required from the defense.[72] Through a revised FMA, Congress can put an end to the Supreme Court's inconsistent interpretations of magistrates' jurisdiction in the realm of jury selection.

C. Immigration and Nationality Act

Voluntary Departure. — Courts deploy the absurdity doctrine to except from an overinclusive rule a case inconsistent with the rule's purpose.[1] Thus, for example, the Supreme Court held in *United States v. Kirby*[2] that police commit no crime when they arrest a mail carrier for murder, despite the plain text of a statute prohibiting the knowing obstruction of the mail.[3] As in *Kirby*, the typical remedy for absurdity is to create an exception: courts acknowledge the general validity of a law, excepting a peculiar case.[4] Last Term, in *Dada v. Mukasey*,[5] the Supreme Court invoked a novel form of the absurdity doctrine[6] to provide relief for aliens granted voluntary departure who were forced to choose between leaving the country and forgoing their right to seek reopening of their removal proceedings or staying and facing sanctions. A five-member majority of the Court saw "untenable conflict" in this choice,[7] holding that aliens must be permitted to withdraw their requests for voluntary departure in order to realize their right to seek reopening.[8] This remarkable remedy — no mere exception, but a new affirmative right — raises a number of positive and normative concerns that undermine the Court's use of absurdity, but the lesson of *Dada* may be that Congress must speak especially clearly

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[72] Such an approach would address the concerns of scholars. *See, e.g.*, Monique Mulcare, *Article III, the Federal Magistrate, and the Power of Consent*, 1992 ANN. SURV. AM. L. 297, 315–17 (proposing that Congress pass a set policy of only accepting waiver by the written consent of the defendant herself). Furthermore, to alleviate any concerns about judicial independence and defendants' rights, any congressional revision of the FMA should include a provision granting district judges the right to review de novo any magistrate judge's jury selection proceedings so that it is made clear that the current standard of judicial oversight is continued under the new law.

[1] Professor Einer Elhauge explains that courts invoke absurdity in two kinds of situations: first, where a statute's application offends universal common sense, and second, where a statute's application conflicts with the legislature's clear enacting preferences, given other statutory language. In either case, the statute's text can be said to be inconsistent with its purposes: either the presumed purpose of every legislature to enact rational laws or the apparent purpose of the enacting legislature to achieve certain outcomes as revealed by the statute. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES 143–48 (2008).

[2] 74 U.S. (7 Wall.) 482 (1869).

[3] *See id.*

[4] See, for example, the situations described in *Kirby* itself. *See id.* at 487.

[5] 128 S. Ct. 2307 (2008).

[6] Although the Court did not use the *terms* "absurdity" or "absurdity doctrine," it did alter the plain text of the statute in question because of "untenable conflict" in light of the statute's purposes. This reasoning is characteristic of the absurdity doctrine.

[7] *Dada*, 128 S. Ct. at 2320.

[8] *Id.* at 2319.

where it intends to burden certain marginalized groups that the Court is inclined to protect.

Nigerian citizen Samson Taiwo Dada came to the United States in 1998 on a temporary visa, which he overstayed.[9] Dada claimed to have married an American citizen in 1999, but his wife's I-130 Petition for Alien Relative was defective.[10] In 2003, the Department of Homeland Security sought to remove him under section 237(a)(1)(B) of the Immigration and Nationality Act[11] (INA) for overstaying his visa.[12] Despite a second pending I-130, the immigration judge denied Dada's request for a continuance and found him removable.[13] Rather than ordering removal, however, the judge granted Dada's request for voluntary departure under 8 U.S.C. § 1229c(b), allowing Dada to choose the time and destination of his departure, so long as he left within thirty days.[14]

