Google Books search engine “tests the boundaries of fair use.” Authors Guild, 804 F.3d at 206. We conclude that Digs goes one step further—and crosses the line.

Like Digs, the Google Books search engine operates on a closed database comprised of complete digital copies of original works. Id. at 217. But the similarities end there. The Google Books project makes it possible to search books for “identifying information instantaneously supplied [that] would otherwise not be obtainable in lifetimes of searching.” Id. at 209. With this broad purpose in mind, the court rightfully observed that this system “augments public knowledge.” Id. at 207. This rationale bears no comparison to Digs.

Nor is the limited transformation present on Digs remotely comparable to the unprecedented text mining, word pattern, frequency of use, and other statistical analyses made possible for the first time by Google Books. Google Books search results provide “[a] brief description of each book, entitled ‘About the Book,’” as well as, for some books, links for borrowing or purchasing the book. Id. at 209. Significantly, a Google Books search produces only a “snippet” of the book, and sometimes it “disables snippet view entirely.” Id. at 210. At the request of a rights holder, Google “will exclude any book altogether from snippet view.” Id.

These features, in conjunction with other creative aspects of Google Books, result in a categorically more transformative use than Zillow’s simple tagging and query system that displays full-size copyrighted images serving the same purpose as the originals, with no option to opt out of the display, and with few, if any, transformative qualities. Any transformation by Zillow pales in comparison to the uses upholding in prior search engine cases. Such use also does nothing to further the use of copyrighted works for the socially valuable purposes identified in the Copyright Act itself, like “criticism, comment, news reporting, teaching … , scholarship, or research.” 17 U.S.C. § 107; see also 4 NIMMER ON COPYRIGHT § 13.05[A]. The lack of transformation is especially significant because, as Kelly teaches, “[t]he more transformative the new work, the less important the other factors, including commercialism, become.” 336 F.3d at 818 (citing Campbell, 510 U.S. at 579). If, as the Second Circuit suggested, Google’s use “tests the boundaries of fair use,” Zillow’s efforts push Digs into the outer space of fair use. Authors Guild, 804 F.3d at 206. So while Google Books may inch across the boundary of fair use, Zillow’s use does not approach the line.

Our decisions in Amazon and Kelly provide a roadmap for analyzing the second factor, which focuses on the nature of the copyrighted work. In those cases, we held that photographers’ images are creative, especially when they are created for public viewing. Amazon, 508 F.3d at 1167; Kelly, 336 F.3d at 820. “Works that are creative in nature are ‘closer to the core of intended copyright protection’ than are more fact-based works.” Napster, 239 F.3d at 1016 (quoting Campbell, 510 U.S. at 586).

So too here. VHT’s photos are aesthetically and creatively shot and edited by professional photographers. That Zillow’s curators select the most creative photos for the Digs searchable set underscores the creative nature of the works. But, as the district court properly noted, this factor operates “with less force” in favor of VHT because the photos had already been published on the Listing Platform. See Kelly, 336 F.3d at 820 (“The fact that a work is published or unpublished also is a critical element of its nature. Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.”). Ultimately, this factor only slightly favors VHT, further cutting against finding fair use.

The third factor evaluates the amount and substantiality of the copyrighted work that was used. “[C]opying an entire work militates against a finding of fair use.” Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000) (quotation and citation omitted). However, this analysis is informed by the “purpose of the copying.” Campbell, 510 U.S. at 586. In that spirit, we have found that copying full works qualifies as fair use where “[i]t was necessary … to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site.” Kelly, 336 F.3d at 821. In contrast to Amazon and Kelly, nothing justifies Zillow’s full copy display of VHT’s photos on Digs.

Finally, the fourth factor considers “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). To defeat a fair use defense, “one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.” Harper & Row Publishers, 471 U.S. at 568 (citation and quotation omitted).

Although VHT had licensed only a handful of photos for secondary uses (and none on a searchable database), that market was more than “hypothetical.” See Amazon, 508 F.3d at 1168. Significantly, VHT was “actively exploring” the market for licensing its photos to home design websites like Digs—including with Zillow itself. This factor favors VHT.

Taken together, the nature of Zillow’s use, when integrated with the four factors, cuts against finding fair use by Zillow. We affirm the district court’s grant of summary judgment to VHT with respect to fair use.

II. SECONDARY INFRINGEMENT—DIGS

Turning to VHT’s claim for secondary infringement, the district court correctly concluded that Zillow did not second-
arily infringe VHT’s exclusive rights in the 28,125 photos used on Digs, aside from 114 images created on Digs after VHT specifically identified them, which are not on appeal. As noted before with regard to the district court’s ruling on direct infringement, “we apply the same standard used by the district court in evaluating the jury’s verdict” and uphold the verdict unless “the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict.” Wallace, 479 F.3d at 624; Fed. R. Civ. P. 50(a). The jury’s verdict here did not meet this standard. We affirm the district court’s grant of Zillow’s motion for judgment notwithstanding the verdict with respect to secondary infringement, both contributory and vicarious infringement.

A. Contributory Liability

Contributory liability requires that a party “(1) has knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces that infringement.” Perfect 10, Inc. v. Visa Int’l Serv., Ass’n, 494 F.3d 788, 795 (9th Cir. 2007). Zillow’s actions do not satisfy the second prong—material contribution or inducement—so we do not address the first prong. See Giganews, 847 F.3d at 671.

In Giganews, we outlined the means of material contribution to infringement:

In the online context, … a “computer system operator” is liable under a material contribution theory of infringement “if it has actual knowledge that specific infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.”

Id. at 671 (quoting Amazon, 508 F.3d at 1172); see also Ellison v. Robertson, 357 F.3d 1072, 1078 (9th Cir. 2004) (applying this standard in the online context); Napster, 239 F.3d at 1022 (same); Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (same). There is insufficient evidence to support the contributory infringement verdict under the “simple measures” standard.

VHT’s position that “the jury could have reasonably decided that Zillow in fact had the means to identify and remove” the allegedly infringing images that VHT identified by property address, as opposed to their website designation or Uniform Resource Locator (“URL”), fails. Zillow testified throughout trial that, in order to systematically or swiftly take down a large number of photos, it required the Zillow Image ID—a number that is in the URL for each image. This stands to reason, because “Zillow receives multiple copies of the same photograph, depicting the same property, with the same listing agent, from different feeds.” Merely identifying the physical property address in no way identified the proper feed or the correct photo. Thus, Zillow did not have appropriately “specific” information necessary to take “simple measures” to remedy the violation.

VHT’s argument that Zillow is liable for failing to ask for the URLs of the allegedly infringing photos also fails. Asking for the URLs was not Zillow’s duty under the contributory liability standard: Zillow must have “actual knowledge that specific infringing material is available using its system.” Amazon, 508 F.3d at 1172 (citation and quotation omitted). Zillow first reasonably asked to see the licenses between VHT and the feed providers; otherwise, Zillow could not assess ownership and rights in the undefined images. That Zillow did not proactively request a list of URLs before VHT filed suit does not make Zillow contributorily liable.

Additionally, Zillow’s failure to systematically use watermarking technology does not show there was a “simple measure” available that it failed to use. Even assuming there were “reasonable and feasible means” for Zillow to employ watermark detection technology, in practice VHT rarely watermarked its photos. See Giganews, 847 F.3d at 672 (citation and quotation omitted).

Nor did Zillow induce infringement. Inducement liability requires evidence of “active steps … taken to encourage direct infringement.” Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005) (citation and quotation omitted). Evidence of active steps includes “advertising an infringing use or instructing how to engage in an infringing use,” because such evidence “show[s] an affirmative intent that the product be used to infringe.” Id.; see also Columbia Pictures Industries, Inc. v. Fung, 710 F.3d 1020, 1032 (9th Cir. 2013) (inducement liability requires “an object of promoting [the product’s] use to infringe copyright”). The “improper object” of infringement “must be plain and must be affirmatively communicated through words or actions[.]” Fung, 710 F.3d at 1034.

In view of the evidence, “no reasonable juror could conclude [Zillow] distributed its product with the object of promoting its use to infringe copyright.” Giganews, 847 F.3d at 672 (quotation and citation omitted). For example, Zillow’s generally applicable tools and messages for users to save more photos from the Listing Platform to Digs does not “promote[] the use of [Digs] specifically to infringe copyrights.” Amazon, 508 F.3d at 1170 n.11. Nor does evidence that Zillow sometimes makes mistakes about the display rights in a feed plainly communicate an improper object of infringement. Zillow corrects these inadvertent errors when it learns of them. Because a “failure to take affirmative steps to prevent infringement” alone cannot trigger inducement liability, the inducement claim is a particularly poor fit for Zillow’s real estate and home design websites, which have “substantial noninfringing uses.” Grokster, 545 U.S. at 939 n.12.

B. Vicarious Liability

Neither does the vicarious liability theory fit the Zillow platform. To prevail on a vicarious liability claim, “[VHT]
must prove ‘[Zillow] has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.’” Giganews, 847 F.3d at 673 (quoting Visa, 494 F.3d at 802). The first element requires “both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” Amazon, 508 F.3d at 1173. VHT’s vicarious infringement argument fails because, as the district court found, “Zillow ‘lack[ed] the practical ability to police’ its users’ infringing conduct” on Digs.

As discussed with respect to contributory infringement, there was insufficient evidence that Zillow had the technical ability to screen out or identify infringing VHT photos among the many photos that users saved or uploaded daily to Digs. Regardless, such allegations do not fall under the vicarious liability rubric: Zillow’s “failure to change its operations to avoid assisting [users] to distribute … infringing content … is not the same as declining to exercise a right and ability to make [third parties] stop their direct infringement.” Amazon, 508 F.3d at 1175.

Our conclusion is consistent with earlier dicta that “the vicarious liability standard applied in Napster can be met by merely having the general ability to locate infringing material and terminate users’ access.” UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1030 (9th Cir. 2013) (emphasis added). Once VHT photos were uploaded to the Listing Platform with appropriate certification of rights, ferreting out claimed infringement through use on Digs was beyond hunting for a needle in a haystack. As the district court concluded, “the trial record lacks substantial evidence of a practical ability to limit direct infringement for the same reasons it lacks substantial evidence of simple measures to remove infringing material.” And linking a claimed infringement to a feed provider was even more of an impossibility.

We affirm the district court’s judgment notwithstanding the verdict concluding that substantial evidence did not support the claim that Zillow secondarily infringed VHT’s exclusive rights in its photos.

