I. Opinions

Weaver v. Massachusetts, 16-240. By a 7-2 vote, the Court held that a criminal defendant who alleges that his trial counsel was ineffective for failing to assert a public-trial violation must prove prejudice to obtain a new trial, even though a public-trial violation constitutes structural error. Petitioner Kentel Weaver was indicted in Massachusetts state court for first-degree murder and unlicensed possession of a handgun. During jury selection at his trial, Weaver’s mother and pastor tried to enter the courtroom to watch. They were stopped by the bailiff, who told them the courtroom was closed for jury selection because all the seats were taken by potential jurors. Weaver’s mother told defense counsel about the closure while jury selection was still taking place, but defense counsel did not object, believing the closure to be constitutional. (This all occurred before Presley v. Georgia, 558 U.S. 209 (2010) (per curiam), made clear that the public-trial right included jury selection.) At trial (during which the courtroom was not closed), the state presented strong evidence of Weaver’s guilt, and Weaver was convicted. A few years later, he moved for new trial, arguing that his counsel was ineffective for not objecting to the courtroom closure during jury selection. Under Strickland v. Washington, 446 U.S. 689 (1984), a defendant must prove both (1) deficient performance and (2) prejudice. The trial court ruled that counsel had performed deficiently by not objecting to the public-trial violation, but that Weaver had not shown prejudice. The Massachusetts Supreme Judicial Court affirmed. In an opinion by Justice Kennedy, the Court affirmed, rejecting Weaver’s contention that “when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry” (i.e., he need not demonstrate actual prejudice).

The Court first discussed the concept of structural error, which is an error that cannot be deemed harmless if raised at trial and on direct appeal. Unlike ordinary errors, a structural error “affect[s] the framework within which the trial proceeds,” rather than being “simply an error in the trial process itself.” The Court explained that it had provided three different rationales for deeming an error structural. The first was that “the right at issue is not designed to protect the defendant from an erroneous conviction, but instead protects some other interest.” See, e.g., Faretta v. California, 422 U.S. 806 (1975) (protecting a defendant’s right “to make his own choices about the proper way to protect his own liberty”). The second rationale was that “the effects of the error are simply too hard to measure.” See, e.g., United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (denial of a defendant’s counsel of choice). And the third rationale was that the error “always results in fundamental unfairness.” See, e.g., See Gideon v. Wainwright, 372 U.S. 335 (1963) (right to an attorney); Sullivan v. Louisiana, 508 U.S. 275 (1993) (right to reasonable-doubt instruction). The “critical” point, stated the Court, was that “[a]n error can count as structural even if the error does not lead to fundamental fairness in every case.” And, found the Court, a public-trial violation is an example of such an error. We know this because that there are “some circumstances when [courtroom closure] is justified.” Although “these cases should be rare, a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so.” In addition, the public-trial right “protects the rights of the public at large, and
the press, as well as the rights of the accused.” In short, “in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant’s standpoint.”

The Court then turned to how the Strickland test applies when the ineffective assistance was the failure to raise and preserve a public-trial violation for direct review. Strickland ordinarily requires a defendant claiming ineffective assistance to prove prejudice, i.e., “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Weaver argued, however, that Strickland more generally held that “even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair.” The Court assumed that interpretation to be correct, but reiterated that “not every public-trial violation will in fact lead to a fundamentally unfair trial. . . . Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically.” The Court pointed not only to the nature of the public-trial violation but also to the benefits of counsel’s preserving the claim in the first place, which gives the trial court “the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.” Plus, preservation followed by direct review imposes fewer “costs and uncertainties” than ineffective-assistance claims asserted on collateral review, which pose greater risks to the “finality interest.” Lastly, the Court turned to the facts here and concluded that Weaver could not show actual prejudice, given that the closure was relatively brief, venire members who did not become jurors observed the jury-selection proceedings, and the record of the proceedings did “not indicate any basis for concern.” (The Court noted that “[i]n other circumstances”—such as if “the government’s main witness testifies in secret”—“a different result might obtain.”)

Justice Thomas filed a concurring opinion, which Justice Gorsuch joined, to offer “two observations about the scope of the Court’s holding.” First, he expressed doubt whether Presley “is consistent with the original understanding of the right to a public trial.” Second, he disagreed with the Court’s assumption that a defendant may establish Strickland prejudice by a showing of fundamental unfairness. Justices Alito filed an opinion concurring in the judgment, which Justice Gorsuch also joined. In Justice Alito’s view, “there are two ways of meeting the Strickland prejudice requirement. A defendant must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to the denial of counsel, for which an individualized showing of prejudice is unnecessary.” For that reason, stated Justice Alito, the concept of structural error “is irrelevant under Strickland.”

Justice Breyer issued a dissenting opinion, which Justice Kagan joined. The dissent believed that prejudice should be presumed whenever the “attorney’s constitutionally deficient performance produced a structural error.” That is because “all structural errors . . . have features that make them defy analysis by harmless-error standards,” which “mean that all structural errors defy an actual-prejudice analysis under Strickland.” (Internal citation and quotation marks omitted.) For example, “to establish actual prejudice from an attorney’s failure to object to a public-trial violation, a defendant would face the nearly impossible burden of establishing how his trial might have gone differently had it been open to the public.” The dissent would not “read Strickland as requiring defendants to prove what this Court has held cannot be proved.”
Packingham v. North Carolina, 15-1194. The Court unanimously held that a state law barring registered sex offenders from accessing social media websites violates the First Amendment as an impermissible restriction on speech. North Carolina enacted a law making it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” N.C. Gen. Stat. Ann. §§14-202.5(a), (e). After petitioner Lester Packingham, a registered sex offender, posted a message on Facebook celebrating the dismissal of a traffic ticket, North Carolina prosecuted him for violating the statute. Packingham was convicted, and the North Carolina Supreme Court ultimately affirmed the conviction and upheld the statute in the face of First Amendment objections. In an opinion by Justice Kennedy, the Court reversed.