Twenty-eight days later, Dada sought to withdraw his request for voluntary departure and moved to reopen his removal proceedings under 8 U.S.C. § 1229a(c)(7), citing "new and material evidence demonstrating a bona fide marriage."[15] After more than two months, the Board of Immigration Appeals "denied the motion to reopen on the ground that [Dada] had overstayed his voluntary departure period."[16] The Board ruled that because Dada had overstayed the thirty-day window, he was barred under section 240B(d) of the INA[17] from seeking adjustment of his status.[18] Having sought and received voluntary departure, Dada was required to leave within the statutory window regardless of the pendency of his motion to reopen, which would have been automatically withdrawn as soon as he left.[19]

Dada sought review of the Board's decision in the Fifth Circuit, but the court denied his petition in a short per curiam opinion.[20] The panel held that the Board's conclusion that Dada was statutorily ineli-

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9 *Id.* at 2311.

10 *Id.* The petition failed to include "[t]he necessary documentary evidence" to prove that a valid marriage had taken place. *Id.*

11 8 U.S.C. §§ 1101–1537 (2006).

12 *Dada*, 128 S. Ct. at 2311 (citing 8 U.S.C. § 1227(a)(1)(B)).

13 *Id.*

14 *Id.* The INA allows up to sixty days for the departure window, 8 U.S.C. § 1229c(b)(2), but the Board of Immigration Appeals set Dada's window at thirty days.

15 *Dada*, 128 S. Ct. at 2311.

16 *Id.* at 2312.

17 8 U.S.C. § 1229c(d) (2006).

18 *Dada*, 128 S. Ct. at 2312.

19 *See* 8 C.F.R. § 1003.2(d) (2008) ("Any departure from the United States . . . occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.").

20 Dada v. Gonzales, 207 F. App'x 425 (5th Cir. 2006) (per curiam).

gible to seek adjustment of his status was reasonable.[21] It declined to reach the merits of Dada's challenge to the immigration judge's decision because his petition for review was directed at the Board's denial of his motion to reopen.[22]

The Supreme Court reversed and remanded. Writing for the Court, Justice Kennedy[23] explained that the terms of the voluntary departure provision conflicted with the INA's guarantee that every alien has a right to move to reopen his removal proceedings. Voluntary departure "allows the Government and the alien to agree upon a *quid pro quo*": the alien agrees to leave expeditiously, saving the Government the costs of deportation, and the Government permits the alien to exit on his own terms.[24] And the text "contains no ambiguity" — the alien must depart within the prescribed period.[25] At the same time, however, the INA gives every alien the right to one motion to reopen, the adjudication of which can take many months.[26] If an alien leaves the country pursuant to a voluntary departure before the Board rules on his motion, the motion is automatically withdrawn. Thus, a plain reading of the INA presents an alien granted voluntary departure with a difficult choice: leave and withdraw your motion to reopen or stay beyond the voluntary departure window and become ineligible for the relief you seek, namely, adjustment of status.[27] Justice Kennedy's majority opinion cast this choice as an Odyssean dilemma,[28] where leaving the plain text intact would perpetuate "quixotic results" and "untenable conflict."[29]

The majority opinion implicitly suggested what the Court said much more directly in another case: the statute "can't mean what it says."[30] Persuaded by the absurdity of the statutory scheme, the majority was "reluctant to assume that the voluntary departure statute was designed to remove this important safeguard [(the motion to reopen)] for the distinct class of deportable aliens most favored by the same law."[31] Thus, the Court determined that tolling of the with-

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[21] *Id.* at 425.

[22] *Id.* at 426.

[23] Justices Stevens, Souter, Ginsburg, and Breyer joined the majority opinion.

[24] *Dada*, 128 S. Ct. at 2314. The Court also noted that an alien who voluntarily departs escapes the onerous statutory bars on readmission facing aliens who are involuntarily removed. *See id.*

[25] *Id.* at 2316.

[26] *See id.* at 2317–18.

[27] *See id.* at 2318.

[28] *See id.* (describing the choice as "between Scylla and Charybdis").

[29] *Id.* at 2320.

[30] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989) (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)).