III. DAMAGES

A. Compilation

The size of the damages award hinges on whether VHT’s photos used on Digs are part of a “compilation” or if they are individual photos. This distinction makes a difference. If the VHT photo database is a “compilation,” and therefore one “work” for the purposes of the Copyright Act, then VHT would be limited to a single award of statutory damages for Zillow’s use of thousands of photos on Digs. 17 U.S.C. § 504(c)(1). But if the database is not a compilation, then VHT could seek damages for each photo that Zillow used.

In lieu of actual damages, a copyright holder may elect to receive statutory damages under the Copyright Act. 17 U.S.C. § 504(c)(1). VHT did so. The Act provides for “an award of statutory damages for all infringements involved in the action, with respect to any one work … in a sum of not less than $750 or more than $30,000.” Id. This provision ties statutory damages to the term “work,” which is undefined, except in a circular manner: copyright law protects “original works of authorship.” 17 U.S.C. § 102(a). Fortunately, there is a definition of compilation: “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101. For purposes of statutory damages, “all the parts of a compilation … constitute one work.” 17 U.S.C. § 504(c)(1). “The question of whether a work constitutes a ‘compilation’ for the purposes of statutory damages pursuant to Section 504(c)(1) of the Copyright Act is a mixed question of law and fact.” Bryant v. Media Right Prods., Inc., 603 F.3d 135, 140 (2d Cir. 2010).

Whether various VHT photo collections comprise one or more compilations is a threshold damages question. Before trial, Zillow asked for a legal determination on the compilation issue. That motion was denied. However, the district court did not make an explicit determination about compilation and the specifics of compilation were not put before the jury. In fairness to the district court, we might infer from the transcript that there was an implicit determination as to whether VHT’s photos are part of a compilation, but we are left in doubt. Instead, the jury was instructed that “[e]ach VHT Photo that has independent economic value constitutes a separate work.” On the verdict form, the jury was asked which “photographs have independent economic value.”

The notion of “independent economic value” derives not from the statute, but from case law. In the Ninth Circuit, the question of whether something—like a photo, television episode, or so forth—has “independent economic value” informs our analysis of whether the photo or episode is a work, though it is not a dispositive factor. See Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1193 (9th Cir. 2001). But consideration of the independent economic value factor does not answer the question whether something is a compilation. That question remains unanswered here.

On appeal, the parties have polar opposite views on whether there was a compilation (Zillow’s position) or whether each photo is entitled to a separate damages award (VHT’s position). VHT registered thousands of photos as compilations. But the Copyright Office warns that such a registration “may” limit the copyright holder “to claim only one award of statutory damages in an infringement action, even if the defendant infringed all of the component works covered by the registration.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1104.5 (Sept. 2017), https://www.copyright.gov/comp3/docs/compendium.pdf. Though the registration label is not controlling, it may be considered by the court when assessing whether a work is a compilation. See Yellow Pages Photos, Inc. v. Ziplocal, LP, 795 F.3d 1255, 1277 (11th Cir. 2015) (“Although the manner of copyright registration is not dispositive of the works issue, this Court has previously considered it to be at
least a relevant factor.”). Ultimately, what counts is the statutory definition.

Because there were at least ten different copyright registrations, thousands of photos, and no explicit determination on compilation, we decline to sort out the compilation issue on appeal. We remand to the district court for further proceedings as to whether the VHT photos remaining at issue were a compilation.

B. Willfulness

The jury found that Zillow willfully infringed exclusive rights to 3,373 searchable VHT photos that were eligible for statutory damages. The district court largely upheld the willfulness finding in its post-trial motions order. However, the court granted Zillow judgment notwithstanding the verdict on 673 images that were not displayed, so the court’s final willfulness judgment applied to 2,700 searchable photos on Digs.

To uphold a jury’s willfulness finding, there must be substantial evidence “(1) that the [the infringing party] was actually aware of the infringing activity, or (2) that the [infringing party’s] actions were the result of reckless disregard for, or willful blindness to, the copyright holder’s rights.” UniColors, 853 F.3d at 991 (citation and quotation omitted). Under the second prong, willful blindness requires that the infringing party “(1) subjectively believed that infringement was likely occurring on their networks and that they (2) took deliberate actions to avoid learning about the infringement.” Luvdarts, LLC v. AT&T Mobility, LLC, 710 F.3d 1068, 1073 (9th Cir. 2013). Reckless disregard can be demonstrated, for example, when a party “refus[es], as a matter of policy, to even investigate or attempt to determine whether particular [photos] are subject to copyright protections.” UniColors, 853 F.3d at 992. A finding of willfulness has significant financial consequences—the jury may increase damages up to $150,000 per violation. See 17 U.S.C. § 504(c)(2).

As noted with respect to infringement, we do not take lightly the decision to reverse a jury verdict, nor do we cavalierly set aside the district court’s thoughtful analysis. But here, we are compelled to disagree with both because substantial evidence does not support willfulness as to the 2,700 photos.

The test for willfulness is in the alternative: either actual notice or recklessness shown by reckless disregard or turning a blind eye to infringement. We turn first to actual notice. That VHT provided Zillow with minimal notice of infringement does not itself establish that any subsequent infringement was willful. Rather, “[c]ontinued use of a work even after one has been notified of his or her alleged infringement does not constitute willfulness so long as one believes reasonably, and in good faith, that he or she is not infringing.” Evergreen Safety Council v. RSA Network Inc., 697 F.3d 1221, 1228 (9th Cir. 2012); see also Danjaq LLC v. Sony Corp., 263 F.3d 942, 959 (9th Cir. 2001) (“It would seem to follow that one who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not ‘willful’ for these purposes.”) (quoting 4 Nimmer on Copyright § 14.04[B][3]).

Such is the case here. Zillow’s agreements with its feed providers grant it an express license to use, copy, distribute, publicly display, and create derivative works for each photo, and the agreements include unambiguous representations by the feed providers that they have the authority to assign such rights. Zillow developed procedures to identify ex ante the scope of its license for each uploaded photo and employed automated protocols to manage the use of each photo consistent with its evergreen or decidual designation. At no point during their year of communications prior to issuance of the notice letter did VHT raise the specter of infringement. Notably, VHT’s eventual notice was minimal: one letter with a list of allegedly infringing photos, designated by residential street address, not web address.

The notion that Zillow failed to take appropriate responsive measures after receiving this notice is belied by the record. Zillow immediately requested information to confirm VHT’s copyright ownership and cross-reference the photos with licensing information. VHT was not forthcoming with that information. Rather, in response, VHT offered merely an unsigned form contract. Instead of providing helpful information, VHT then filed suit. Given the limited information provided by VHT, Zillow could not reasonably be expected to have promptly and unilaterally removed each flagged photo. As the district court noted, VHT failed to demonstrate there were simple measures available for the removal of infringing photos or that Zillow had any “practical ability to independently identify infringing images.”

Thus, we are compelled to conclude that substantial evidence does not show Zillow was “actually aware” of its infringing activity. See Evergreen Safety Council, 697 F.3d at 1228. Zillow’s belief that feed providers had properly licensed its uses and that its system effectively respected those rights was reasonable. And, as the district court observed, “[t]he record suggests no reason to conclude that Zillow maintained that position in bad faith, and Zillow’s non-infringement contention proved accurate as to most of the images at issue in this lawsuit.”

We reach the same conclusion as to whether Zillow recklessly disregarded or willfully blinded itself to its infringement. In reaching an opposite conclusion, the district court observed that Zillow did not “perform[]” further investigation into the rights each [feed provider] possesses,” nor did it “[t]ake[]” responsive measures to obtain further information” after VHT provided the minimal notice of potential infringement. That conclusion is at odds with the evidence, for the reasons outlined above.

VHT’s argument that Zillow, a sophisticated business with a robust legal team, should have known that its feed provider license agreements were invalid is unavailing. VHT argues that when Zillow saw the non-exclusive grant of rights in VHT’s unsigned form contract, showing that the feed pro-
viders did not have a right to sublicense, Zillow should have known the licenses were invalid. Despite requests for such information, Zillow did not have access to VHT’s executed licenses with the feed providers who furnished VHT’s photos to Zillow. Access to a blank form contract (that the district court earlier found ambiguous as a matter of law) is not enough. We conclude that substantial evidence does not show Zillow was “reckless or willfully blind” as to its infringement. We reverse the district court and vacate the jury’s finding of willful infringement.

IV. CONCLUSION

We affirm the district court’s summary judgment in favor of Zillow on direct infringement of the Listing Platform photos. With respect to direct liability on the Digs photos, we affirm the district court’s grant of judgment notwithstanding the verdict on the 22,109 non-displayed photos and the 2,093 displayed but not searchable photos. We uphold summary judgment in favor of VHT on the 3,921 displayed, searchable photos.

We affirm the district court’s judgment notwithstanding the verdict on secondary liability, both contributory and vicarious, on the Digs photos.

We reverse the district court’s denial of judgment notwithstanding the verdict on the issue of willfulness and vacate the jury’s finding on willfulness.

We remand consideration of the compilation issue to the district court.

Affirmed in part, reversed in part and remanded. Each party shall pay its own costs on appeal.

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OPINION

OWENS, Circuit Judge:

Defendant Kyle Korte appeals from his convictions for bank robbery. During his crime spree, Korte was on parole and had consented to warrantless, suspicionless searches of his person, residence, and any property under his control. Relying on this parole condition, officers placed a Global Positioning System (“GPS”) device on his car and later searched its trunk. Officers also obtained Korte’s historical cell site location information (“CSLI”) by court order. On appeal, Korte primarily challenges the district court’s denial of his suppression motions as to each of these searches. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In a world of cybercrime and identity theft, Korte stole money the old-fashioned way — he robbed banks. After serving time in state prison for bank robbery, Korte was paroled
in August 2016. As a parolee in California, Korte was “subject to search or seizure … at any time of the day or night, with or without a search warrant or with or without cause.” CAL. PENAL CODE § 3067(b)(3); see also id. § 3067(a). On October 25, 2016, Korte acknowledged his parole conditions, including that he was now subject to searches of “[y] ou, your residence, and any property under your control.”

In October 2016, the Los Angeles Sheriff’s Department (“LASD”) began investigating a series of bank robberies. The first robbery took place on October 7. A masked robber entered a bank and demanded “all your hundreds.” The frightened teller, protected by bulletproof glass, activated the silent alarm and retreated to a back office. The robber left with no money. On October 12, the masked robber targeted another bank, this time brandishing a toy gun. He was more successful this go-around, escaping with $1,600. He then hit two more banks on October 27. Again displaying the toy gun, the robber pocketed $2,200 and $7,000. In total, the masked robber stole less than $11,000 — not a Neil McCauley heist by any means.

