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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2000

MARCH 5 THROUGH JUNE 10, 2001

FRANK D. WAGNER

REPORTER OF DECISIONS

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Erratum

527 U. S. 650, line 9: "§ 502, p. 402" should be "§ 558, pp. 402–403".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.

RETIRED

BYRON R. WHITE, Associate Justice.

OFFICERS OF THE COURT

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BARBARA D. UNDERWOOD, Acting Solicitor General.
WILLIAM K. SUTER, Clerk.
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DALE E. BOSLEY, Marshal.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. VI, 509 U. S., p. V, and 512 U. S., p. V.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1994 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
AAA Michigan; American Medical Security, Inc. *v.*	1066
Abarca-Venegas *v.* United States	1001
ABB Industrial Systems, Inc.; Plummer *v.*	972
ABB Power T & D, Inc.; Fultz *v.*	914
A B Chance Co.; Webb *v.*	923
Abdullah *v.* United States	925
Abidekun *v.* New York City Transit Authority	973
Abou-Sakher *v.* McCoy	1021
Abou-Sakher *v.* Tennessee	1022
Acierto *v.* Merit Systems Protection Bd.	938
Acker *v.* Jefferson County	1051
Acomb *v.* United States	1016
Acosta-Funez *v.* United States	987
Adame-Silva *v.* United States	989
Adams, *In re*	1016
Adams; Chambers *v.*	1012
Adams; Circuit City Stores, Inc. *v.*	105
Adams *v.* Moore	1023
Adamson *v.* New Jersey	1072
Adams Outdoor Advertising *v.* East Lansing	920
Adarand Constructors, Inc. *v.* Mineta	941,967
Adirondack Correctional Facility; Santos *v.*	946
Adkins, *In re*	1037
Adkins *v.* Easley	981
Adkins *v.* Siegelman	1026
Administrators of Tulane Ed. Fund *v.* Rubinstein	937
Administrators of Tulane Ed. Fund; Rubinstein *v.*	937
Adult Video Megaplexxx *v.* Houston	1067
Advanced Display Systems, Inc. *v.* Kent Display Systems, Inc.	904
AEC Corp. *v.* Pirie	995

Page
Aetna Plywood, Inc.; Montgomery *v.* 1038
Ag Services of America, Inc. *v.* Nielsen 1021
Agu *v.* United States 1002
Agua Caliente Band of Cahuilla Indians; Hardin *v.* 958
Agudath Israel Bookstore *v.* Avis Rent-A-Car System, Inc. 919
Ah *v.* Greiner 1070
Ahmed; Circuit City Stores, Inc. *v.* 938
Ahn *v.* United States 924
Aikens *v.* United States 1014
Air Line Pilots Assn., International *v.* Delta Air Lines, Inc. 1019
Ajinomoto Co.; Archer-Daniels-Midland Co. *v.* 1019
Alabama; Barksdale *v.* 1055
Alabama *v.* Bozeman 939
Alabama; Calhoun *v.* 1071
Alabama *v.* Griffin 953
Alabama; Hammonds *v.* 907
Alabama; Hyde *v.* 907
Alabama; Jackson *v.* 934,962
Alabama; James *v.* 1040
Alabama; McWhorter *v.* 976
Alabama; Melson *v.* 907
Alabama; Reynolds *v.* 1054
Alabama *v.* Shelton 1018
Alabama; Tyson *v.* 1040
Alabama; Whitehead *v.* 907
Alameda Books, Inc.; Los Angeles *v.* 902
Alaniz *v.* United States 1053
Alaska *v.* United States 902,1006,1017
Alaska Bar Assn.; Obermeyer *v.* 922,1048
Albright; Robinson *v.* 1022
Albritton; Lua *v.* 1070
Aleksey *v.* South Carolina 1027
Alexander, *In re* 1018
Alexander *v.* Sandoval 275
Alexander *v.* United States 1031
Alexis *v.* United States 1032
Alford, *In re* 918
Alford; Sanders *v.* 1043
Alford *v.* U. S. District Court 916
Ali *v.* Johnson 948,1015
Allegheny County Dept. of Aviation; Olup *v.* 995
Allen *v.* Crabtree 1009
Allen; Owens *v.* 969
Allen *v.* United States 907,989