The Court began with the premise that the First Amendment necessarily requires fora for exercising the rights it secures. And, the Court explained, in today’s world “the most important place[] (in a spatial sense) for the exchange of views . . . is cyberspace.” Citing statistics on social media use, the Court emphasized the value of the internet as a forum for exercising First Amendment rights, such as “debating religion and politics with friends and neighbors” on Facebook and “petitioning [one’s] elected representatives” through Twitter. Noting that “the Cyber Age is a revolution of historic proportions” such that “we cannot appreciate yet its full dimensions and vast potential,” the Court warned that it must “exercise extreme caution” when considering restrictions on access to the internet.

Turning to the challenged statute, the Court concluded that—even assuming it was content neutral and subject to intermediate scrutiny—it “cannot stand.” The Court further assumed that although the statute might apply even more broadly, at the very least it applies “to social networking sites ‘as commonly understood’—that is, websites like Facebook, LinkedIn, and Twitter.” And the Court assumed that a state may “enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.” With those assumptions behind it, the Court concluded that the North Carolina law is “unprecedented in the scope of First Amendment speech it burdens. . . . By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern square, and otherwise exploring the vast realms of human thought and knowledge.” The Court added that “[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the worlds of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.” And the Court found no other examples of such a sweeping law. The Court concluded by saying that “the Government ‘may not suppress lawful speech as the means to suppress unlawful speech.’”

Justice Alito wrote an opinion concurring in the judgment only, which Chief Justice Roberts and Justice Thomas joined. The concurring Justices agreed that the statute has a “staggering reach” and could not survive the scrutiny applicable to a content-neutral law. But the concurring opinion faulted the majority’s opinion for “its undisciplined dicta” that “seem to equate the entirety of the internet with public streets and parks.” Justice Alito feared that this language will “be inter-
interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites.” In Justice Alito’s view, “it is legitimate and entirely reasonable for States” to attempt to stop sexual predators from using the internet to engage in sexual abuse. He interpreted the North Carolina law, however, as barring sex offenders not only from accessing Facebook and similar social media sites, but also from accessing “a large number of websites”—such as Amazon.com, WashingtonPost.com, and WebMD—“that are most unlikely to facilitate the commission of a sex crime against a child.”

McWilliams v. Dunn, 16-5294. The Court held by a 5-4 vote that petitioner was entitled to habeas corpus relief because Alabama failed to provide what Ake v. Oklahoma, 470 U.S. 68, 83 (1985), clearly established: “that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively ‘assist in evaluation, preparation, and presentation of the defense.’” Petitioner James McWilliams was charged with rape and capital murder in Alabama. The trial court granted defense counsel’s “motion for a psychiatric evaluation of McWilliams’ sanity, including aspects of his mental condition relevant to ‘mitigating circumstances.’” The state therefore convened a three-psychiatrist “lunacy commission,” each of whom examined McWilliams and concluded he was competent to stand trial and was not suffering from a mental illness at the time of his crimes. McWilliams was convicted of capital murder. At the sentencing phase, the defense called McWilliams and his mother, both of whom testified that he had suffered multiple serious head injuries as a child. McWilliams also described his psychiatric history, which included a “blatantly psychotic thought disorder.” The jury recommended a death sentence, and the trial court set a judicial sentencing hearing. Before that sentencing, McWilliams moved for further neurological and neuropsychological testing. The court appointed Dr. Goff, an expert from the state health department, who filed a report with the court two days before the hearing. Dr. Goff opined that, although McWilliams was exaggerating his symptoms, he appeared to have “genuine neuropsychological problems” that were “compatible with injuries [McWilliams] said he sustained as a child.” And prison records delivered one day before the hearing showed that McWilliams was taking both psychotropic and antipsychotic medication. At the judicial sentencing hearing, defense counsel stated that he needed “to have someone else review these findings” and offer “a second opinion as to the severity of the organic problems discovered.” The trial court rejected counsel’s request for a continuance and, at the conclusion of the hearing, sentenced McWilliams to death. McWilliams appealed, arguing that Ake v. Oklahoma entitled him to a mental health expert who was part of the defense team. The Alabama Court of Criminal Appeals rejected the claim, and the Alabama Supreme Court affirmed without reaching the issue. A federal district court then denied habeas relief. The Eleventh Circuit affirmed, holding that Ake did not clearly establish the right to a partisan expert. In an opinion by Justice Breyer, the Court reversed and remanded.

Because this case was on federal habeas review, McWilliams could obtain relief only if he showed that the Alabama Court of Criminal Appeals decision was contrary to law clearly established by the U.S. Supreme Court. McWilliams argued that it was because Ake (in his view) “clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties.” Although that was the issue upon which the Court had granted certiorari, it declined to resolve it. Instead, the
Court ruled for McWilliams “because Alabama here did not meet even Ake’s most basic requirements.” Specifically, the Court found that Ake “requires the State to provide the defense with ‘access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense.’ Ake, supra, at 83 (emphasis added).” Yet, found the Court, although “Alabama met the examination portion of this requirement by providing for Dr. Goff’s examination of McWilliams,” it did not meet the other three requirements. No expert helped the defense evaluate Dr. Goff’s report or the late-arriving prison records; and no expert helped the defense prepare and present arguments related to Dr. Goff’s findings. Rather, “when McWilliams asked for the additional assistance to which he was constitutionally entitled at the sentencing hearing, the judge rebuffed his requests.” The Court remanded to allow the Eleventh Circuit to revisit its alternative holding that, even if McWilliams had been denied his rights under Ake, it had not had a “substantial and injurious effect or influence,” as required for a grant of habeas relief.