Working with LASD, the Federal Bureau of Investigation (“FBI”) began to suspect that Korte was the masked robber. Surveillance video from one of the robberies showed a car registered to the address that Korte provided to his parole officer. An LASD officer who saw video of the masked robber also reported that the individual resembled Korte, who the officer knew was on parole for bank robbery.

On November 4, 2016, without a warrant or Korte’s consent, LASD placed a GPS tracking device on Korte’s car and periodically monitored the vehicle’s movements over the next six days. That same day, the Government obtained a court order under the Stored Communications Act (“SCA”), 18 U.S.C. § 2703(d), to acquire Korte’s CSLI. This information placed Korte’s cell phone near three of the four banks at the time of the respective robberies.

On November 10, 2016, LASD learned that the FBI had obtained an arrest warrant for Korte. Officers followed Korte as he drove from his home to a bank and parked nearby, seeming to surveil his next target. An officer saw Korte open the car’s trunk and place something inside. Shortly thereafter, they arrested Korte and searched the car. The officers’ search of the trunk revealed the toy gun used during the three armed robberies and the shirt Korte had been wearing while casing the bank just prior to his arrest.

A grand jury indicted Korte for one count of attempted bank robbery in violation of 18 U.S.C. § 2113(a) and three counts of bank robbery in violation of 18 U.S.C. § 2113(a), (d). Korte pled not guilty and moved to suppress (1) the evidence found in his car’s trunk, (2) the information derived from the GPS tracker on his car, and (3) his CSLI. The district court denied all three suppression motions. The court reasoned that Korte’s parole status permitted the warrantless search of the trunk and placement of the GPS tracker on his car. As for the CSLI, it held that even if the acquisition of this information violated Korte’s Fourth Amendment rights, see Carpenter v. United States, 138 S. Ct. 2206 (2018), the good-faith exception clearly applied based on the case law at that time.

Korte went to trial. As to Count 1 — the unsuccessful robbery — the bank teller testified that even though bulletproof glass separated her from the robber and she saw no weapon, she was nevertheless “[k]ind of panicked,” “[s]hocked,” and “[s]cared.” Korte filed a motion for a judgment of acquittal, under Federal Rule of Criminal Procedure 29, focusing on Count 1. The district court rejected his argument that the Government failed to prove the element of “force and violence, or by intimidation,” as 18 U.S.C. § 2113(a) requires. Citing the teller’s “testimony with regard to a mask and the demand,” the court found sufficient evidence of “intimidation” to send the matter to the jury.

The jury returned a guilty verdict as to all four counts. Korte was sentenced to 210 months in prison.

II. DISCUSSION

We review de novo the denial of Korte’s suppression motions. See United States v. Zapien, 861 F.3d 971, 974 (9th Cir. 2017) (per curiam). We address each search — of his car’s trunk, the GPS tracker on his car, and the acquisition of his CSLI — in turn.

A. Search of the Trunk

We first examine whether Korte’s parole-search condition authorized the warrantless search of his car’s trunk. See United States v. Cervantes, 859 F.3d 1175, 1183 (9th Cir. 2017) (“A search of a parolee that complies with the terms of a valid search condition will usually be deemed reasonable under the Fourth Amendment.”).

California Penal Code section 3067(b)(3) provides that every parolee “is subject to search or seizure … at any time of the day or night, with or without a search warrant or with or without cause.” In Samson v. California, 547 U.S. 843, 846 (2006), the United States Supreme Court reviewed California’s parole-search condition to determine “whether a suspicionless search, conducted under the authority of [section 3067], violates the Constitution.” The Court first reasoned that “parole is more akin to imprisonment.” Id. at 850. Because parolees “have severely diminished expectations of privacy by virtue of their status alone” — even less than probationers — and because “[t]he State’s interests” in supervising parolees and reducing recidivism “are substantial,” the Court upheld California’s parole-search condition.1 Id. at 852–53.

1. There are two limitations on this condition. First, the officer conducting the search must know at the time that the individual is currently on parole. See Moreno v. Baca, 431 F.3d 633, 641 (9th Cir. 2005). Second, the search cannot be “arbitrary, capricious, or harassing.” See CAL. PENAL CODE § 3067(d) (“It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.”); see also Samson, 547 U.S. at 856 (“The concern that California’s suspicionless search system gives officers unbridled discretion to conduct searches … is belied by California’s prohibition on ‘arbitrary, capricious or harassing’ searches.”)
Korte does not — and cannot — argue that officers unlawfully searched his car. He admits that he rented the car and referred to it as “my car.” As “property under [his] control,” California’s parole-search condition authorized the warrantless search of it. See, e.g., United States v. Caseres, 533 F.3d 1064, 1075–76 (9th Cir. 2008) (explaining that a search of the parolee’s car would have been lawful if the officer had known that the defendant was on parole).

Yet, Korte contends that a lawful parole search of his car does not extend to the trunk because the trunk is not similarly “property under [his] control.” We reject his narrow interpretation of this condition. Property is subject to search when a parolee “exhibit[s] a sufficiently strong connection to [the property in question] to demonstrate ‘control’ over it.” United States v. Grandberry, 730 F.3d 968, 980 (9th Cir. 2013) (defining “property under [a parolee’s] control”); see also Cervantes, 859 F.3d at 1183 (explaining that having a key to and belongings inside a hotel room sufficiently demonstrate control, even if the room is co-occupied). Consistent with our understanding of the condition, the Supreme Court of California explained that a parolee controls property based on “the nexus between the parolee and the area or items searched,” including the “nature of that area or item” and “how close and accessible the area or item is to the parolee.” People v. Schmitz, 288 P.3d 1259, 1270 (Cal. 2012) (holding that a parolee, who is only a passenger in a third-party’s vehicle, is in control of areas within his reach in the passenger compartment).

Korte’s uncontested control over the car was sufficient to permit a warrantless search of its trunk. In any event, his conduct also illustrated a sufficiently close nexus to the trunk itself. Officers observed him putting things inside the trunk.

Permitting a warrantless search of the trunk of a parolee’s car is also consistent with broader Fourth Amendment precedent. Generally, a lawful search of a fixed space or premise extends to its entire area, whether or not that requires opening a confined space: “[N]ice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.” United States v. Ross, 456 U.S. 798, 821 (1982). This reasoning applies to a car’s trunk. See, e.g., id. at 825 (“If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”); United States v. Ewing, 638 F.3d 1226, 1231 (9th Cir. 2011) (“[I]f a law enforcement officer has probable cause to search a vehicle, that probable cause extends to all contents in the vehicle that could be connected to the suspected activity.”); United States v. McWeeney, 454 F.3d 1030, 1035 (9th Cir. 2006) (holding that consent to search a defendant’s car extends to the trunk).

We also note that Korte’s proposed distinction between a car and trunk was already rejected by the Supreme Court of California in the context of a probationer — who has more Fourth Amendment protection than Korte as a parolee. See Lilienthal, 587 P.2d at 711 (“We conclude that the officers were justified in searching defendant’s car trunk pursuant to defendant’s consent to warrantless searches as a condition of his probation.”).

As property under his control, Korte fails to explain how searching his car’s trunk would offend the Fourth Amendment when a warrantless search of his home — the apex of constitutionally protected places — would not. See United States v. Lopez, 474 F.3d 1208, 1213–14 (9th Cir. 2007) (upholding the warrantless search of a parolee’s home), overruled on other grounds by United States v. King, 687 F.3d 1189 (9th Cir. 2012) (en banc) (per curiam); see also Florida v. Jardines, 569 U.S. 1, 6 (2013) (“But when it comes to the Fourth Amendment, the home is first among equals.”). The district court summed it up well: “If an individual’s residence falls within the scope of an appropriate search under the parolee provisions, how would a trunk not?”

Accordingly, the district court correctly held that the search of Korte’s trunk was a lawful parole search.

B. Placement and Use of the GPS Tracker

We next decide whether Korte’s parole-search condition permitted the warrantless placement of a GPS device on his car and the subsequent surveillance of his car’s movements.

Installing a GPS tracker on a car constitutes a search, typically requiring a warrant. See United States v. Jones, 565 U.S. 400, 404 (2012). The application of this principle to a parolee’s car, however, is less clear. While the parties agree that placing the device on Korte’s car was a search under the Fourth Amendment, they disagree on whether doing so without a warrant offends the Constitution. In light of Samson’s strong pronouncement that parolees in California have very limited Fourth Amendment rights, 547 U.S. at 851–52, we agree with the district court that this was a lawful parole search.

Our decision in United States v. Johnson, 875 F.3d 1265 (9th Cir. 2017), instructs us not to necessarily apply a newly established Fourth Amendment protection to parolees. In Riley v. California, 573 U.S. 373, 386 (2014), the United States Supreme Court held that the warrantless search of an arrestee’s cell phone was unlawful. The Court emphasized the significant privacy intrusion that arose when searching a person’s cell phone. Id. at 393; see also Johnson, 875 F.3d at 1274 (noting that Riley was premised on “privacy interests implicated in cell phone searches [being] particularly acute”). Cell phones, the Supreme Court said, are now “a pervasive and insistent part of daily life” that “place vast quantities of

(citations omitted).

Here, it is undisputed that the officers knew that Korte was on parole, and there is no evidence the officers engaged in an arbitrary, capricious, or harassing search. Nor does Korte contend he was unaware of the parole-search condition. See People v. Lilienthal, 587 P.2d 706, 711 (Cal. 1978) (“The condition itself provides general notice to a defendant that he or his belongings may be subjected to warrantless searches.”).
personal information literally in the hands of individuals.” Riley, 573 U.S. at 385–86. Because cell phones “collect[] in one place many distinct types of information … that reveal much more in combination than any isolated record,” searching a cell phone would give law enforcement the unparalleled ability to reconstruct “[t]he sum of an individual’s private life.” Id. at 394.

Despite the Court’s cautionary words, we held that Riley did not apply to parolees. Johnson, 875 F.3d at 1275; but see United States v. Lara, 815 F.3d 605, 612 (9th Cir. 2016) (applying Riley to the warrantless search of a probationer’s cell phone). Rather, noting that “the balance of privacy interests and factual circumstances in this context are different,” we permitted the warrantless search of a parolee’s cell phone. Johnson, 875 F.3d at 1273.