[31] *Dada*, 128 S. Ct. at 2318.

drawal period "or some other remedial action" was necessary.[32] Precisely what remedial action was appropriate, however, was a difficult question.[33]

Dada urged the Court in his brief and at oral argument to resolve this absurdity by tolling the voluntary departure period pending the resolution of a motion to reopen.[34] But the Court rejected Dada's suggested approach as inconsistent with voluntary departure's "agreed-upon exchange of benefits": an alien cannot enjoy the benefits of voluntary departure without holding up his end of the bargain and leaving within sixty days.[35] For a remedy more consistent with mutual exchange, the majority looked to proposed rules issued by the Department of Justice, which would permit an alien to unilaterally withdraw a voluntary departure request, forgoing the concomitant benefits.[36] Although this scheme was not the most "expeditious" the Court could imagine, it avoided the perceived absurdity compelled by the statute's plain text without "alter[ing] the *quid pro quo*."[37] Thus, the Court held that aliens granted voluntary departure must be permitted to withdraw their requests in order to pursue a motion to reopen.

Justice Scalia dissented.[38] He argued that, although the Court claimed to adjust the plain text of the statutory scheme out of necessity, the "perceived 'necessity' [did] not exist."[39] The INA does not force an alien to either "depart and lose [his] right to seek reopening, or stay and incur statutory penalties"; it "offers the alien a deal."[40] The alien who accepts the benefits of voluntary departure also accepts the possibility that he may lose his right to pursue reopening.[41] Thus, in Justice Scalia's opinion, the Court solved a problem that did not exist. And the Court's chosen remedy did not maintain the quid pro quo: the alien is no longer "*bound* to his agreement."[42] Perhaps paramount

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[32] *Id.*

[33] That this choice was difficult may in part explain why, after oral argument, the Court ordered supplemental briefing on what would become its chosen remedy. *See* Dada v. Mukasey, 128 S. Ct. 1116 (2008).

[34] *See* Transcript of Oral Argument at 57, *Dada*, 128 S. Ct. 2307 (2008) (No. 06-1181), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1181.pdf (asking the Court to "grant tolling"); Brief for Petitioner at 12–50, *Dada*, 128 S. Ct. 2307 (2008) (No. 06-1181), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-1181_Petitioner.pdf.

[35] *Dada*, 128 S. Ct. at 2319.

[36] *See id.* (citing Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 72 Fed. Reg. 67674, 67679 (proposed Nov. 27, 2007)).

[37] *Id.* at 2320.

[38] Chief Justice Roberts and Justice Thomas joined Justice Scalia's dissent.

[39] *Dada*, 128 S. Ct. at 2321 (Scalia, J., dissenting).

[40] *Id.*

[41] *See id.* at 2321–22.

[42] *Id.* at 2323.

among Justice Scalia's reasons for dissenting from the statutory rewrite was that the Court lacked the authority to do it — barring unconstitutionality, statutes are to be enforced as written.[43]

Justice Alito also dissented. Because the INA was silent on an alien's ability to withdraw a request for voluntary departure, he argued that "the authority to make that policy choice rest[ed] with the agency."[44] He would have remanded the case to the Board of Immigration Appeals to address Dada's motion to withdraw his request and to clarify the rationale behind its decision.[45]

The *Dada* Court applied the absurdity doctrine to create a more palatable balance between voluntary departure and the motion to reopen than what was otherwise required by the plain text of the INA. That the Court set aside text in the face of perceived absurdity is unremarkable.[46] What makes *Dada* unique is the form of its remedy: whereas the prototypical absurdity case denies the application of an overinclusive rule to a situation inconsistent with the rule's purpose, *Dada* upheld both relevant provisions but created a right to withdraw without any textual basis in the statute.[47] This unexpected remedy raises a host of normative and positive questions that undermine the Court's approach. Nevertheless, the Court's willingness to stretch absurdity to its limits in *Dada* suggests that Congress must speak especially clearly when burdening marginalized groups that the Court is inclined to protect.