Justice Alito issued a dissenting opinion, which Chief Justice Roberts and Justices Thomas and Gorsuch joined. In the dissent’s view, the majority wrongly dodged the question presented, which was whether Ake clearly entitled indigent defendants to “the assistance of a psychiatric expert who is a member of the defense team instead of a neutral expert who is available to assist” both parties. As the dissenters saw it, Ake was “deliberately ambiguous” on this point and provided “no clear guidance one way or the other.” Indeed, “the opinion in Ake has all the hallmarks of a compromise.” For example, Justice Marshall, who authored Ake, later dissented from certiorari denials on this very issue and opined that defendants were entitled to an expert who was part of the defense team. Yet none of the other Justices endorsed this view or voted to grant certiorari in those cases. Further, lower courts had come to widely divergent assessments of Ake, and many commentators have noted Ake’s ambiguity. In the dissent’s view, because Ake was unclear the state court judgments were entitled to respect, and McWilliams was not entitled to habeas relief. The dissent chided the majority for instead deciding a question the Court had declined to review—whether, assuming Ake did not require an expert as part of the defense team, the assistance provided in this case fell short of what Ake did require. Such “bait and switch” tactics, said the dissent, is an “inexcusable departure from sound practice” and denied Alabama the chance to address the grounds for the actual decision. This was a “most unseemly maneuver.”

**Jenkins v. Hutton, 16-1116.** Through a unanimous per curiam opinion, the Court summarily reversed a Sixth Circuit decision that improperly excused a procedural default and invalidated a death sentence. Respondent Percy Hutton was convicted of aggravated murder in Ohio for kidnapping and shooting two (former) friends, one of whom died. In connection with the murder conviction, the jury found two aggravating circumstances: (1) Hutton tried to kill two or more persons; and (2) the killing/attempted killing took place during a kidnapping. During the penalty phase, the state sought the death penalty; Hutton responded that he was innocent and presented some psychological evidence. The trial court instructed the jury that it could sentence Hutton to death only if it found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. The jury sentenced Hutton to death. The Ohio appellate courts affirmed the conviction and sentence after independently weighing the factors and concluding that death was justified. Hutton then filed a federal habeas petition, claiming that the trial court violated his due process rights because
it had not told the jury that it could consider as aggravating circumstances (to be weighed against the mitigating factors) only those they had found during the guilt phase. The district court ruled that because Hutton had not raised this argument in state court, it was procedurally defaulted. The Sixth Circuit reversed, holding that although the claim was procedurally defaulted, it would reach the merits to “avoid a fundamental miscarriage of justice.” It based this holding on Sawyer v. Whitley, 505 U.S. 333 (1992), which held that defaulted claims are reviewable on a petitioner’s showing, by clear and convincing evidence, that “but for a constitutional error, no reasonable jury would have found” him death-eligible. The Sixth Circuit believed the exception applied for two reasons: (1) the jury had not found the necessary aggravating circumstances; and (2) the record did not show that the jury’s recommendation of death “was actually based on a review of any valid aggravating circumstances.” The Court reversed.

The Court held that the “Sixth Circuit was wrong to reach the merits of Hutton’s claim” for two reasons, one factual, and one legal. The Sixth Circuit’s first ground for excusing the default was factually wrong because the jury did in fact find two aggravating circumstances during the guilt phase. And the trial court’s erroneous instruction was given during the penalty phase, and so “plainly had no effect on the jury’s” guilt-phase decision. Next, held the Court, the Sixth Circuit’s second ground for excusing the default rested on legal error because it asked the wrong question. Under Sawyer, a court can excuse a default if, “‘but for a constitutional error, no reasonable jury would have found the petitioner eligible for the death penalty.’” Thus, the Sixth Circuit should have asked “[w]hether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances.” Instead, the Sixth Circuit asked “whether, given the (alleged) improper instruction, the jury might have been relying on invalid aggravating circumstances when it recommended a death sentence.” To read Sawyer as the Sixth Circuit did “would justify excusing default whenever an instructional error could have been relevant to a jury’s decision,” which is “incompatible” with Sawyer itself. The Court concluded that, because the state trial and appellate courts had each independently weighed the appropriate factors and found the death penalty justified, the Sixth Circuit erred in holding that it could review Hutton’s procedurally defaulted claim.

- **Matal v. Tam**, 15-1293. By an 8-0 vote, the Court held that 15 U.S.C. §1052(a), a provision of the Lanham Act that authorizes the Patent and Trademark Office (PTO) to refuse registration of trademarks that “disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute,” violates the First Amendment’s Free Speech Clause. When respondent Simon Tam, a member of the rock band “The Slants,” attempted to register the band’s name, the PTO denied registration of the mark based on §1052(a). Tam lost his administrative appeal, but ultimately prevailed in the en banc Federal Circuit, which held that the disparagement clause is facially unconstitutional under the Free Speech Clause. In an opinion by Justice Alito, the Court affirmed.

After tracing the history of trademark law, the Court rejected Tam’s threshold argument that “persons” in the disparagement clause’s text cannot be interpreted to include racial or ethnic groups. Tam pointed to the Lanham Act’s definition of “person,” which “includes a juristic person as well as a natural person”—and therefore does not include (said Tam) racial and ethnic groups,
which are neither. The Court found, however, that “[a] mark that disparages a ‘substantial’ percentage of the members of a racial or ethnic group, necessarily disparages many ‘persons,’ namely, members of that group” (internal citation omitted). Moreover, the disparagement clause covers “institutions” and “beliefs,” and “thus applies to the members of any group whose members share particular ‘beliefs,’ such as political, ideological, and religious groups.”