In light of our ruling in Johnson, we are hard-put to say that the warrantless placement of a GPS tracker on a parolee’s car is impermissible. If an officer can conduct a warrantless search of a parolee’s cell phone — an object that is “[t]he sum of an individual’s private life,” Riley, 573 U.S. at 394 — placing a GPS device on a parolee’s car cannot logically demand more constitutional protection. Although a GPS tracker may create a summary of a parolee’s public movements, it offers none of the “vast quantities of personal information” that a cell phone does. Id. at 386.

The State’s interest in supervising parolees is also particularly strong here. See Samson, 547 U.S. at 853 (referencing the State’s “substantial” interests in “reducing recidivism,” “promoting reintegration,” and deterring future criminal conduct). Tracking a parolee’s movements by car can be a critical tool for monitoring this group. Its value is well illustrated here: Korte returned to a life of crime just months after his release from prison, but LASD was able to investigate Korte and prevent other armed robberies by tracking his movements. In Johnson, we explained that requiring officers to obtain a warrant before searching a parolee’s cell phone “would often undermine the state’s ability to supervise effectively.” 875 F.3d at 1274. We have similar concerns with requiring officers to obtain a warrant before tracking a parolee’s vehicular movements.

Lastly, we notice that our decision aligns with another court’s interpretation of California’s parole-search condition. In People v. Zichwic, 114 Cal. Rptr. 2d 733, 738–39 (Ct. App. 2001), the California Court of Appeal considered the warrantless placement of an electronic monitoring device on a parolee’s car. It held that even “assum[ing] that attaching an electronic tracking device to the undercarriage of defendant’s truck constituted a search, it was authorized by defendant’s parole search condition.” Id. at 740. Granted, Zichwic differs in that it considered the use of a beeper, id. at 738, rather than a GPS device — investigatory methods treated differently under the Fourth Amendment. Compare United States v. Karo, 468 U.S. 705, 713 (1984) (“[N]o Fourth Amendment interest … was infringed by the installation of the beeper.”), with Jones, 565 U.S. at 409 n.6 (noting that GPS tracking is a more intrusive law enforcement practice than a beeper).

Nonetheless, we believe that Zichwic is, at minimum, informative. Although it was decided almost two decades before Jones, its holding was unaffected because it had assumed that placing a tracking device on a car constituted a search. Zichwic, 114 Cal. Rptr. 2d at 740. The Supreme Court of California has not since interpreted the parole-search condition differently. And, while a beeper and GPS device might differ in their tracking capabilities, the court in Zichwic at least concluded, as we do, that the State’s need for electronically monitoring a parolee’s movements outweighs the privacy interests at issue. Id. at 739–40.

We do not disregard the importance of Jones. We acknowledge that “GPS monitoring generates a precise, comprehensive record of a person’s public movements.” Jones, 565 U.S. at 415 (Sotomayor, J., concurring). However, in following precedent distinguishing Fourth Amendment rights in the parole context, we hold that the warrantless placement of a GPS tracker on Korte’s car does not violate the Fourth Amendment.

C. Warrantless CSLI Acquisition

Finally, we consider whether the district court should have excluded the CSLI evidence, acquired without a warrant, as a Fourth Amendment violation. The Supreme Court granted certiorari to resolve the constitutionality of warrantless CSLI acquisition before the district court could rule on Korte’s suppression motion. Carpenter v. United States, 137 S. Ct. 2211 (2017) (mem.). As such, the district court did not address the constitutional issue before it, but denied Korte’s motion under the Fourth Amendment’s good-faith exception. We, therefore, consider only a narrow issue: whether the good-faith exception applies to the warrantless acquisition of a defendant’s CSLI before Carpenter v. United States, 138 S. Ct. 2206 (2018).2

In Carpenter, the Supreme Court summarized CSLI and how this technology permits almost real-time compilation of a person’s location during any given period:

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices … tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone’s features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI).

Id. at 2211. The Court wrestled with how to apply this “new phenomenon” under the Fourth Amendment, id. at 2216, noting that it “does not fit neatly under existing precedents,” id. at

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2. We take no stance on the constitutionality of acquiring a parolee’s CSLI without a warrant.
It ultimately concluded, however, that the Government must obtain a warrant to access a person’s CSLI from a wireless carrier, and could no longer rely on a court order under § 2703(d) of the SCA. *Id.* at 2221.

Although the Government obtained Korte’s CSLI without a warrant, he is not automatically entitled to relief. See *United States v. Leon*, 468 U.S. 897, 906–07 (1984) (explaining that whether there was a Fourth Amendment violation and “[w]hether the exclusionary sanction is appropriately imposed” are separate questions). *Illinois v. Krull*, 480 U.S. 340, 342, 350 (1987), established an important exception to the exclusionary rule: Evidence obtained by the Government, acting in “objectively reasonable reliance upon a statute” that is “ultimately found to violate the Fourth Amendment,” does not require suppression.

Because we find the Government reasonably relied on the SCA when it obtained Korte’s CSLI, we affirm the district court’s application of the Fourth Amendment’s good-faith exception. See also *United States v. Camou*, 773 F.3d 932, 944 (9th Cir. 2014) (placing the burden on the government to prove it acted in good faith). Before *Carpenter*, the SCA authorized a government entity to request “a provider of electronic communication service … to disclose a record or other information pertaining to a subscriber to or a customer of such service.” 18 U.S.C. § 2703(c)(1). The statute explicitly authorized retrieval of these records by court order if the Government “offer[ed] specific and articulable facts showing that there are reasonable grounds to believe that … the records or other information sought, are relevant and material to an ongoing criminal investigation” — a more lenient standard than probable cause. *Id.* § 2703(d).

When the Government obtained Korte’s CSLI — before *Carpenter* was decided — acting by court order was still authorized. Moreover, we cannot say that the Government had any reason to doubt the SCA’s constitutionality, such that it may have been acting in bad faith. See *Krull*, 480 U.S. at 355 (“[T]he standard of reasonableness … is an objective one.”). CSLI remained a relatively novel form of evidence. And, although we had not yet commented on the constitutionality of warrantless CSLI acquisition, a number of our sister circuits had. All had affirmed the SCA’s constitutionality under the Fourth Amendment. See *United States v. Gilton*, No. 16-10109, slip op. at 20 (9th Cir. Mar. 4, 2019) (explaining that, at least as of 2012, “the prevailing belief” was “that CSLI data was not protected by the Fourth Amendment”); see also *United States v. Graham*, 824 F.3d 421, 424 (4th Cir. 2016) (en banc); *United States v. Carpenter*, 819 F.3d 880, 884 (6th Cir. 2016); *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (en banc); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Application of the U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t*, 620 F.3d 304, 313 (3d Cir. 2010).

As explained in *Krull*, it is hardly objectively unreasonable to rely on a then-lawful statute when courts were up-holding it or similar legislative schemes. 480 U.S. at 358–59. Officials should not be “expected to question the judgment of the legislature that passed the law,” particularly when confronted with the pattern of judicial holdings as existed here. *Id.* at 350. Any “defect in the [SCA],” therefore, “was not sufficiently obvious so as to render [the Government’s] reliance upon the statute objectively unreasonable.” *Id.* at 359. The Supreme Court’s own sharply divided opinion in *Carpenter* brings this point to bear. See 138 S. Ct. at 2217 (explaining that the CSLI issue presents “novel circumstances”); see also *id.* at 2223 (referring to the majority’s decision as a “stark departure from relevant Fourth Amendment precedents”) (Kennedy, J., dissenting).

Moreover, our application of *Krull* is anything but novel. Several other circuits have already invoked this good-faith exception when presented with similar facts. See *United States v. Goldstein*, 914 F.3d 200, 203–05 (3d Cir. 2019); *United States v. Curtis*, 901 F.3d 846, 848–49 (7th Cir. 2018); see also *United States v. Chambers*, No. 16-163-cr, 2018 WL 4523607, at *2 (2d Cir. Sept. 21, 2018) (explaining that “the authorities sought information from third parties by complying with the SCA” and “[r]eliance on a federal statute gives rise to a presumption of good faith” (citing *Krull*, 480 U.S. at 349)). Others have analyzed the issue similarly, although without directly invoking *Krull*. See *United States v. Joyner*, 899 F.3d 1199, 1205 (11th Cir. 2018) (per curiam) (noting that “the Government complied with the requirements of the SCA in obtaining the orders to compel cell site records” while it was still lawful); *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018) (refusing to apply the exclusionary rule because “investigators in this case reasonably relied on court orders and the [SCA] in obtaining the cell site records”). Similarly, we recently refused to exclude CSLI data obtained in good-faith reliance on a warrant, later deemed to be defective. *Gilton*, slip op. at 21.

Finally, we note that our decision accords with the exclusionary rule’s limited purpose to deter future Fourth Amendment violations, rather than remedy the rights of a single aggrieved party. See *United States v. Calandra*, 414 U.S. 338, 347–48 (1974); see also *Krull*, 480 U.S. at 347. For us to exclude CSLI, obtained in good faith based on a then-lawful legislative scheme, would do nothing to prevent future Fourth Amendment violations. See *Davis v. United States*, 564 U.S. 229, 236–37 (2011) (“The [exclusionary] rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.”). With the exclusionary rule as “our last resort, not our first impulse,” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), we hold that CSLI acquired pre-*Carpenter* is admissible — so long as the Government satisfied the SCA’s then-lawful requirements — under *Krull*’s good-faith exception.
III. CONCLUSION

For the reasons provided above, we affirm the district court’s denial of Korte’s suppression motions and his convictions for bank robbery.⁴

AFFIRMED.

D.W. NELSON, Circuit Judge, concurring:

I concur in both the reasoning and result—the good-faith exception saves the government’s conduct here. I write separately, however, because I am concerned with the ever “diminishing” reasonable expectation of privacy afforded to probationers and parolees, especially as it relates to their digital privacy.

In Samson v. California, the United States Supreme Court seemingly established a ceiling on a parolee’s expectation of privacy. 547 U.S. 843, 846 (2006). The Supreme Court, however, did not set a floor. Nor did it offer a limiting principle. It is not surprising, therefore, that in the decade or so since Samson, our Court has further diminished probationers’ and parolees’ expectations of privacy. See, e.g., United States v. Johnson, 875 F.3d 1265, 1275 (9th Cir. 2017) (holding that Riley’s prohibition on warrantless phone searches does not apply to parolees); United States v. Cervantes, 859 F.3d 1175, 1183 (9th Cir. 2017) (holding that a search of a parolee that complies with the terms of a valid search condition is usually reasonable); United States v. Grandberry, 730 F.3d 968, 980 (9th Cir. 2013) (defining the types of property under a parolee’s control that are searchable without a warrant); United States v. Lopez, 474 F.3d 1208, 1213–14 (9th Cir. 2007) (upholding the warrantless search of a parolee’s home).