Courts typically invoke the absurdity doctrine to adjust for the overinclusiveness of a rule in order to shape its application consistent with its purpose.[48] The classic example in the Supreme Court is *Holy Trinity Church v. United States*.[49] There, the Court had to decide

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[43] *See id.* ("[I]t is not unusual for the Court to blue-pencil a statute . . . . But that is done when the blue-penciled provision is *unconstitutional*."); *cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2476–85 (2003) (arguing that courts should invoke constitutional norms instead of the absurdity doctrine when a statutory scheme upsets "commonly or deeply held social values," *id.* at 2476).

[44] *Dada*, 128 S. Ct. at 2325 (Alito, J., dissenting).

[45] *Id.* at 2326.

[46] Indeed, the Court has done so on numerous occasions. *See, e.g.*, cases cited *infra* note 54.

[47] The Court found a textual basis for the right in Department of Justice proposed rules, which are hardly authoritative.

[48] On the overinclusiveness of rules, see, for example, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992). Professor Cass Sunstein has argued that because rules are frequently over- or underinclusive, courts often have to make exceptions. *See* Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 986–89 (1995). The idea of using a rule's purposes to guide and shape its application is associated most with Professor Ronald Dworkin, whose method for deciding hard cases relies on identifying the principles and policies that best fit and justify the laws. *See generally* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[49] 143 U.S. 457 (1892). *Holy Trinity* is not universally loved. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting*

whether a statute that prohibited foreigners from performing labor in the United States applied to an Englishman hired as the pastor of a New York church. In light of the statute's legislative history,[50] the Court held that the statute did not apply, citing the "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[51] While some ardent textualists have criticized the absurdity doctrine as inconsistent with "legislative process and the constitutional structure,"[52] even Justice Scalia has invoked it to alter the plain text application of a law,[53] indicating that at least some applications of the absurdity doctrine are widely recognized as valid.

The remedy for the core case of absurdity, as in *Holy Trinity*, is to create an exception. Although the plain text of the *Holy Trinity* statute would have covered ministers, the Court invoked absurdity to hold that ministers do not come within the rule. This remedy of exception is used in the Supreme Court's best known absurdity cases.[54] The Court has held, despite contrary text, that a city and several corporations were "individuals" for standing purposes under the Line Item Veto Act;[55] that the Department of Justice did not "utilize" an American Bar Association Committee that advised the Department;[56] and that a rule of evidence relating unqualifiedly to "defendants" did not apply to civil defendants.[57] The exception remedy is consistent with the stated justification for the absurdity doctrine: looking at the statute

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the Constitution and Laws, *in* A MATTER OF INTERPRETATION 3, 18–23 (Amy Gutmann ed., 1997).

[50] *See Holy Trinity*, 143 U.S. at 464 (citing "testimony presented before the committees of Congress"). Professor Adrian Vermeule argues that the *Holy Trinity* Court misread the legislative history, which is one reason he opposes resort to legislative history in general. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998).

[51] *Holy Trinity*, 143 U.S. at 459; *cf.* FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 284–85 (7th Cir. 2002) ("Nonsensical interpretations of contracts, as of statutes, are disfavored. Not because of a judicial aversion to nonsense as such, but because people are unlikely to make contracts, or legislators statutes, that they believe will have absurd consequences." (citations omitted)); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 628 (1958) (acknowledging that certain cases "not specifically envisaged beforehand" can come literally within a generalized instruction but are nonetheless meant to be excluded as outside "what we 'really' want or our 'true purpose'").

[52] Manning, *supra* note 43, at 2392.

[53] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 45–47 (1994).

[54] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

[55] *See Clinton*, 524 U.S. at 428–36.

[56] *See Pub. Citizen*, 491 U.S. at 464–65.

[57] *See Bock Laundry*, 490 U.S. at 510–11.