The Court then turned to the constitutional issue, addressing three arguments offered by the government “that would either eliminate any First Amendment protection or result in highly permissive rational-basis review.” The Court first rejected the United States’ argument that trademarks are government speech, exempt from the First Amendment’s protections. The PTO “does not dream up these marks,” is not authorized to edit the marks or remove them from registration, and (except under the disparagement clause) may not reject marks based on viewpoint. To deem trademark registration as government speech, held the Court, would mean that the government is routinely “expressing contradictory views,” “endorsing a vast array of commercial products,” speaking profanely, and “babbling prodigiously and incoherently.” The Court distinguished the state-issued license plates at issue in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. __ (2015), finding that trademarks have not been historically considered to convey government messages and that the public does not link the substance of registered marks to the government. The First Amendment therefore applies to trademarks as private speech.

Next, a plurality of the Court (Justice Alito plus Chief Justice Roberts and Justices Thomas and Breyer) rejected the United States’ argument that “this case is governed by cases in which th[e] Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint.” The Court explained that all the case law on government-subsidized activities involved actual monetary expenditures. By contrast, trademark registration, although a government service that requires funds to operate, is one of many government licensing, registration, or permitting schemes that have never been viewed as equivalent to cash subsidies. Finally, the plurality rejected the government’s reliance on “a new doctrine that would apply to ‘government-program’ cases.” The plurality found that this “government-program” doctrine would “simply merge[] our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks.” The United States relied on cases involving state laws limiting when public employers may automatically deduct from non-union-members’ wages the portion of union dues that would be used in election or political activities. The Court found those cases “akin to our subsidy cases,” and therefore “no more relevant for present purposes than the subsidy cases already discussed.”

Finally, the plurality turned to the “dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson*.” The Court declined to resolve the issue, holding that “the disparagement clause cannot withstand even *Central Hudson* review.” The government claimed that two interests justified the clause. The first was “preventing ‘underrepresented groups’ from being ‘bombarded with demeaning messages in commercial advertising.’” But, held the Court, the First Amendment does not permit the government to “prevent[] speech expressing ideas that offend.” The second interest was “protecting the orderly flow of commerce,” which might be disrupted by trademarks that contain
disparagement. The Court ruled that the disparagement clause is not “narrowly drawn” to accomplish that goal, for it sweeps in trademarks that would not be disruptive (e.g., “Down with racists” or “James Buchanan was a disastrous president”).

Justice Kennedy authored an opinion concurring in part and concurring in the judgment, which Justices Ginsburg, Sotomayor, and Kagan joined. In Justice Kennedy’s view, the disparagement clause “constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny.” That conclusion “renders unnecessary any extended treatment of other questions raised by the parties.” Justice Kennedy concluded that the clause constitutes viewpoint discrimination because it permits applicants to register a “positive or benign” mark but “not a derogatory one.” By singling out a subset of messages for disfavor based on the views expressed, the government is targeting certain speech “based on the government’s disapproval of the speaker’s choice of message.” Put differently, “by mandating positivity, the law here might silence dissent and distort the marketplace of ideas.” And because the clause discriminates based on viewpoint, it is subject to heightened scrutiny whether or not “trademarks are commercial speech and whether trademark registration should be considered a federal subsidy.”

Justice Thomas wrote separately to note that he “continue[s] to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”

- Ziglar v. Abbasi, 15-1358. By a 4-2 vote, the Court held that the Bivens damages remedy should not extend to condition-of-confinement claims asserted against high executive branch officials based on policies they adopted with respect to the detention, in the immediate aftermath of the September 11 terrorist attacks, of certain aliens arrested on immigration charges. In the wake of the September 11 attacks, the federal government ordered hundreds of illegal aliens into custody and held them for months pending a determination of whether they had terrorism ties. During that time, the detainees were allegedly held “under harsh conditions” including being in “tiny cells for over 23 hours a day”; having lights left on 24 hours; being denied basic hygiene products; being unnecessarily shackled; being denied most communication with the outside world; being subjected to random searches of their cells and bodies; and being subjected to “physical and verbal abuse.” Some of the detainees brought suit against Bush administration officials—including the former attorney general, director of the FBI, and INS chief (the “Executive Officials”)—and two wardens (the “Wardens”) for violation of constitutional rights, including due process, equal protection, and unreasonable searches and seizures. They sought punitive and compensatory damages under the implied cause of action recognized in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and under 42 U.S.C. §1985(3), “which forbids certain conspiracies to violate equal protection rights.” The district court granted the Executive Officials’ motion to dismiss, but denied the Wardens’ motion. The Second Circuit affirmed as to the Wardens, but reinstated the claims against the Executive Officials. In an opinion by Justice Kennedy, the Court reversed as to the claims against the Executive Officials and vacated and remanded as to the claim against one of the Wardens. (Justices Sotomayor and Kagan recused themselves from the case.)

The Court began by describing the genesis of the Bivens remedy. The Court explained that, although Congress passed 42 U.S.C. §1983 to provide for damages suits against state actors who
deprive individuals of their federal constitutional rights, it provided no parallel cause of action against federal officials. Against that backdrop, Bivens held that the Constitution implied such a cause of action. Over the next decade, the Court allowed Bivens suits to proceed based on Fourth Amendment violations (Bivens itself), due process violations based on gender (Davis v. Passman, 442 U.S. 228 (1979)), and Eighth Amendment violations based on inadequate medical care (Carlson v. Green, 446 U.S. 14 (1980)). For a time, it seemed that the Court would essentially create a federal common-law parallel to §1983. But it only seemed that way. Whereas the Court from the middle of the century through the 1970s believed it appropriate for courts to imply causes of actions, by the late 1970s the Court took a different approach: If Congress does not explicitly create a remedy, the Court will only infer one if the statute shows an intent to do so. And although the Court recognized that whether to imply a cause of action under the Constitution “involves somewhat different considerations” than whether to imply a cause of action under a statute, it remains “a significant step under separation-of-powers principles for a court to determine that it has authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.” Because such claims impose substantial financial and administrative costs on federal employees, Congress is best situated to determine “whether, and the extent to which, monetary and other liabilities should be imposed upon” federal officials. For that reason, “the Court has made clear that expanding the Bivens remedy is now a ‘disfavored’ judicial activity”; in “most” cases, Congress should decide “whether to provide a damages remedy.” The Court’s test is “that a Bivens remedy will not be available if there are special factors counselling hesitation in the absence of affirmative action by Congress.” (Internal quotation marks omitted.) And “special factors” will usually exist, for they include (1) the need to assess “the burden on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself” and (2) that the case arises in a context—such as military matters—where Congress “is less likely” to “want the Judiciary to interfere.”