Justice Stevens, in his Samson dissent, stated that the Supreme Court’s precedents did not support “a regime of suspicionless searches… untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.” Samson, 547 U.S. at 857 (Stevens, J., dissenting). He suggested an individualized suspicion requirement to prevent what he warned would be an “unprecedented curtailment of liberty.” Id. at 866. His words proved to be a prescient warning.

Our physical and digital spaces continue to merge with the creation of new technologies. The individual and societal benefits of these technologies come with increased risks—our devices and third parties store ever more deeply revealing and private information that is easily accessed by law enforcement. The Supreme Court recently reaffirmed that the “progress of science” should not come at the expense of Fourth Amendment protections. See Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (quoting Olmstead v. United States, 277 U.S. 438, 474 (1928)). I believe, therefore, it is time to revisit the degree of protection the Fourth Amendment affords probationers and parolees.

3. Korte also argues that his Count 1 conviction for attempted bank robbery under 18 U.S.C. § 2113(a) cannot stand because there was insufficient evidence of “intimidation.” Longstanding precedent forecloses this argument. Korte’s demand for money and use of a mask satisfies “intimidation” under § 2113(a). See, e.g., United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983) (“[T]he threats implicit in [defendant]’s written and verbal demands for money provide sufficient evidence of intimidation to support the jury’s verdict.”); United States v. Bingham, 628 F.2d 548, 549 (9th Cir. 1980) (“[E]xpress threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]… have never been held to be requirements for a § 2113(a) conviction.”).
ORDER

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Miller did not participate in the deliberations or vote in this case.

COUNSEL


Alex Kostin, Assistant Attorney General, Corrections Division; Robert W. Ferguson, Attorney General; Office of the Washington Attorney General, Olympia Washington; for Respondent-Appellee.

ORDER

We respectfully ask the Washington Supreme Court to answer the certified question presented below, pursuant to Revised Code of Washington (“RCW”) § 2.60.020, because we have concluded that a dispositive question of state law applies to the claim, and therefore “it is necessary to ascertain the local law of [Washington] state in order to dispose of [this] proceeding and the local law has not been clearly determined.”

This case involves a statutory tolling claim under 28 U.S.C. § 2244(d)(2). The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) sets a one-year statute of limitations for filing a federal petition for a writ of habeas corpus, 28 U.S.C. § 2244(d); see also Williams v. Filson, 908 F.3d 546, 557 (9th Cir. 2018). The limitations period shall run from the latest of “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).
The statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” Id. § 2244(d)(2). The definition of “pending” for the purposes of statutory tolling is a question of state law. See Carey v. Saffold, 536 U.S. 214, 219–20 (2012); Hemmerle v. Schriro, 495 F.3d 1069, 1077 (9th Cir. 2007).

The issue here is when Appellant’s personal restraint petition (“PRP”) proceeding was no longer “pending” under Washington state law for the purposes of calculating the statute of limitations applicable to Appellant’s federal habeas petition.

I

We summarize the material facts. Phongmanivan was found guilty of two counts of Washington Assault in the First Degree, RCW § 9A.36.011, with two firearm enhancements, after a jury trial in 2011. Phongmanivan was sentenced to 306 months.

Phongmanivan appealed his conviction. The Washington Court of Appeals affirmed the conviction and denied the motion for reconsideration. Phongmanivan petitioned the Washington Supreme Court for review, which the court denied on December 11, 2013. Phongmanivan did not file a petition for writ of certiorari with the Supreme Court of the United States within the ninety-day window.

Phongmanivan filed a PRP in the Washington Court of Appeals on February 4, 2015. The Washington Court of Appeals issued an order dismissing the PRP on its merits on May 4, 2015. Phongmanivan then filed a petition for review in the Washington Supreme Court, which the Commissioner of the Washington Supreme Court treated as a motion for discretionary review under Rule 16.14(c) of the Washington Rules of Appellate Procedure (“RAP”) and denied. Phongmanivan requested that the Washington Supreme Court vacate or modify the Commissioner’s ruling. The Washington Supreme Court denied Phongmanivan’s motion to modify in the PRP proceedings on February 10, 2016. The Washington Court of Appeals filed a certificate of finality on April 1, 2016. The Washington Supreme Court denied Phongmanivan’s motion to modify in the PRP proceedings on February 10, 2016. By the time Phongmanivan signed his federal habeas petition on April 9, 2016, the statute of limitations had run for a total of 388 days and therefore was untimely. The lower court denied Phongmanivan’s claim for equitable tolling and dismissed his habeas petition with prejudice.

II

Phongmanivan argues on appeal that his federal habeas petition was timely because his PRP was pending under Washington law within the meaning of 28 U.S.C. § 2244(d) (2) (and so the one-year limitations period did not resume running) until the Clerk of the Washington Court of Appeals issued the certificate of finality on April 1, 2016. There is some support for this argument in state law. RAP 12.7, entitled “Finality of Decision,” provides that the Washington Court of Appeals retains “the power to change or modify its decision” until one of three events occurs. RAP 12.7(a). One of these events includes the issuance of a certificate of finality with respect to a PRP, pursuant to RAP 16.15(e). Phongmanivan supports his argument further by citing State v. Kilgore, 216 P.3d 393 (Wash. 2009) (en banc), in which the Washington Supreme Court looked to RAP 12.7 to help determine the finality of a conviction for purposes of retroactive application of a new rule of law. In reaching its conclusion, Kilgore distinguished a case involving finality of a conviction in the PRP context in part because that case “did not address finality for purposes of retroactivity.” See id. at 397 n.5.

Respondent-Appellee contends, and the district court concluded, that Phongmanivan’s PRP proceeding was no longer pending for the purposes of 28 U.S.C. § 2244(d)(2) when the Washington Supreme Court denied the motion to modify the Commissioner’s ruling because the issuance of a certificate of finality is a ministerial act. There is also support for this conclusion in state law. RAP 16.15(e) defines a certificate of finality as “the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end.” The Washington Supreme Court has described the certificate of finality as a document that “has traditionally been issued by the clerk’s office when review of an interlocutory decision is at an end,” which “functions essentially as a ‘mandate’ for such decisions.” In re Personal Restraint Petition of Lord, 870 P.2d 964, 966 n.1 (Wash. 1994) (per curiam). Moreover, RAP 16.15(e)(1)(c) requires the clerk of the Court of Appeals to file a certificate of finality involving a PRP petition immediately “upon denial of the motion for discretionary review” by the Washington Supreme Court, rather than ordering the certificate of finality to be issued thirty days after the Court of Appeals decision is filed (unless a motion for reconsideration or discretionary review is filed earlier) or thirty days after the Court of Appeals denies a motion for reconsideration (unless a motion for discretionary review is filed earlier), as in RAP 16.15(e)(1)(a) and (b). This suggests that after the Washington Supreme Court denies the motion for discretionary re-
view, the court has nothing left to do but “performance of a ministerial function.” Hemmerle, 495 F.3d at 1077.

III

In light of the foregoing discussion, and because the answer to this question is “necessary to ascertain the local law of this state in order to dispose” of this appeal, RCW § 2.60.020, we respectfully certify to the Washington Supreme Court the following question:

Is the denial of a personal restraint petition final when the Washington Supreme Court denies a motion to modify an order of its Commissioner denying discretionary review of the state appellate court’s denial, or is the denial not final until the Clerk of the Washington Court of Appeals issues a certificate of finality as required by Rule 16.15(e)(1)(c) of the Rules of Appellate Procedure?

We do not intend our framing of this question to restrict the Washington State Supreme Court’s consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified question, it may in its discretion reformulate the question. Broad v. Mannesmann Anlagenbau AG, 196 F.3d 1075, 1076 (9th Cir. 1999).

If the Washington Supreme Court accepts review of the certified question, we designate Appellant Phongmanivan as the party to file the first brief pursuant to RAP 16.16(e)(1).

The clerk of our court is hereby ordered to transmit forthwith to the Washington Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all relevant briefs and excerpts of record pursuant to RCW §§ 2.60.010, 2.60.030, and RAP 16.16.

Further proceedings in our court are stayed pending the Washington Supreme Court’s decision on whether it will accept review, and if so, receipt of the answer to the certified question. This case is withdrawn from submission until further order from this court. The Clerk is directed to administratively close this docket, pending further order.

The panel will resume control and jurisdiction on the certified question upon receiving an answer to the certified question or upon the Washington Supreme Court’s decision to decline to answer the certified question. When the Washington Supreme Court decides whether or not to accept the certified question, the Parties shall file a joint report informing this court of the decision. If the Washington Supreme Court accepts the certified question, the Parties shall file a joint status report every six months after the date of the acceptance, or more frequently if circumstances warrant.

It is so ORDERED.
CALIFORNIA DAILY OPINION SERVICE March 20, 2019 CALIFORNIA COURTS OF APPEAL 2446

California Courts of Appeal

Cite as 19 C.D.O.S. 2446

THE PEOPLE, Plaintiff and Respondent, v. SHAKELIA RENEE CHATMAN, Defendant and Appellant.

No. A151408
In The Court of Appeal of the State of California First Appellate District Division Four
(Contra Costa County Super. Ct. Nos. 51618479, 51619709)
Filed March 18, 2019

COUNSEL
Counsel for defendant and appellant: James S. Donnelly-Saalfield, under appointment by the Court of Appeal
Counsel for plaintiff and respondent: Xavier Becerra, Attorney General, Gerald A. Engler Chief Assistance Attorney General Jeffrey M. Laurence, Senior Assistant Attorney General Seth K. Schalit, Deputy Attorney General, Lisa Ashley Ott, Deputy Attorney General

OPINION

Defendant Shakelia Renee Chatman appeals her conviction for committing several forms of identity theft in violation of three subdivisions of Penal Code section 530.5, and one count of second degree commercial burglary in violation of section 459. The principal question presented by the appeal is whether, under the provisions of Proposition 47, identity theft must be treated as a misdemeanor if the value of the personal identifying information at issue does not exceed $950, either as shoplifting under section 459.5 or as petty theft under section 490.2. Our Supreme Court now has before it conflicting opinions regarding the violation of section 530.5, subdivision (a). (Compare People v. Sanders (2018) 22 Cal.App.5th 397, review granted July 25, 2018, S248775, and People v. Liu (2018) 21 Cal.App.5th 143, review granted June 13, 2018, S248130, with People v. Brayton (2018) 25 Cal.App.5th 734, review granted October 10, 2018, S251122, and People v. Jimenez (2018) 22 Cal.App.5th 1282, review granted July 25, 2018, S249397 (Jimenez.).) In this case, the Attorney General acknowledges that the conviction for burglary must be reduced to shoplifting under new section 459.5, subdivision (a), but disputes defendant’s contention that the convictions for the violations of section 530.5 must also be reduced. We disagree and shall reduce all defendant’s convictions to misdemeanors.