Page
Alleyne *v.* California 958
Allied Local and Regional Mfrs. Caucus *v.* EPA 1018
Allison *v.* Cordova 910
Allison *v.* United States 1022
Allstate Ins. Co.; DeTemple *v.* 979
Allston *v.* United States 935
Almendarez *v.* United States 1001
Almon *v.* United States 936
Al-Safin; Circuit City Stores, Inc. *v.* 938
Altadis U. S. A. Inc. *v.* Reilly 956
Alvarado; California *v.* 990
Alvarado *v.* United States 966
Alvarado-Gongora *v.* United States 966
Alvarez *v.* United States 1031
Alvarez-Melgoza *v.* United States 943
Alves-Cruz; Carreras-Rosa *v.* 920
Amavisca *v.* California 975
Amerada Hess Corp.; Miller *v.* 995
American Assn. of Naturopathic Physicians; Hayhurst *v.* 1008
American Civil Liberties Union; Ashcroft *v.* 1037
American General Finance, Inc. *v.* Dickerson 972
American Lung Assn. *v.* American Trucking Assns., Inc. 901
American Medical Assn.; Kevorkian *v.* 995
American Medical Security, Inc. *v.* AAA Michigan 1066
American National Ins. Co.; Watkis *v.* 992
American Telephone & Telegraph Technical Services, Inc.; West *v.* 967
American Trucking Assns., Inc.; American Lung Assn. *v.* 901
American Trucking Assns., Inc.; Massachusetts *v.* 901
America Online, Inc.; Fine *v.* 942
Ameritech Corp.; Metro Communications Co. *v.* 1021
Ames *v.* United States 987
AmSouth Bank, N. A.; Tipp *v.* 991
Anderson; Ball *v.* 979
Anderson; Gearing *v.* 1042
Anderson; Guy *v.* 1011
Anderson; Hoskins *v.* 929
Anderson *v.* Kraft 929
Anderson; Lowery *v.* 959
Anderson; Mitchell *v.* 1070
Anderson; Mobley *v.* 1070
Anderson *v.* United States 981,1045
Anderson; Williams *v.* 1041
Anderson; Woodcox *v.* 977
Anderson; Zenthofer *v.* 945

Page
Andrews; TRW Inc. *v.* 902,1017
Andrews *v.* United States 912
Andrewski *v.* Michigan 985
Angelone; Bilal *v.* 935
Angelone; Bond *v.* 998
Angelone; Gaston *v.* 911
Angelone; Hembry *v.* 976
Angelone; Jones *v.* 930
Angelone; Newby *v.* 1031
Angelone; Saulsgiver *v.* 1056
Angelone; Simpson *v.* 938
Angelone; Taylor *v.* 1029
Angelone; White *v.* 1013
Angelone; Williams *v.* 1010
Antonio C. (Anonymous) *v.* Department of Social Servs. of N. Y. 942
Antonio Cruz *v.* United States 1074
Antonio Mejia *v.* United States 936
Apfel; McDow *v.* 1036
Aponte Figueroa; Gonzalez Duarte *v.* 1021
Appalachian Power Co. *v.* Environmental Protection Agency 903
Appalachian Power Co. *v.* Whitman 903
Arbelaez *v.* Newcomb 1066
Arboleda *v.* Newland 908
Archer-Daniels-Midland Co. *v.* Ajinomoto Co. 1019
ARCO Marine, Inc.; Perna *v.* 1063
Arechiga-Gil *v.* United States 912
Arevalos-Barrios *v.* United States 966
Arias *v.* United States 1045
Arizona; Hess *v.* 960
Arizona *v.* Howell 994
Arizona; Jones *v.* 978
Arkansas; Hale *v.* 1039
Arkansas; Hoover *v.* 1057
Arkansas; Johnson *v.* 944
Arkansas *v.* Sullivan 769
Armijo *v.* Williams 928
Armstrong; Dontigney *v.* 953
Armstrong; Harris *v.* 958
Arnold *v.* Cain 1053
Arnold *v.* Wolfe 930
Arons *v.* Office of Disciplinary Counsel of Supreme Court of Del. 1065
Arredondo-Hernandez *v.* United States 1057
Arreola *v.* Williams 1028
Arsenal, Inc.; Glass Enterprises, Inc. *v.* 1022