The Court then turned “to the Bivens claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks.” The Court faulted the Second Circuit for failing to perform a “special factor” analysis. The Second Circuit reasoned that such an analysis was not needed because the claims did not ask “for a Bivens remedy in a new context.” The Court disagreed, holding that “[i]f a case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new.” For example, “[a] case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; . . . or the presence of other special factors that previous Bivens cases did not consider.” The Court had little difficulty concluding that the claims here—a suit from illegal aliens challenging a “high-level executive policy created in the wake of a major terrorist attack on American soil”—were vastly different from previous Bivens cases, and thus new.

The Court then performed the “special factors” analysis and concluded that Bivens should not be extended to this new context. Among other things, the Court found that these claims would require inquiry into executive deliberations and distract the officials from “the proper discharge of
their duties”; “discovery and the litigation process . . . would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch”; the case would “require an inquiry into sensitive issues of national security”; and it would likely cause executive officials “to second-guess difficult but necessary decisions concerning national-security policy.” All told, Congress was better suited to consider the costs of providing remedies for those decisions, and had declined to do so despite numerous opportunities. The Court noted that “this is not a case . . . in which it is ‘damages or nothing.’” The detainees could file suit for injunctive relief and “might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.”

The Court next turned to the Bivens claim against one of the wardens based on alleged prisoner abuse. The Court agreed that the claim “has significant parallels” to Carlson, which allowed a Bivens claim for failure to provide medical care to a prisoner. But, stated the Court, “even a modest extension is still an extension. And this case does seek to extend Carlson to a new context.” For example, “Carlson was predicated on the Eighth Amendment and this claim is predicated on the Fifth”; the standard for assessing this claim “is less clear under the Court’s precedents”; the availability of alternative remedies might differ between the two cases; and Congress’ enactment of the Prison Litigation Reform Act in 1995 might bear on the analysis. The Court remanded to allow the Second Circuit to resolve the issue in the first instance. Finally, the Court held that the defendants were entitled to qualified immunity from the §1985(3) claims because no Court decision has expressly held that “official discussions between or among agents of the same entity” (here, the Executive Branch and the Department of Justice) can constitute a conspiracy under the provision.

Justice Thomas issued an opinion concurring in part and concurring in the judgment. He agreed in the result, but wrote separately to express his “concerns about our qualified immunity precedents.” Under current case law, an officer is entitled to immunity from a §1983 action if he did not violate a “clearly established” statutory or constitutional right. In Justice Thomas’ view, this “diverge[s] from the [appropriate] historical inquiry,” which focused on whether a suit could proceed under the common law causes of action as understood in 1871 when Congress passed the Civil Rights Act. The Court has therefore impermissibly expanded immunity based on the Court’s, rather than Congress’, choices. Justice Thomas would “reconsider” this line of decisions “in an appropriate case.”

Justice Breyer filed a dissenting opinion, which Justice Ginsburg joined. Justice Breyer stated that the claims here fell within “longstanding Bivens law,” and should thus proceed. For him, that conclusion rested “upon four basic legal considerations.” First, the notion that the Constitution grants federal courts the “authority to use traditional remedies to right constitutional wrongs” goes back as far as Marbury v. Madison. Second, Congress’ silence shows that the legislative branch intended to “leave this matter to the courts.” Third, the remedy should exist absent “special considerations.” And fourth, Bivens remedies are necessary to ensure that federal officials are just as accountable as state officials for violating federal rights. To the extent the Court has refused to expand those remedies in recent years, it has been in contexts that differed “with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered.” But here, the foundational principles and relevant context show that the detainees’ claims fall squarely within Bivens—they are suits for damages against executive officials for core constitutional violations of the same
nature as claims the Court has previously allowed and Congress has not taken issue with. Justice Breyer also maintained that, even assuming Bivens did not already reach these claims, it should be extended to do reach them because otherwise there would be no remedy—an injunction would not do, because the detainees have long since been released. To the extent the majority relied on preserving executive deliberations and tough-call decisions, Justice Breyer believed that the Bivens remedy would not unduly undermine those decisions, but would rather provide accountability for constitutional violations in both peace and wartime. He added that officials have defenses—such as qualified immunity and the personal-involvement requirement—to defeat all but the most glaring violations, and that the courts could tailor discovery to protect privileged material and preserve the candor of executive deliberations.

- **Bristol-Myers Squibb Co. v. Superior Court of California, 16-466.** By an 8-1 vote, the Court held that California courts lack specific jurisdiction over nonresidents’ claims against a Delaware company headquartered in New York when there is no connection between the plaintiffs’ specific claims and the forum state. After a group of plaintiffs sued petitioner Bristol-Myers Squibb Co. over damages allegedly caused by the pharmaceutical drug Plavix, Bristol-Myers moved to quash service of the nonresidents’ claims based on lack of personal jurisdiction. The trial court concluded that Bristol-Myers’ business activities in California gave rise to general jurisdiction; the California Court of Appeal concluded that it had specific, not general, jurisdiction over the nonresidents’ claims; and the California Supreme Court affirmed, applying a “sliding scale approach” to specific jurisdiction and concluding that Bristol-Myers’ “wide ranging” contacts with California were sufficient for the nonresidents’ claims. In an opinion by Justice Alito, the Court reversed.