BACKGROUND

In an amended felony information, defendant was charged with, and subsequently convicted by a jury of, one count of violating section 530.5, subdivision (a) (unauthorized use of personal identifying information), four counts of violating section 530.5, subdivision (c)(2) (fraudulent possession of personal identifying information with a prior conviction), one count of violating section 530.5, subdivision (e) (mail theft), and one count of violating section 459 (second degree commercial burglary). Defendant does not contest the sufficiency of the evidence to establish these offenses; she disputes only the proper designation of the offenses in light of the statutory amendments made by Proposition 47. No evidence was introduced indicating that the value of any of the personal information or property in question exceeded $950 and, in most instances, the evidence clearly showed the value to be considerably less than that amount.

The victim of three of the counts was one Nathaniel Bates. The evidence established that on November 30, 2015, defendant without permission took mail from Bates’s home mail box (violation of section 530.5, subdivision (e) (count 5)) and that, in separate searches on December 10 and December 16, 2015, defendant was found in possession of, among other things, a checkbook for a Wells Fargo account of Bates and his son, and pieces of checks written to, or by, Bates, as well as personal identifying information, checks and credit cards belonging to numerous other people (two violations of section 530.5, subdivision (c)(2) (counts 1, 2)).

One count related to Kevin Almestad, whose credit card was used by another without his permission on March 11, 2016, for a purchase at a Target store. In a search on March 17, defendant was found in possession of Almestad’s credit card (violation of section 530.5, subdivision (c)(2) (count 3)).

Three counts related to Cynthia Bailey, who received a $300 charge from Target that she had not incurred, and whose forged check defendant cashed at a check cashing store (violations of section 530.5, subdivision (a) (count 6), section 530.5, subdivision (c)(2) (count 7) and section 459 (count 8)).

Upon defendant’s conviction for these offenses, the court imposed a split sentence pursuant to section 1170, subdivision (h), consisting of two years in custody and three years of mandatory supervision.

1. All statutory references are to the Penal Code unless otherwise noted.

2. Defendant was also charged with another offense relating to Almestad’s personal identifying information, but the jury was unable to agree on that count, which was ultimately dismissed.

3. The court calculated the sentence as follows: upper term of three years on count 6, consecutive terms of eight months (one-third the midterms) on counts 1, 2 and 3, one year concurrent with count 6 on count 5, and midterms of two years on counts 7 and 8, both stayed pursuant to section 654.
DISCUSSION

The framework for the principal issues before us was summarized in Jimenez, supra, 22 Cal.App.5th at pages 1286-1288 as follows: “On November 4, 2014, California voters enacted Proposition 47, ‘The Safe Neighborhoods and Schools Act,’ which became effective the next day. [Citation.] Proposition 47 reduced certain theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. [Citation.] . . . [¶] Proposition 47 directs that the ‘act shall be broadly construed to accomplish its purposes.’ [Fn. omitted.] One such purpose of Proposition 47 is ‘“to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative.”’ [Citations.] [Proposition 47] also expressly states an intent to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.”’” [Citations.] [¶] Proposition 47 added several new provisions, including section 459.5, which created the crime of shoplifting. Section 459.5, subdivision (a) provides: ‘Notwithstanding section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary.’ ‘Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense.’ [Citations.] Section 459.5, subdivision (b) explicitly limits charging with respect to shoplifting: ‘“Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”’” (Citing People v. Gonzales (2017) 2 Cal.5th 858.)

The Attorney General acknowledges that under People v. Gonzales, supra, 2 Cal.5th 858, defendant’s burglary conviction must be reduced to misdemeanor shoplifting (§ 459.5), but disputes that any of the identity theft convictions must be similarly reduced. Relying primarily on People v. Sanders, supra, 22 Cal.App.5th 397, the Attorney General argues that the offenses specified in section 530.5, though referred to as forms of “identity theft,” are not truly theft offenses and do not come within the scope of sections 459.5 or 490.2. Defendant relies on Jimenez, which has been followed in People v. Brayton, supra, 25 Cal.App.5th 734 and which disagrees with Sanders and “reject[s] the People’s request to exempt identity theft under section 530.5, subdivision (a) from the purview of shoplifting under section 459.5.” (Jimenez, supra, 22 Cal.App.5th at p. 1290.) We need not extend this opinion by relating the conflicting arguments and analyses of prior cases that are well articulated in the cited opinions. Suffice it to say that we are persuaded by the reasoning in Jimenez.

“In sum, section 459.5, subdivision (b) barred the People from charging [the defendant] with identity theft under section 530.5, subdivision (a) when the underlying conduct constituted shoplifting.” (Jimenez, supra, at p. 1291.) Pending forthcoming clarification on the issue from our Supreme Court, we shall follow that decision.

Jimenez, Brayton, and Sanders, however, all dealt with convictions for the violation of section 530.5, subdivision (a). Under the reasoning of Jimenez, defendant’s conviction on count 6, for the violation of that subdivision with respect to the personal identifying information of Cynthia Bailey, must be reduced to a misdemeanor violation of section 459.5.

The convictions on the remaining counts present additional questions. Pursuant to our request, both counsel have submitted supplemental briefs on whether the result should be the same as to counts 1, 2, 3, and 7 for the violation of section 530.5, subdivision (c)(2), and as to count 5, for the violation of section 530.5, subdivision (e).

There are two significant differences between the offenses defined in subdivision (a) and subdivision (c)(2) of section 530.5. Whereas subdivision (a) applies to one who willfully obtains another’s personal identifying information and uses that information for an unlawful purpose, subdivision (c)(2) prohibits the mere acquisition or possession of another’s personal identifying information with the intent to defraud; actual use of the information is not an element of the offense. And, unlike subdivision (a), subdivision (c)(2) applies only to one who has previously been convicted of violating section 530.5.

The first question, then, with respect to the convictions for violating section 530.5, subdivision (c)(2) is whether those offenses should have been charged as violations of section 459.5 and therefore could not be charged as violations of section 530.5, subdivision (c)(2). The information did not allege and the evidence showed that it was not the case that in committing the offenses charged in counts 1, 2 and 3, defendant entered a commercial establishment to use the victim’s personal identifying information. Those offenses were based on defendant’s possession of the Bates and Almestad personal identifying information seized in two searches, not on any use of that information. As to those three counts, therefore, defendant could not have been prosecuted for violating the shoplifting statute because she did not enter a commercial establishment and did not use the victim’s information. Defendant argues that “nothing” in Gonzales, Jimenez, or Brayton “indicates that subdivision (a)’s use requirement was significant to the result reached in those decisions” and “[t]he fact that section 530.5, subdivision (c)(2) does not require use of personal identifying information is therefore irrelevant and is not an appropriate ground upon which to distinguish [those cases].” However, we cannot so easily disregard the language of the statutory provisions. The conduct underlying counts 1, 2 and 3 did not include entry into a commercial establishment and simply does not constitute a violation of section 459.5. There might well be an equal protection is-
sue if subdivision (c)(2) required only the possession of another person’s personal identifying information yet provided a more severe penalty than the law provides for possession and use of the same information. But since subdivision (c)(2) applies only if the defendant has previously been convicted of violating section 530.5, there is no such problem. Subdivision (c)(2) includes the element of recidivism, which itself justifies the inapplicability of the new shoplifting provision to the conduct the subdivision proscribes.4

Count 7 of the information alleges only the possession of the personal identifying information of Cynthia Bailey in violation of section 530.5, subdivision (c)(2). However, the evidence and the prosecutor’s argument at trial indicated that the charge was based on defendant having cached at a cash-checking store a forged check in Bailey’s name. Thus, like the conduct underlying count 6, defendant’s use of the victim’s personal identifying information supported the offense charged in this count and the offense should also have been charged as a violation of section 459.5. Moreover, since the identical conduct supports both convictions for violating what should be the same statute, one of the convictions must be vacated. (People v. Vidana (2016) 1 Cal.5th 632, 650.)

Although defendant’s conduct underlying counts 1, 2 and 3 cannot constitute shoplifting under section 459.5, the conduct may nonetheless come within section 490.2, another provision added by Proposition 47. Section 490.2, subdivision (a) provides: “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . .”5 In People v. Romanowski (2017) 2 Cal.5th 903, the Supreme Court held that section 490.2 reduces to a misdemeanor the acquisition or possession of another’s access card account information, otherwise penalized by section 484e, subdivision (d), if the information is valued at $950 or less. Noting that section 484e characterizes that offense as grand theft, and relying largely on the reasoning in People v. Sanders, supra, 22 Cal.App.5th 397, the Attorney General argues that “section 530.5, subdivisions (a) and (c) do not use the word ‘theft’ and theft is not an element of either offense.” We disagree.

The fact that section 530.5 does not use the term “theft” or “grand theft” in describing the offenses is not dispositive. “Nothing in the operative language of [section 490.2, subdivision (a)] suggests an intent to restrict the universe of covered theft offenses to those offenses that were expressly designated as ‘grand theft’ offenses before the passage of Proposition 47.” (People v. Page (2017) 3 Cal.5th 1175, 1186.) In Gonzalez, the Supreme Court recognized identity theft as a theft offense in upholding the application of section 459.5. (People v. Gonzalez, supra, 2 Cal.5th at pp. 876-877.) In Page itself, the court held that the violation of Vehicle Code section 10851,6 if based on the theft of a vehicle worth $950 or less, falls within section 490.2, subdivision (a), although the offense is not described as “theft” and is not even within the Penal Code. The Attorney General further disregards Page in arguing that identity theft does not come within section 490.2 because “section 530.5, subdivisions (a) and (c) punish a wide range of conduct that lies far afield of the petty theft crimes Proposition 47 aims to reduce.” Page similarly recognized that Vehicle Code section 10851 encompasses more than theft of a vehicle but held that, if the defendant’s conduct did in fact constitute theft, section 490.2, subdivision (a) applies.