Page
Arthur; Haley *v.* 1004
Artuz; Felix *v.* 1026
Artuz; Yonamine *v.* 1041
Arviso *v.* Williams 963
Arvizu; United States *v.* 1065
Ashanti *v.* Lockyer 1040
Ashanti *v.* Terhune 962,967
Ashanti *v.* U. S. District Court 967
Ashcroft *v.* American Civil Liberties Union 1037
Ashcroft *v.* Free Speech Coalition 917,1006,1017
Ashcroft *v.* Humanitarian Law Project 904
Ashcroft; Humanitarian Law Project *v.* 904
Ashcroft; Parker *v.* 940
Ashcroft; Vargas-Lopez *v.* 999
Ashway *v.* Hatcher 911,1035
Asiana Airlines; Chubb & Son, Inc. *v.* 902
Association. For labor union, see name of trade.
Atchison, T. & S. F. R. Co.; Willis *v.* 1009
Atkinson *v.* United States 1000
Atkinson Trading Co. *v.* Shirley 645,902
Atlantic City Medical Center; Gece *v.* 938
Atraqchi *v.* Darui 901
AT&T Corp.; Balls *v.* 937
Attorney General *v.* American Civil Liberties Union 1037
Attorney General *v.* Free Speech Coalition 917,1006,1017
Attorney General *v.* Humanitarian Law Project 904
Attorney General; Humanitarian Law Project *v.* 904
Attorney General; Parker *v.* 940
Attorney General; Vargas-Lopez *v.* 999
Attorney General of Cal.; Ashanti *v.* 1040
Attorney General of Conn. *v.* Department of Interior 1007
Attorney General of Fla.; Bailey *v.* 961
Attorney General of Ind.; Bridenbaugh *v.* 1002
Attorney General of Md.; Bantam *v.* 928
Attorney General of Mass.; Altadis U. S. A. Inc. *v.* 956
Attorney General of Mass.; Lorillard Tobacco Co. *v.* 956
Attorney General of N. M.; Madrid *v.* 961
Attorney General of N. C.; Adkins *v.* 981
Attorney General of Ohio; Becker *v.* 757,917
Attorney General of Tex.; Fahle *v.* 1043
Attorney General of Va.; Thomas *v.* 980
Atwater *v.* Lago Vista 318
Ault; Snow *v.* 998
Aviles *v.* Small 927

Page
Aviles *v.* United States 1064
Avis Rent-A-Car System, Inc.; Zeirei Agudath Israel Bookstore *v.* 919
Aware Woman Center for Choice, Inc.; Raney *v.* 971
Aware Woman Center for Choice, Inc.; Roe *v.* 990
Ayala *v.* California 908,1029
Ayers; Barrios *v.* 1026
Ayers; Fryer *v.* 1069
B. *v.* Hickok 972
Baber *v.* Florida 1022
Bacon *v.* Lee 950
Baculo *v.* United States 951
Bailey *v.* Butterworth 961
Bailey *v.* Carter 910
Bailey *v.* Moore 932,989
Bailey *v.* United States 937,1009,1031
Baker *v.* Coxe 995
Baker *v.* Johnson 946
Baker *v.* Jones 907
Baker *v.* Thompson 955
Balawajder *v.* Jacobs 1005
Baldwin *v.* California 1072
Baldwin *v.* Pinchak 1043
Ball *v.* Anderson 979
Ballejos *v.* Williams 978
Balls *v.* AT&T Corp. 937
Baltas *v.* United States 1030
Balter *v.* United States 985
Baltimore County; Gilbert *v.* 923
Baltimore County; Greenspring Racquet Club, Inc. *v.* 957
Baltimore Ravens, Inc. *v.* Bouchat 1038
Bamburg *v.* Oklahoma 928
Bancroft *v.* Cain 945
Bandera Electric Cooperative, Inc.; Concan Cable TV *v.* 972
Bandera Electric Cooperative, Inc.; Gilchrist *v.* 972
Banes *v.* Moore 1005
Bank of N. Y.; Lefkowitz *v.* 1038
Banks *v.* Mid-States Electric 1056
Banks *v.* Stoneybrook Apartments 1022
Banning *v.* Hubbard 997
Bannister *v.* Cain 930
Bannister *v.* United States 958
Bantam *v.* Curran 928
Banuelos-Campos *v.* United States 984
Baptiste *v.* United States 1056