The Court began with the long-established principle that the Due Process Clause of the Fourteenth Amendment limits personal jurisdiction in state courts. Under the Court’s precedent, courts may have personal jurisdiction in one of two ways. General jurisdiction, for a corporation, exists only where the corporation is fairly considered “at home” and may support any claim. Goodyear Dunlop Tires Operations, S.A. v. Brown, 562 U.S. 915, 919, 924 (2011). Specific jurisdiction, however, can be exercised only when the lawsuit “arises out of or relates to the defendant’s contacts with the forum.” Daimler AG v. Bauman, 571 U.S. __ (2014). “In determining whether personal jurisdiction is present, a court must consider a variety of interests[,] . . . [b]ut the ‘primary concern’ is ‘the burden on the defendant.’” The Court then emphasized that this burden “encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.” Limits on personal jurisdiction “‘are a consequence of territorial limitations on the power of the respective States.’” And so, in some cases, “‘the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment’” even when the forum has an interest in the litigation and would be convenient to the parties.

The Court concluded that its settled specific-jurisdiction precedent—requiring a connection between the underlying controversy and a defendant’s activities in the forum state—determined the outcome here. Bristol-Myers did not develop, manufacture, package, label, create a marketing strategy for, or work on regulatory approval for Plavix in California. The nonresidents’ injuries and medical treatment did not occur in California. Nor did the nonresident plaintiffs allege that they
purchased Plavix in California. Indeed, “[a]ll conduct giving rise to the nonresidents’ claims occurred elsewhere.” The connections to the forum that respondents asserted—e.g., that Bristol-Myers conducted research on other drugs in California and that different plaintiffs (California residents) have brought similar claims against Bristol-Myers based on Plavix—are not adequate links to these specific claims. The Court criticized the California Supreme Court’s newly minted “sliding scale” approach as “resembl[ing] a loose and spurious form of general jurisdiction.” At bottom, the Court considered the case to require a “straightforward application . . . of settled principles of personal jurisdiction.” And because out-of-state plaintiffs have multiple options for where to sue, the decision “will not result in the parade of horribles that respondents conjure up.”

Justice Sotomayor dissented. In her view, the Court’s decision works a “contraction of specific jurisdiction,” along the lines of Daimler, such that a defendant corporation “cannot be held accountable in a state court by a group of injured people unless all those people were injured in the forum State”—even when the defendant has “engage[d] in a nationwide course of conduct.” Justice Sotomayor asserted that “there is nothing unfair” about subjecting a defendant corporation to jurisdiction in such cases. In any event, here, she contends, the Court’s three conditions for exercise of specific jurisdiction are present: (1) Bristol-Myers “purposefully avail[ed] itself” of California’s pharmaceutical market, J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 877 (2011), (2) the nonresidents’ claims “relate to” Bristol-Myers’ conduct in California, International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945), and (3) “there is no serious doubt that the exercise of jurisdiction over the nonresidents’ claims is reasonable” because it would “facilitate[] the efficient adjudication of the residents’ claims” and enable more effective regulation of corporations like Bristol-Myers. Finally, Justice Sotomayor expressed concerned that the Court’s decision will create “substantial” consequences in the form of “piecemeal litigation,” bifurcated claims, and the “impossib[ility]” of certain nationwide mass actions.

**Turner v. United States**, 15-1503. By a 6-2 vote, the Court held that alleged Brady evidence in a 30-year-old murder case was not material, and thus did not entitle petitioners to a new trial. Petitioner Charles Turner and 10 other men were charged with the robbery and murder of Catherine Fuller in 1985. Fuller’s body was found in an alley garage in Washington, DC, where she “had been robbed, severely beaten, and sodomized with an object that caused extensive internal injuries.” The government’s theory was that she was attacked by group of 11 men. Two of the men confessed and testified at trial. Though their testimony differed in some respects, it was consistent that Fuller was attacked by a large group and that one of the men sodomized her with a pipe or pole. The videotaped statement of another participant was also played at trial, in which that man confessed to being involved in the group attack. The government presented four other witnesses who had not participated, but had seen the group attack. At trial, each defendant pursued “what was essentially a ‘not me, maybe them’ defense.” No one disputed that the victim was killed in a group attack; they just claimed they were not part of the group. All but two of the men were convicted. Years later in post-conviction, seven of the men alleged that the government had withheld seven pieces of exculpatory evidence, falling into two basic categories. The first category was evidence that other men—acting either alone or with one other person—committed the crimes, one of whom (McMillan) later robbed, sodomized, and murdered another woman in a similar manner to Fuller. The second category was impeachment evidence on a number of the government’s witnesses, including evi-
dence of drug use and partial recantation. The D.C. trial court held a 16-day evidentiary hearing, after which it ruled that this evidence was not material under *Brady*, and denied relief. The D.C. Court of Appeals affirmed. In an opinion by Justice Breyer, the Court affirmed.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that the Due Process Clause requires the government to turn over “evidence that is favorable to the defense and material to the defendant’s guilt or punishment.” This includes impeachment evidence. See *Giglio v. United States*, 405 U.S. 150 (1982). Evidence is “material” under *Brady* “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” The Court agreed with the government that the evidence at issue was not material. Petitioners maintained that the new evidence “would have permitted the defense to knit together a theory that the group attack did not occur at all—and that it was actually McMillan alone or with an accomplice, who murdered Fuller.” The Court concluded, however, that the evidence was “too little, too weak, or too distant from the main evidentiary points to meet *Brady*’s standards.” Most critically, “a group attack was the very cornerstone of the Government’s case. The witnesses may have differed on minor details, but virtually every witness to the crime itself agreed as to a main theme: that Fuller was killed by a large group of perpetrators.” To sustain petitioners’ new theory, the jury would have had to believe that two defendants falsely confessed to participating in a group attack; that a disinterested witness fabricated seeing a group attack; and that several other witnesses falsely testified to witnessing a group attack. As to the withheld impeachment evidence, the Court found it to be largely cumulative to that presented at trial.