"as a whole,"[58] it becomes clear from the purpose of the statute that it is not meant to apply to the particular case at bar. Whether right or wrong, this justification allows those who invoke absurdity to deny claims that they are "rewriting" a statute — insofar as their exception is compelled by the statute itself, they are merely interpreting the law consistent with its purpose.[59]

The *Dada* Court's remedy for the INA's "untenable conflict" is remarkably different from the norm described above. Instead of excepting aliens or some subset of aliens from a general rule, the Court crafted a provision for withdrawal from voluntary departure — despite the lack of any textual or extra-textual indication that the Congress that enacted the INA intended to create such a provision. Of course, creating a fact-specific exception to the rule that aliens granted voluntary departure must leave within sixty days would have been difficult: not only is the text unambiguous, but it also clearly indicates that Congress was aware of the existence of the class of aliens that the Court would wish to except — the relatively favored class of removable aliens who could be granted voluntary departure. Indeed, the apparently conflicting provisions were enacted by the same Congress in the same Act, so the argument that the Court should except from the sixty-day requirement all aliens seeking reopening — to which all have the right — appears to be a nonstarter.

Dada's novel remedy reveals that the majority was applying something distinct from the core absurdity doctrine. If the rule were absurd in the conventional sense, the remedy for its absurdity would be implicit in the statute's purpose — the statute's "meaning" as informed by its purposes would differ from a plain reading of its text, calling for an exception. But the *Dada* "absurdity" was not a conflict between purposes and text in an unusual case; it was instead an onerous burden imposed on a class of aliens of whom Congress was clearly aware when it passed the statute.[60] On one view, therefore, the Court cor-

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[58] The move to considering the statute "as a whole" is an important one and was pivotal in Justice Kennedy's majority opinion. *See Dada*, 128 S. Ct. at 2317 ("In reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'" (quoting Kokoszka v. Belford, 417 U.S. 642, 650 (1974))).

[59] This method is consistent with what Judge Posner calls "imaginative reconstruction": "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

[60] Justice Kennedy would add that these aliens were not just contemplated but "most favored" elsewhere in the INA, *Dada*, 128 S. Ct. at 2318, yet favoring aliens in one provision and burdening them in another is at best *inconsistent*, not absurd.

rected what it saw as an unreasonable policy choice rather than the inadvertent overinclusiveness of a rule.[61]

This distinction between the *Dada* approach and core absurdity doctrine makes a difference with respect to the justification for departing from the plain text of a statute. Excepting a particular case from a generalized classification is arguably consistent with purpose-based interpretation because a statute's "meaning" as informed by its core purposes may compel an interpretation inconsistent with its text.[62] While a purpose-based reading of a statute may suggest an exception, it is hard to imagine how a statute like the INA could implicitly contain something like the withdrawal provision created by *Dada*. Indeed, the Court did not and could not suggest that Congress intended to create the withdrawal provision. Instead of saying, as in the core case, that a rule is overinclusive and cannot apply to an unusual situation, the Court said that a scheme concededly applicable to the specific case was so burdensome as to be unacceptable. The best explanation for *Dada* may be not that the Court interpreted the INA consistent with the enterprise of purpose-based statutory interpretation, but instead that it interpreted the statute with a particular normative vision of immigration law. Thus, the primary normative justification for the absurdity doctrine — that the exception is implicit in the rule — cannot bolster the Court's holding.

Instead of relying on the purpose of the statute in crafting the remedy, the Court resorted to citing a *proposed* rule in the Federal Register.[63] This approach raises a host of concerns. As a matter of normative constitutional theory, relying on a proposed rule rather than the plain text of a duly enacted statute flouts bicameralism and presentment — a criticism that Professor John Manning raises with regard to legislative history[64] and that applies a fortiori to the instant case. Professor Manning argues that treating legislative history as authoritative

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[61] *Cf.* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV J.L. & PUB. POL'Y 61, 64 (1994) ("'Getting things right' may be a principal goal of *law* without its being a principal or even a particularly important goal of legal interpretation.").