“Theft” is defined in section 484 to include “feloniously steal[ing], tak[ing] . . . the property of another.” In Romanowski the Supreme Court observed that “even if we assume that section 490.2 only reduces punishment for crimes that require the definition set out in section 484, theft of access card information falls within that definition.” (People v. Romanowski, supra, 2 Cal.5th at p. 913.) The same is true with respect to personal identifying information, which Romanowski makes clear is also within section 490.2’s reference to “property.” (See id. at p. 911, fn. 3.) One who, with the intent to defraud, “acquires or retains possession” of another person’s personal identifying information as described in section 530.5, subdivision (c)(2), violates section 490.2 no less than, as Romanowski holds, one who “acquires or retains possession” of another person’s access card information as described in section 484e violates that provision.

Indeed, the information in this case alleged in counts 1, 2 and 3 that defendant “did willfully and unlawfully with the intent to defraud acquire and retain possession of” another person’s personal identifying information. In closing, the prosecutor summarized the evidence as follows: “I said at the beginning in my opening that the defendant is a serial identity thief. And the evidence in this case bore that out. We’ve heard about multiple incidents where she is found in possession of other people’s identifying information, and that she uses that information to defraud for her own gain. And we also heard from the stories of the victims who came into court and testified that there is a clear pattern here about how their information got compromised. Each one of them described how

4. We do not agree with defendant’s suggestion that the recidivism element of section 530.5, subdivision (c)(2) has somehow been superseded by the exclusion from misdemeanor treatment in section 459.5 of persons who have previously been convicted of a crime listed in section 667, subdivision (e)(2)(iv) or a sex crime requiring registration under section 290.

5. The subdivision goes on to permit punishment of such conduct as a felony for persons previously convicted of a crime listed in section 667, subdivision (e)(2)(iv) or of a sex crime requiring registration under section 290. Subdivision (c) of section 490.2 also excepts theft of a firearm.

6. Vehicle Code section 10851, subdivision (a) provides in relevant part: “Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense . . . .”
they were expecting something in the mail: checkbooks that they had ordered, a replacement debit card, financial documents that were going to be delivered via FedEx. There’s a pattern here. And we know that starting with the first charge on November 30th, that this is the defendant’s MO. She steals other people’s mail in order to get some of the most sensitive documents that get sent through the mail: people’s names, their banking accounts, social security numbers, credit cards, checks, you name it. What goes into your mail, she can get it.” The jury was instructed that to prove these offenses it was required to find, among other things, that “defendant acquired or kept the personal identifying information of another person.” The verdict forms returned by the jury found defendant “guilty of (IDENTIFYING INFORMATION THEFT) a violation of Penal Code section 530.5(c)(2).”

Despite “the broad consumer protection” objective underlying section 484e, the Supreme Court in Romanowski held this to be no reason to disregard the limitation to misdemeanors prescribed by Proposition 47 if the $950 threshold is not crossed. (People v. Romanowski, supra, 2 Cal.5th at pp. 913-914.) We can discern no reason why enforcing the strong public interest in preventing identity theft is not subject to the same limitation prescribed by Proposition 47 and recognized in Romanowski. We repeat what the Supreme Court stated in Gonzales: “‘One of Proposition 47’s primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative.’ [Citations.] The Act also expressly states an intent to ‘[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.’ ” (People v. Gonzalez, supra, 2 Cal.5th at p. 870.) Both Page and Romanowski demonstrate the Supreme Court’s view that the language of Proposition 47 should be “construed ‘broadly’ and ‘liberally’ to effectuate its purposes.” (People v. Page, supra, 3 Cal.5th at p. 1187.) As the court pointed out in Page, “In the voter guide to Proposition 47, the Legislative Analyst explained that under existing law, theft of property worth $950 or less could be charged as a felony ‘if the crime involves the theft of certain property (such as cars).’ [Citation.] Under the initiative, according to the analysis, such crimes would no longer be charged as grand theft ‘solely because of the type of property involved.’ [Citation.] To the extent section 490.2 is ambiguous as to its inclusion of a theft charged under Vehicle Code section 10851, these indicia of the voters’ intent support an inclusive interpretation.” (Ibid.) These indicia similarly support an inclusive interpretation with respect to the theft of personal identifying information charged under section 530.5, subdivision (c)(2).

Finally, defendant was convicted under count 5 for mail theft, as defined in federal law, under section 530.5, subdivision (e). There is no doubt that this conduct is a theft offense. We perceive no argument why this offense must not be reduced to petty theft under section 490.2, subdivision (a).7

Because there is no evidence that the value of any of the personal identifying information defendant unlawfully obtained or used exceeds $950, each of the offenses must be reduced to misdemeanors, under either section 459.5 or section 490.2. This disposition moots defendant’s alternative arguments concerning the adequacy of the jury instructions and compliance with constitutional rights.

**DISPOSITION**

Defendant’s convictions under counts 6 and 8 are reduced to misdemeanors for the violation of section 459.5. Defendant’s convictions under counts 1, 2, 3 and 5 are reduced to misdemeanors for the violation of section 490.2, subdivision (a). The conviction under count 7 is vacated. The matter is remanded to the trial court for resentencing.

POLLAK, P. J.

WE CONCUR: STREETER, J., BROWN, J.

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7. Defendant’s counsel initially declined to seek reduction of this count to an offense under section 490.2 because violation of section 530.5, subdivision (e) is already a misdemeanor and he considered “there is no felony to reduce.” However, because violation of section 530.5, subdivision (e) is punishable by one year of imprisonment, while violation of section 490.2, subdivision (a) is punishable by only six months’ imprisonment (§ 19), defendant now seeks reduction of the offense to a violation of section 490.2, subdivision (a).
COUNSEL
Joel S. Farkas, for Plaintiff and Appellant.
Leroy Smith, County Counsel, Roberto R. Orellana, Assistant County Counsel for Defendants and Respondents.

OPINION
To be elected county sheriff, a person must meet certain law-enforcement experience and education requirements set forth in Government Code, section 24004.3. Bruce Boyer has no law enforcement experience. He filed a petition for writ of mandate to compel respondents, Ventura County, Ventura County Board of Supervisors, and Ventura County Clerk Mark Lunn to put him on the June 5, 2018 Primary Election ballot for county sheriff. (Code Civ. Proc., § 1085.) The trial court ruled that Government Code section 24004.3 was constitutional and denied the petition. We affirm. As we shall explain, constitutional, statutory, and case-law compel affirmance. We are quick to observe a common sense reason why appellant cannot prevail. Experience is the best teacher. This is true whether you are a plumber, a teacher, a doctor, or a lawyer. It also applies to being the elected sheriff of a county where there are several hundred deputy sheriffs and several hundred non-sworn personnel to supervise. It does not matter how intelligent you are or if you are acting in good faith. There is a good reason why the Legislature has imposed an experience requirement. To get a “feel” for law enforcement, i.e., coming to a true understanding of it, you must learn about it in the field by doing it. The people of California have been well served by personnel who have worked their way up the chain of command to leadership. Such personnel have years of practical experience.

Although the election has come and gone, resolution of this constitutional issue is appropriate because it is a matter of public interest and likely to recur in the future. (Rawls v. Zamora (2003) 107 Cal.App.4th 1110, 1113 (Rawls).)

PROCEDURAL HISTORY
On February 22, 2018, appellant filed a candidate application to be placed on the ballot for Ventura County Sheriff in the upcoming primary election. Four days later, Lunn advised appellant that he had not submitted documentation establishing appellant’s qualifications to run for county sheriff, as required by California Elections Code section 13.5 and Government Code section 24004.3. Appellant responded that the statutes were unconstitutional and that Lunn’s refusal to place appellant’s name on the ballot denied citizens of their right to vote for elected officials of their own choosing.

On March 27, 2018, appellant filed a mandamus petition “commanding [Lunn] to name, designate, or authorize [appellant] to run as a candidate for the position of Ventura County Sheriff for the June 5, 2018 election.” (Code Civ. Proc., § 1085.) Appellant served the writ petition on April 4, 2018, four days after Lunn was required by federal and state law to submit the ballot materials to the printer. Appellant scheduled a hearing on the petition, five days after the printer deadline for ballot changes. Lunn declared that changing the ballots at that late a date would cost between $800,000 and $1 million, and require that 430,000 sample ballots and 1,105,735 ballot cards be reprinted. Denying the writ petition, the trial court ruled that Government Code section 24004.3 was constitutional and the writ petition was barred by the doctrine of laches.

On appeal, the standard of review on constitutional questions is independent judgment with deference to trial court’s underlying factual findings, which are reviewed for substantial evidence. (People ex rel. Bill Lockyer v. Fremont Life Ins. Co. (2002) 104 Cal.App.4th 508, 514.) “[A] statute is presumed to be constitutional and … must be upheld unless its unconstitutionality ‘clearly, positively and unmistakably appears.’ [Citations.]” (Hale v. Morgan (1978) 22 Cal.3d 388, 404.)

Elections Code section 13.5/Government Code section 240043
As county clerk, Lunn, has a ministerial duty to follow Elections Code section 13.5 which provides that no person shall be considered a legally qualified candidate for sheriff unless he or she has filed a declaration of candidacy accompanied by documentation that the person meets the statutory qualifications to run as county sheriff as set forth in section 24004.3.1 A ministerial office may not add or subtract lan-

1. Elections Code section 13.5 provides in pertinent part: “(a)(1) Notwithstanding subdivision (a) of Section 13, no person shall be considered a legally qualified candidate for any of the offices set forth in subdivision (b) unless that person has filed a declaration of candidacy, nomination papers, or statement of write-in candidacy, accompanied by documentation, including, but not necessarily limited to, certificates, declarations under penalty of perjury, diplomas, or official correspondence, sufficient to establish, in the determination of the official with whom the declaration or statement is filed, that the person meets each qualification established for service in that office by the provision referenced in subdivision (b). [¶] [¶] (b) This section shall be applicable to the following offices and
Legislative Authority to Enact Statutory Qualifications for County Sheriff

Appellant argues that the position of county sheriff is a state office and the Legislature lacks the power to add candidate ballot qualifications for a state office. The argument is based on Wallace v. Superior Court of Placer County (1956) 141 Cal.App.2d 771 (Wallace), disapproved on other grounds in Knoll v. Davidson (1974) 12 Cal.3d 335, 343. There, section 69500 required that a candidate for the office of superior court judge be a resident of the county in which he or she is elected for two years preceding the judge’s election. (Id. at p. 772.) The Court of Appeal concluded that “it was and is beyond the power of the Legislature to add this qualification in view of the fact that the Constitution has established the qualifications therefor: [¶] [¶] [¶] (3) For the office of county sheriff, the qualifications set forth in Section 24004.3 of the Government Code.”