Justices Kagan filed a dissenting opinion that Justice Ginsburg joined. In their view, the evidence was material because an alternative-attacker theory could have gained traction if all the defendants had adopted it. This would have changed the “whole tenor” of the trial and “may well have flipped one or more jurors,” which is “all *Brady* requires.”

*Maslenjak v. United States*, 16-309. Title 18 U.S.C. §1425(a) makes it a crime to “knowingly procure[] or attempt[] to procure, contrary to law, the naturalization of any person.” “And when someone is convicted under §1425(a) of unlawfully procuring her own naturalization, her citizenship is automatically revoked. 8 U.S.C. §1451(e).” The Court unanimously held that to obtain a conviction under §1425(a), the United States must establish that the defendant’s illegal act contributed to her acquisition of citizenship. Petitioner Divna Maslenjak, an ethnic Serb, relocated from Bosnia to the United States in 1998, seeking refugee status for herself and her family. She attested to officials that they feared persecution from Muslims based on their ethnicity and from Serbs because Maslenjak’s husband had evaded service in the Bosnian Serb Army. The United States granted them refugee status. Maslenjak then applied for and obtained U.S. citizenship, attesting in the process that she had never given false information to a government official in the course of obtaining entry. The government later discovered, however, that Maslenjak’s husband had served in the Bosnian Serb Army and that she knew that all along. It therefore charged her with “knowingly . . . procure[ing], contrary to law, [her] naturalization,” in violation of §1425(a), because 18 U.S.C. §1015(a) makes it unlawful to give false statements under oath in a naturalization proceeding. The district court instructed the jury that the false statement need not be material to support a conviction under §1425(a), and the jury convicted Maslenjak. The Sixth Circuit affirmed, holding that if
Maslenjak made a false statement in violation of §1015(a) and procured naturalization, she automatically violated §1425(a). In an opinion by Justice Kagan, the Court reversed.

The Court began with the text of §1425(a) and the dictionary definition of “procure,” noting that “to ‘procure . . . naturalization’ means to obtain naturalization.” The Court concluded that the adverbial phrase “contrary to law” is “wedged in between ‘procure’ and ‘naturalization’” in order to reflect a “causal relation.” Looking to the entire statutory phrase, then, “the most natural understanding is that the illegal act must have somehow contributed to the obtaining of citizenship.” Any alternative understanding not requiring “some kind of means-end relationship” would, in the Court’s view, make no sense. Accordingly, the Court rejected the United States’ contrary interpretation that §1425(a) requires merely a “violation[] of law in the course of procuring naturalization” regardless of whether the violation contributed to obtaining citizenship. That interpretation, the Court explained, would make “the violation of law and the acquisition of citizenship . . . merely coincidental.” (Imagine . . . that John made an illegal turn while driving to the auction house to purchase a painting. Would you say that he had ‘procured the painting illegally’ because he happened to violate the law in the course of obtaining it? Not likely.)

The Court then set forth an objective “causal inquiry” test for determining when §1425(a) has been violated. Where “the defendant misrepresents facts that the law deems incompatible with citizenship,” that lie necessarily played a role in procuring citizenship, and §1425(a) has been violated. Where the “true facts lying behind a false statement” would not have prohibited citizenship but might have prompted an investigation and discovery of facts that would disqualify a defendant from citizenship, the government must satisfy a two-part test to proceed under §1425(a). First, the government must prove that the lie was “sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials” to investigate further. Second, the government must establish the predictability (but not certainty) that an investigation would have “borne disqualifying fruit.” If those two steps are satisfied, a defendant may rebut the showing by establishing that she nonetheless meets the legal qualifications for acquiring citizenship. Because the jury instructions below were in error—requiring the jury to find only a false statement, and not causality, to convict—the Court vacated and remanded for further proceedings.

Justice Gorsuch wrote an opinion concurring in part and concurring in the judgment, which Justice Thomas joined. The concurring Justices agree that the text of §1425(a) requires the government to prove causation but would stop short of “operational[izing]” the causation requirement. Because the question presented and briefing before the Court focused on a materiality element, not a causation element, the concurring Justices would decline to declare a test without the benefit of “the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches.” Justice Alito wrote separately, concurring in the judgment only. He would hold that a naturalized citizen cannot be stripped of citizenship based on a false statement that is immaterial. In Justice Alito’s view, although §1425(a) does not mention materiality, by using the word “procure” it “essentially imposes the familiar materiality requirement that applies in other contexts.” Accordingly, he would not read §1425(a) to require that the misrepresentation “actually had some effect on the naturalization decision,” only that the illegal misrepresentation is “material to the outcome” of the naturalization decision.
By a 7-2 vote, the Court held that when a federal employee files a complaint with the Merit Systems Protection Board (MSPB) alleging both civil service violations and discrimination, and the case is dismissed for lack of jurisdiction, the proper venue for appeal is a federal district court. When a federal employee believes he has suffered some adverse employment action—a firing, a demotion, a denial of a promotion, etc.—he can file a complaint with the MSPB. If he alleges that the action was taken in violation of civil service laws, and the MSPB denies his claim, the Civil Service Reform Act states that the Federal Circuit has exclusive jurisdiction over an appeal. If he alleges a violation of federal antidiscrimination laws, however, the Federal Circuit lacks jurisdiction and he must seek review in district court. When an employee alleges both civil service and antidiscrimination violations, he has filed a “mixed” case. The Court had previously held that when the MSPB reaches the merits of a mixed case, or dismisses it on procedural grounds, the appeal goes to the district court. Kloeckner v. Solis, 568 U.S. 41 (2012). But what if the MSPB dismissed the case on jurisdictional grounds?