[62] *See, e.g.*, Logan v. United States, 128 S. Ct. 475, 484 (2007) ("Statutory terms, we have held, may be interpreted against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand." (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945))).

[63] One could argue that the Court relied on the purpose of the INA when it said that the Government's position failed because it "would render the statutory right to seek reopening a nullity in most cases of voluntary departure," *Dada*, 128 S. Ct. at 2317, but the Court's statement only supported crafting *some* remedy, not the particular one derived from the proposed rule.

[64] *See* John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707–10 (1997).

allows legislators to make "law" outside the constraints of Article I[65] and to avoid being held accountable for unpopular laws[66] because what they say in committee — and not merely what gets passed by both houses and signed by the President — is binding. But at least in the case of legislative history, each constitutional actor could in theory refuse to vote for or sign legislation where the legislative history includes undesirable statements of legislators.[67] The use of a *proposed* rule or law as authoritative has no such check: we can rely on neither the administrative process nor the requirements of Article I to protect ourselves from bad laws.

As a prediction of positive political theory, the Court's novel remedy in *Dada* may allow Congress to pass sloppier legislation. If the Court is right that Congress could not have intended to "remove [the] important safeguard"[68] of a motion to reopen for those granted voluntary departure, then given the inconsistency between the INA's plain text and Congress's assumed intent, the Court did Congress a favor. On this account, Congress was careless, and the Court cleaned up Congress's mess by supplying the provision Congress would have enacted had it thought to do so. But if statutes will be rewritten to erase Congress's mistakes, then Congress has fewer incentives to produce careful legislation.[69] And where Congress would prefer *not* to be held accountable for unpopular aspects of legislation, it can write sloppy statutes, inviting the Court to rewrite the statutory scheme in light of its legislative history or a proposed rule. If we want good legislation, and we want that good legislation to come from the political branches rather than the courts, we should resist the urge to have courts correct congressional sloppiness.[70]

But perhaps Congress *did* intend to give aliens the choice between Scylla and Charybdis — or at least something more akin to a choice

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[65] *See id.* at 707 ("When, however, the Court gives authoritative weight to [legislative history,] . . . it empowers Congress to specify statutory details — without the structurally-mandated cost of getting two Houses of Congress and the President to approve them.").

[66] *See id.* at 720–21 (explaining how legislators can avoid accountability through "strategic behavior").

[67] Professor Vermeule argues, however, that this would increase the costs for all actors — since researching legislative history is hard — without obvious corresponding benefits, particularly considering how bad courts are at interpreting legislative history. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 192–95 (2006).

[68] *Dada*, 128 S. Ct. at 2318.

[69] This argument is an adaptation to the absurdity context of what Professor James Bradley Thayer argued about judicial review. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893) ("[E]ven in the matter of legality, [legislators] have felt little responsibility; if we are wrong, they say, the courts will correct it.").

[70] Whether and to what extent the absurdity doctrine and related methods of statutory interpretation actually affect legislative behavior are of course empirical questions on which we lack good data.

between a plea bargain and a potential conviction.[71] Insofar as Congress intended to impose onerous restrictions on the rights of aliens, the Court's remedy increases the costs of enacting such onerous legislation. While the Court was able to avoid the plain text by invoking "the statute as a whole," it could hardly have crafted the withdrawal provision were the INA to state that "motions to reopen do not affect the departure window: aliens cannot withdraw voluntary departure motions, and the departure period is not subject to tolling." If Congress wishes to impose such a burden on aliens after *Dada*, it must do so by employing this directed language. But such a "we mean what we say" clause would have made the INA more difficult to pass, as members of Congress are loath to highlight the most burdensome aspects of legislation. Even if one favors making it costly for Congress to burden aliens, it is far from clear that one should want the Court to impose such costs by expanding the absurdity doctrine in such an unusual way.