Government Code section 24004.3 provides in pertinent part: “(a) No person is eligible to become a candidate for the office of sheriff in any county unless, at the time of the final filing date for election, he or she meets one of the following criteria:

(1) An active or inactive advanced certificate issued by the Commission on Peace Officer Standards and Training.
(2) One year of full-time, salaried law enforcement experience within the provisions of Section 830.1 or 830.2 of the Penal Code at least a portion of which shall have been accomplished within five years prior to the date of filing, and possesses a master’s degree from an accredited college or university.
(3) Two years of full-time, salaried law enforcement experience within the provisions of Section 830.1 or 830.2 of the Penal Code at least a portion of which shall have been accomplished within five years prior to the date of filing, and possesses a bachelor’s degree from an accredited college or university.
(4) Three years of full-time, salaried law enforcement experience within the provisions of Section 830.1 or 830.2 of the Penal Code at least a portion of which shall have been accomplished within five years prior to the date of filing, and possesses an associate in arts or associate in science degree, or the equivalent, from an accredited college.
(5) Four years of full-time, salaried law enforcement experience within the provisions of Section 830.1 or 830.2 of the Penal Code at least a portion of which shall have been accomplished within five years prior to the date of filing, and possesses a high school diploma or the equivalent.”

All statutory references are to the Government Code unless otherwise stated. exclusive qualifications that can be required for the office of superior court judge.” (Id. at p. 774.)

Relying on Wallace, appellant argues that the state Constitution does not require that county sheriff candidates have prior law enforcement experience. But California Constitution, article XI section 1(b) states: “The Legislature shall provide for an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county.” (Italics added.) It is an express power and includes the power to set candidacy requirements for the elected office of county sheriff. “California decisions long have made it clear that under our Constitution the Legislature enjoys plenary legislative power unless there is an explicit prohibition of legislative action in the Constitution itself. [Citation.]” (Marine Forests Society v. California Coastal Com. (2005) 36 Cal.4th 1, 39.) Stated another way, “‘…we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited.’ [Citation.] … [R]estrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.’” (Citations.)” (County of Riverside v. Superior Court (2003) 30 Cal.4th 278, 284.) Based on appellant’s construction of the constitution, the Legislature has the power to “provide for an elected county sheriff,” (Cal. Const., art. XI, § 1(b)) but lacks the power to prescribe the qualifications for a ballot candidate. “We hesitate to ascribe such shortsightedness to the framers of our Constitution.” (Fitts v. Superior Court of Los Angeles County (1936) 6 Cal.2d 230, 234.)

Pursuant to California Constitution article XI, section 1(b), the Legislature enacted section 24009, subdivision (a) which provides that “the county officers to be elected by the people are the . . . sheriff . . . .” It also enacted section 24004.3 which sets forth the qualifications for ballot candidates running for the office of county sheriff. Unlike Wallace, which addressed the election of superior court judges, our state Constitution directs the state Legislature to provide for the election of the office of county sheriff.

Appellant argues that his constitutional claim is similar to Jackson v. State (Colo. 1998) 966 P.2d 1046. There, a Colorado statute required that county sheriffs complete certain training requirements and obtain peace officer certification. (Id. at pp. 1049-1051.) Jackson was elected Morgan County Sheriff after the 1990 enactment of the Sheriff Training Statute. When Jackson’s term of office began in 1995, he lacked peace officer certification and was suspended by the Morgan County Commissioners. (Id. at p. 1050.) The Colorado Supreme Court held that the Sheriff Training Statute was unconstitutional because the state constitution did not authorize

2. Although this Legislative power dates back over 150 years, the Legislature did not require candidate qualifications for the office of county sheriff until 1988 when section 24004.3 was enacted. (Stats. 1988, c. 57, § 1.) California Constitution of 1849, article VI, section 11, (later superseded by Cal. Const. of 1879) states: “The Legislature shall provide for the election of a Clerk of the Supreme Court, County Clerks, District Attorneys, Sheriffs, and other necessary officers . . . .”
the legislature to impose new and additional qualifications to serve as county sheriff. (Id. at p. 1051.) “When Sheriff Jackson was elected in 1994, the constitution only required that a county sheriff be a qualified elector and a resident of the county for the one-year period preceding his election. [Citation.] [¶] … [T]hese constitutional qualifications were exclusive, and the General Assembly had no authority to impose additional qualifications as a prerequisite to holding the office of county sheriff. [Citation.]” (Ibid.)

Unlike Jackson, our state Constitution empowers the Legislature to provide for the election of county sheriffs and to set minimum qualifications for sheriff candidates. (Cal. Const. art. XI, § 1(b).) And unlike Jackson, section 24004.3 is not being applied to forfeit a sheriff’s elected position. Section 24004.3, subdivision (b) has a savings clause and provides: “All persons holding the office of sheriff on January 1, 1989 shall be deemed to have met all qualifications required for candidates seeking election or appointment to the office of sheriff.” We reject the argument that section 24004.3 conflicts with or is preempted by the California Constitution.

**First Amendment**

Appellant argues that section 24004.3 violates the First Amendment in that it restricts the pool of sheriff candidates to law enforcement personnel and excludes civilian viewpoint from being heard. A similar claim was made in Rawls, supra, 107 Cal.App.4th 1110. There, a would-be write-in candidate (Rawls) for Santa Clara County Sheriff was an advocate of the Second Amendment right to bear arms and lacked section 24004.3 law enforcement experience. Rawls sought election as sheriff on a civilian platform that promised to limit denials of concealed weapon permits. (Id. at p. 1114.) He claimed the current sheriff had a reputation for denying virtually all concealed weapon permit applications. (Ibid.) The Santa Clara County Registrar of Voters advised Rawls that write-in votes for Rawls would not be counted because his nomination papers did not satisfy the section 24004.3 candidate qualifications for county sheriff. (Id. at p. 1113.) Rawls sued on the theory that section 24004.3 violated the First Amendment right to free speech and the Fourteenth Amendment right to equal protection of the laws. (Id. at p. 1114.) Rejecting the claim, the Court of Appeal held that “section 24004.3 is evenhanded – it is applicable to all candidates. It is politically neutral – it simply requires candidates to have law enforcement experience.” (Id. at pp. 1116-1117.)

Appellant argues that section 24004.3 violates his First Amendment Right to run for and hold an elected public office. (See, e.g., Zeilenga v. Nelson (1971) 4 Cal.3d 716, 719-721) [five-year residency requirement to run for elected position of county board of supervisors invalid.] “’Qualifications for office must have a rational basis, such as age, integrity, training or, perhaps, residence… . If a classification is employed in prescribing qualifications, it must be nondiscriminatory and “based on a real and substantial difference having reasonable relation” to the object sought to be accomplished by the legislation… .’ (Italics ours.)” (Id. at p. 721.)

Appellant claims that candidacy for a public office is a fundamental right and requires a compelling overriding state when imposing candidacy qualifications to access a public ballot. But not all facets of the electoral process are subject to strict scrutiny review. Candidacy for public office is not a fundamental constitutional right to which a rigorous standard of review applies. (Clements v. Fashing (1982) 457 U.S. 957, 963.) “Far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’ [Citation.]” (Ibid.)

Strict scrutiny analysis was rejected in Rawls, supra, 107 Cal.App.4th 1110 wherein a would-be write-in candidate for sheriff lacked the qualifications to be on the ballot. The First Amendment claim was predicated on plaintiff’s free speech rights and the rights of voters to cast their ballots effectively. (Id. at p. 1114.) Plaintiff claimed that section 24004.3 restricted the pool of sheriff candidates to law enforcement personnel and excluded the civilian viewpoint from being heard. (Ibid.) The Court of Appeal applied a balancing test to resolve the tension between a candidate’s speech rights and the state’s interest in preserving the fairness and integrity of the voting process. (Id. at pp. 1115-1116.) It concluded that section 24004.3 “does not significantly impact access to the ballot – there are five broad disqualifications, which embrace people of varying experience. The section does not stifle speech or dictate electoral outcome in any sense.” (Id. at p. 1117.)

The Rawls’ court viewed the constitutional claim as “a qualification case in the sense that the law at issue relates to eligibility to be elected rather than electoral procedure. [Citation.]” (Rawls, supra, 107 Cal.App.4th at p. 1115, fn 3.) The court made clear that its holding applied to challenges based on First Amendment rights asserted on behalf of potential voters and would-be candidates. (Ibid.) “There can be no doubt that the state has a strong interest in assuring that a person with aspirations to hold office is qualified to administer the complexities of that office. [Citation.] And the authority of the state to determine the qualifications of their most important government officials is an authority that lies at the heart of representative government. [Citation.]” (Id. at p. 1117.)

We concur and adopt the same analysis here. There is no merit to the argument that Legislature exceeded its authority pursuant to the California Constitution in enacting section 24004.3 or that the statute violates the First Amendment rights of would-be candidates or the voters at large.

**Laches**

Appellant contends there was no unreasonable delay in filing the writ petition or prejudice to support the finding that the action was barred by the doctrine of laches. Lunn knew about the writ petition when it was filed on March 27,
2018, yet went forward with printing the ballots. Appellant asserts that printing and mailing corrected ballots at a cost of $800,000 to $1 million would not prejudice Lunn. But Lunn’s declaration states the delay would result in “severe and adverse consequences, including voters having different materials before them … . Any changes made after April 16, 2018, would result in overseas voters not having the same sample ballot materials as local voters.” Lunn further states: “For the June 5, 2018, primary election, the deadline required in order to comply with state and federal law was March 31, 2018, four days before I was served with the Petition in this matter.” (Italics added.)

Appellant chose to sleep on his right to timely challenge section 24004.3 well after his candidate statement was rejected by Lunn. Over the next few weeks, appellant issued press releases and appeared at city council meetings and before the Ventura County Board of Supervisors, threatening to sue Lunn. The trial court reasonably concluded that the appellant’s delay in filing and prosecuting the writ petition prejudiced Lunn, other candidates running for public office (federal, state and local) on the primary ballot, and the voters at large. The law helps the vigilant, not those who sleep on their claimed rights. (Civ. Code, § 3527.)

DISPOSITION

The judgment (order denying mandamus petition) is affirmed. Costs on appeal are awarded to respondents.

CERTIFIED FOR PUBLICATION. YEGAN, J.

We concur: GILBERT, P. J., PERREN, J.