Petitioner Anthony Perry worked for the U.S. Census Bureau. He was told he would be fired because of a “spotty attendance” record. Perry then filed discrimination claims with the EEOC. The parties settled—rather than being fired, Perry agreed to a brief suspension followed by an early retirement, in exchange for which he would dismiss his discrimination claims. After he retired, Perry filed a mixed case with the MSPB, alleging he had been forced out of his job on the basis of both his race and his making antidiscrimination claims. He also claimed that his settlement agreement was coerced. The administrative law judge ruled that his settlement was voluntary and dismissed his case. The MSPB affirmed, agreeing that his settlement was voluntary, and holding that it therefore lacked jurisdiction because it could review only “adverse” employment actions. Perry filed an appeal in the D.C. Circuit, which, after briefing from the parties on the issue, held that the Federal Circuit should hear Perry’s appeal. The Court, in an opinion by Justice Ginsburg, reversed.

The government contended that employees such as Perry must split their claims, “appealing MSPB nonappealability rulings to the Federal Circuit while repairing to the district court for adjudication of their discrimination claims.” In the government’s view, although the CSRA authorizes district courts to review mixed claims, “[a]n MSPB finding of nonappealability removes a case from that category . . . .” The Court disagreed, holding that “a nonfrivolous allegation of jurisdiction generally suffices to establish jurisdiction upon initiation of a case.” The key, as the Court explained in Kloeckner, “was the employee’s ‘claim’ that an agency action appealable to the MSPB violates an antidiscrimination statute listed in’” the relevant CSRA provision. To hold otherwise, and distinguish “between MSPB merits and procedural decisions, on the one hand, and the Board’s jurisdictional rulings, on the other, . . . would be perplexing and elusive” because properly categorizing a case as jurisdictional (or not) can be a “slippery” question. The cleaner procedure is for all mixed cases go to district court, since the Federal Circuit cannot decide discrimination claims.

Justice Gorsuch, joined by Justice Thomas, dissented. In these Justices’ view, the majority deviated from the process Congress had established: Under the CSRA, discrimination claims go to district court, and civil service claims go to the Federal Circuit. Although the majority’s scheme might be more efficient, it was not the Court’s place to “tweak” statutes, even if “just a little.”
II. Cases Granted Review

- **Gill v. Whitford, 16-1611.** The Court will review a decision by a three-judge district court holding that Wisconsin’s redistricting plan for its State Assembly is an unconstitutional partisan gerrymander. After the 2010 census, the Wisconsin Legislature adopted a redistricting plan (“Act 43”) for its State Assembly. Plaintiffs, 12 individual Wisconsin voters, filed a lawsuit alleging that Act 43 constituted an illegal partisan gerrymander in violation of the First and Fourteenth Amendments. A three-judge district court heard the case and adopted a three-part test, considering the intent, effect, and justification of the redistricting plan, with an eye to the “entrench[ment]” of a particular political party. Finding that an objective of Act 43 was “entrenching Republican’s control of the Assembly,” that the effect of Act 43 has matched its objective, and that any justification for choosing Act 43 over a less partisan plan was absent, the district court permitted the plaintiffs to challenge the map statewide and enjoined use of the redistricting plan contained in Act 43. Wisconsin appealed, and the Court granted review.

Wisconsin’s request for review poses five questions: “(1) Did the district court violate *Vieth v. Jubelirer*, 541 U.S. 267 (2004), when it held that it had the authority to entertain a statewide challenge to Wisconsin’s redistricting plan, instead of requiring a district-by-district analysis? (2) Did the district court violate *Vieth* when it held that Wisconsin’s redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complied with traditional redistricting principles? (3) Did the district court violate *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986)? (4) Are Defendants entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court’s test, which the court announced only after the record had closed? (5) Are partisan-gerrymandering claims justiciable?”

Wisconsin contends that two principles emerging from *Vieth* bar plaintiffs’ lawsuit. First, *Vieth* compels that plaintiffs cannot maintain a statewide challenge but must bring their challenges on an individual-district level. This rule, Wisconsin contends, is made plain from a reading of the four-Justice plurality opinion and Justice Souter’s dissent in that case. Second, *Vieth* establishes that when a redistricting plan is drafted according to traditional redistricting principles, it will not be struck down as an unconstitutional gerrymander. Because it is undisputed that “Act 43 complies with traditional redistricting principles, like compactness, contiguity, and respect for political-subdivision lines,” plaintiffs’ partisan-gerrymandering claim cannot proceed. Wisconsin contends that nothing in the Court’s racial-gerrymandering jurisprudence undermines this conclusion. Moreover, because the three-part test the district court applied is not a “limited and precise rationale,” as required by Justice Kennedy’s concurring opinion in *Vieth*, Wisconsin argues that the case is non-justiciable.

In response, plaintiffs contend that the three-part test the district court endorsed is “deeply rooted in the Court’s jurisprudence and highly workable.” The first prong, discriminatory intent, “follows from basic First and Fourteenth Amendment principles.” The second prong, discriminatory effect, is (according to plaintiffs) supported by several “themes” in the Court’s cases—for example, the Court’s concern about gerrymanders that are asymmetrical or durable. The third prong, justifi-
cation, comes from the one-person, one-vote cases, in which the Court has looked to whether “deviations are justified by legitimate factors” or “malapportionment cannot be properly explained.” Plaintiffs contend that all three parts are easily satisfied here, where the skew to Republican control following Act 43 has been so large and lasting that it cannot be given any neutral explanation. (For example, in 2012 the Republicans won 60 seats out of 99 while losing the statewide vote.) Finally, plaintiffs dispute that Vieth precludes statewide partisan-gerrymandering claims, arguing that Wisconsin’s “idiosyncratic view” of Vieth’s implications does not comport with subsequent cases, such as League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006), where any such prohibition would naturally have been mentioned by the Court.

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