In the end, *Dada* may stand for the proposition that the Court will stretch statutory interpretation to its limits to protect marginalized groups from burdens it deems intolerable. Thus, where Congress wishes to impose such burdens, it must do so clearly. Even where a statute is unambiguous, litigants put into a difficult position by the law can cite *Dada* and ask courts to "look at [a] statute as a whole" and consider the "untenable" situation that a law creates. Whether *Dada* is of any use to such litigants will depend on whether courts accept their invitation to revise an inequitable statutory scheme, which itself will turn on the judges' substantive views — though it seems fair to say that *Dada* can be most profitably invoked by marginalized groups, including aliens, criminal defendants, Native Americans, and members of the military, whom judges are more likely to protect.[72] Insofar as *Dada*'s conflict is not conventional absurdity but instead an overly burdensome scheme, the likely success of *Dada*-based arguments

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[71] *Compare Dada*, 128 S. Ct. at 2318 (Scylla and Charybdis), *with id.* at 2322 (Scalia, J., dissenting) (plea bargain).

[72] Each of these groups can cite "dice-loading rules" that counsel interpreting statutes in their favor. *See* Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 337 (2007) (book review) (quoting Scalia, *supra* note 49, at 28); *see also, e.g.*, King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 n.9 (1991) (noting such a rule favoring members of the military); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515 (2003) (analyzing a rule favoring aliens); Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006) (discussing a rule favoring criminal defendants). Because these rules purport to resolve *ambiguity*, they should not apply in absurdity cases, since absurdity is invoked when the plain text is concededly unambiguous. Nevertheless, the Court cited one such rule in *Dada*. *See* 128 S. Ct. at 2318 (citing Costello v. INS, 376 U.S. 120, 127–28 (1964)).

necessarily depends on whether judges will see a scheme as overly burdensome.

Even those who zealously support constitutional review of statutes as a means to protect political minorities[73] might read *Dada* in wonder: how could the Court create an affirmative right and a way out of statutory obligation without support from either the unambiguous statute or the Constitution? The Court applied a form of the absurdity doctrine, but its remarkable remedy for "untenable conflict" suggests that this was no typical absurdity case. *Dada* thus offers hope for marginalized groups facing troubling laws: if Congress has not spoken with particular resolve, courts may cite *Dada* to mitigate what they perceive to be an unfair statutory scheme.

D. Money Laundering

Rule of Lenity. — The rule of lenity is a necessary safety valve in an adversarial system of justice that strives to provide due process to participants.[1] Lenity, a rule that states that, when a statute is irreconcilably ambiguous, the tie goes to the defendant, has long been a staple of the American justice system.[2] Though lenity was a robust doctrine for much of this country's legal development, in recent decades lenity has been disfavored, a deciding factor in only a limited subset of cases if at all.[3] Many modern judges and scholars either write off lenity as a dormant doctrine or theorize that its scope has gradually condensed to preventing only the criminalization of innocent conduct.[4] Last Term, in *United States v. Santos*,[5] the Supreme Court began reversing that trend. Considering "whether the term 'proceeds' in the federal money-laundering statute . . . means 'receipts' or 'profits,'"[6] the Court found that the term was ambiguous and applied the rule of lenity to hold that the more defendant-friendly "profits" definition was the correct interpretation.[7] By turning to lenity as its first point of analysis and strictly construing a statutory term whose broader construction could only have added additional penalties to a preexisting conviction, the

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[73] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 135–80 (1980).

[1] *See, e.g.*, Ellsworth A. Van Graafeiland, *RICO and the Rule of Lenity*, 9 N. ILL. U. L. REV. 331, 340–41 (1989).

[2] *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (applying strict construction to a penal statute).

[3] *See* Zachary Price, *The Rule of Lenity As a Rule of Structure*, 72 FORDHAM L. REV. 885, 885–86 (2004).

[4] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347; *cf.* Price, *supra* note 3, at 885–86; Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420–21 (2006).

[5] 128 S. Ct. 2020 (2008).

[6] *Id.* at 2022 (citation omitted).

[7] *Id.* at 2025.