Page
Baptist Healthcare System, Inc.; Tracy *v.* 920
Barber *v.* United States 1031
Bargery; Walls *v.* 1070
Barksdale *v.* Alabama 1055
Barnes *v.* Barnes 1020
Barnes *v.* Texas Dept. of Criminal Justice, Institutional Division 1026
Barnett; US Airways, Inc. *v.* 970
Barrett *v.* Carlisle 943,973
Barrett *v.* United States 1030
Barringer *v.* Independent School Dist. No. I–89 of Okla. Cty. 1020
Barrios *v.* Ayers 1026
Barron *v.* Martin Correctional Institution 1024
Barth *v.* Cape Savings Bank 1011
Barth *v.* Kaye 990
Bartis; Ligon *v.* 1021
Bartlett *v.* Perry 905
Bartnicki *v.* Vopper 514
Bartnicki *v.* Williams 514
Baskerville; Drinkard *v.* 944
Bass *v.* Board of Medical Examiners of Nev. 921,1035
Bass *v.* United States 986
Bass-Bey *v.* United States 965
Bates *v.* United States 952
Bath Petroleum Storage, Inc. *v.* Market Hub Partners 1037
Batten *v.* United States 1010
Battie *v.* Florida 944
Battle; Jones *v.* 1043
Battle *v.* LeBlanc 1038
Battles; Glass *v.* 911
Bauer Buick Co.; Mathis *v.* 1027
Baugh; Doolittle *v.* 939
Baumer *v.* Lasater 1011
Bawazir *v.* Mahfouz 914
Baxter *v.* Norris 961
Bayon *v.* State Univ. of N. Y. at Buffalo 926
Bayoni; Pennington *v.* 962
Bayou Fleet, Inc. *v.* Home Place Batture Leasing, Inc. 905
Bayramoglu *v.* Maddock 1028
Bazemore *v.* United States 1023
B. C. Rogers Processors, Inc. *v.* BOC Group, Inc. 920
Beach *v.* Williams 931
Beary; Steele *v.* 938
Beasley *v.* Johnson 908
Beasley *v.* Sodexho USA, Inc. 1052

Page

Beasley *v.* United States 936
Beaubrum *v.* Moore 908
Beaver *v.* Texas 927
Beaver *v.* West Virginia 967
Becerra-Sandoval *v.* United States 966
Beck; Hornkohl *v.* 994
Becker *v.* Ghee 1043
Becker *v.* Montgomery 757,917
Becker *v.* United States 1000
Bedell *v.* Gorczyk 1025
Beecher; Dallas *v.* 926
Beedle, *In re* 1018
Begay *v.* Williams 1071
Beharry *v.* M. T. A. New York City Transit Authority 1041
Beierle *v.* New Jersey 922
Bejerano *v.* Gillis 948
Bekker *v.* Humana Health Plan, Inc. 972
Belasco *v.* Snyder 1016
Belhumeur *v.* Massachusetts Labor Relations Comm'n 904
Belk; Eldon *v.* 1008
Bell; Bridges *v.* 1064
Bell; Edwards *v.* 946,1035
Bell; Pendleton *v.* 1070
Bell *v.* Stegall 977
Bell *v.* United States 935
Bell; Workman *v.* 955
Bellah *v.* Johnson 947
Bellinger *v.* Johnson 979
Bellingham *v.* DeBoer 992
BellSouth Telecommunications, Inc.; Brungart *v.* 1037
Beltran-Casares *v.* United States 1001
Benjamin *v.* Cain 962
Bergeson; Tunstall *v.* 920
Berkley *v.* H&R Block Eastern Tax Services, Inc. 971
Berry, *In re* 1037
Bertrand; Pozo *v.* 961
Beshears; Feaster *v.* 1035
Bessette; Textron Funding Corp. *v.* 1048
Best *v.* Samjo Realty Corp. 1026
Best *v.* United States 1007
Bester *v.* Louisiana Committee on Bar Admissions 906
Bexar County; Shull *v.* 975
Bhatti *v.* Immigration and Naturalization Service 972
Bibbs *v.* Lubbock 1066

Page

Bigelow *v.* Department of Defense 971
Bilal *v.* Angelone 935
Binion; Murphy *v.* 906
Binns *v.* Wal-Mart Stores, Inc. 937
Bin Yang *v.* New Prime, Inc. 1041
Birkett; Spearman *v.* 928
Birmingham News Co.; Horn *v.* 1019
Birmingham News Co.; Stewart *v.* 1019
Bishop; Delaware County Housing Authority *v.* 990
Bishop; Evans *v.* 999
Bishop; Meek *v.* 923
BITE, Inc. *v.* First National Bank 1037
Bivens *v.* United States 1044
Blachy *v.* Butcher 994
Blachy; Butcher *v.* 994
Blackwell *v.* Indiana 1023
Blackwell; Lambert *v.* 919
Blanco; Bradley *v.* 978
Blandon-Rojas *v.* United States 1045
Blank *v.* Cox 1011
Bledsoe, *In re* 1016
Blount *v.* Moore 945
Blumenthal *v.* Department of Interior 1007
Blunt *v.* United States 1033
Board of Comm'rs of Madison County; McPhaul *v.* 921
Board of County Comm'rs of Bryan County *v.* Brown 1007
Board of Ed. of City School Dist. of Yonkers; M. S. *v.* 942
Board of Medical Examiners of Nev.; Bass *v.* 921,1035
Board of Patent Appeals and Interferences; Chung *v.* 956
Board of Trustees of Ball State Univ.; Webb *v.* 942
Bobo *v.* United States 1045
BOC Group, Inc.; B. C. Rogers Processors, Inc. *v.* 920
Boehner; McDermott *v.* 1050
Boeing Co.; Martini *v.* 957
Bogany *v.* Texas 978
Boggs *v.* Collins 913
Bogle *v.* Stewart 927
Bogle *v.* U. S. District Court 927
Boise Cascade Corp. *v.* Oregon 923
Boles *v.* EMSA Correctional Care, Inc. 948
Bolien *v.* Nevada 1028
Bolton *v.* Moore 1002
Bolton *v.* United States 1058
Bond *v.* Angelone 998

Page

Bondage Breaker Ministries *v.* Securities and Exchange Comm'n 905
Bonilla-Guzman *v.* United States 966
Booker; Duncan *v.* 947
Booker *v.* Florida 1033
Booker; McLeod *v.* 930
Booker; Reed *v.* 925
Booker; Williams *v.* 1069
Books; Elkhart *v.* 1058
Boone, *In re* 940
Boone *v.* Fisher 943
Boone; Freeman *v.* 960
Boone; Still *v.* 1071
Boone *v.* United States 1013,1031
Booth *v.* Churner 731
Borge *v.* Department of Health and Human Services 934
Boroff *v.* Van Wert City Bd. of Ed. 920
Borough. See name of borough.
Borrero Bejerano *v.* Gillis 948
Bouchat; Baltimore Ravens, Inc. *v.* 1038
Boufford *v.* Moore 1050
Boulineau *v.* Tripp 991
Bouza Soto *v.* United States 1031
Bowens *v.* Senkowski 978
Bowens *v.* United States 944
Bowers *v.* United States 1002
Bowman *v.* Cortellessa 962
Bowman *v.* Florida 1071
Box *v.* California 963
Boyd *v.* Dormire 1012
Boykin *v.* Entergy Operations, Inc. 906,922
Boyles *v.* United States 952
Boyne *v.* Moore 973
Bozeman; Alabama *v.* 939
Braddock; Garrison *v.* 959
Bradley *v.* Blanco 978
Bradt *v.* Lilly 905
Bramson *v.* United States 991
Bramwell *v.* United States 936
Brandon *v.* Seabold 929
Brater *v.* United States 1001
Braun, *In re* 940,1035
Braxton; Irving *v.* 948
Brazas *v.* Brazas 973
Brazil; Jordan *v.* 1025

Page
Breeden; Clark County School Dist. *v.* 268
Brennan; Twillie *v.* 991
Breslin; Ford *v.* 949
Brian B. *v.* Hickok 972
Bridenbaugh *v.* Carter 1002
Bridgers *v.* Texas 1034
Bridges *v.* Bell 1064
Brigano; McMeans *v.* 958
Bright *v.* Walter 1070
Bright *v.* Washington 1070
Briley; Poole *v.* 950
Brinson *v.* Hall 1017
Brito *v.* Halter 933
Britton *v.* Securities and Exchange Comm'n 971
Broadie *v.* United States 1002
Broder *v.* Stegall 1072
Brogton; Choice *v.* 934
Bromfield; Henson *v.* 954
Brooks *v.* United States 1002
Brooks-Bey *v.* Kupec 952
Brotherhood. For labor union, see name of trade.
Broussard *v.* Roe 945
Brown; Board of County Comm'rs of Bryan County *v.* 1007
Brown *v.* Chicago Transit Authority 969
Brown *v.* Delaney 925
Brown *v.* Hodges 926,991
Brown *v.* Johnson 910
Brown *v.* Kashyap 979
Brown *v.* Martin Correctional Institution 1024
Brown *v.* Minnesota 995
Brown *v.* Mitchem 946,1049
Brown *v.* Moore 926,968,990
Brown *v.* O'Dea 1012
Brown *v.* Oklahoma Juvenile District Court 928
Brown; Ryan *v.* 969
Brown *v.* United States 912,913,974,1015,1030,1032,1058
Broyles; Ward *v.* 1054
Brumfield *v.* United States 958
Brundage *v.* United States Information Agency 1022
Brungart *v.* BellSouth Telecommunications, Inc. 1037
Bruns *v.* Stewart 927
Buchanan *v.* United States 1023
Buchbinder *v.* Franchise Tax Bd. of Cal. 973
Buckhannon Board & Care Home *v.* W. Va. Dept. of H. H. R. 598

Page

Buford *v.* United States 59
Buhrman *v.* Carter 1058
Bui *v.* Texas 928
Bull *v.* Galaza 977
Bullock *v.* Torpey 1071
Bumgarner; Dillard *v.* 1028
Bureau of Prisons; Payment *v.* 950
Bureau of Workers' Compensation; Estrada *v.* 928
Burke; McQuirter *v.* 1023
Burke *v.* United States 1072
Burlington N. S. F. R. Co.; Willis *v.* 1009
Burnes *v.* Clinton 982
Burns, *In re* 957,1049
Burr *v.* Goord 935
Bush; Carlson *v.* 945
Bush *v.* United States 1032
Bustillo *v.* Virginia 1072
Butcher *v.* Blachy 994
Butcher; Blachy *v.* 994
Butcher *v.* Johnson 1027
Butler *v.* Craven 1057
Butler *v.* Dahlberg 910,1014
Butterworth; Bailey *v.* 961
Byrd Foundation for Racial Healing; Jason *v.* 925
Caddo Correctional Center; Jackson *v.* 1003
Cadoree *v.* Johnson 1040
Cain; Arnold *v.* 1053
Cain; Bancroft *v.* 945
Cain; Bannister *v.* 930
Cain; Benjamin *v.* 962
Cain; Celestine *v.* 997
Cain; Counterman *v.* 1025
Cain; Dammerau *v.* 934
Cain; Green *v.* 909
Cain; Guidry *v.* 908
Cain; Guillory *v.* 960
Cain; Hennigan *v.* 946
Cain; Jackson *v.* 1055
Cain *v.* Michigan 921
Cain; Pittman *v.* 982
Cain; Reynolds *v.* 909
Cain; Thompson *v.* 928
Cain; Tyler *v.* 940
Cain; Williams *v.* 961

Page

Calbert *v.* Yukins 1054
Caldwell *v.* Taylor 979
Caldwell *v.* United States 987
Calhoun *v.* Alabama 1071
California; Alleyne *v.* 958
California *v.* Alvarado 990
California; Amavisca *v.* 975
California; Ayala *v.* 1029
California; Baldwin *v.* 1072
California; Box *v.* 963
California; Cardenas *v.* 931
California; Clayburn *v.* 997
California; Cooper *v.* 910,1035
California; Corona *v.* 1054
California; Dixon *v.* 948
California; East Bay Asian Local Development Corp. *v.* 1008
California; Escobar *v.* 1053
California; Fink *v.* 1063
California; Guzman *v.* 1042
California; King *v.* 950
California; Kraft *v.* 908
California; Macon *v.* 1014
California; Medrano Ayala *v.* 908
California; Mendoza *v.* 1040
California; Miller *v.* 922
California; Mott *v.* 1024
California; O'Keefe *v.* 1040
California; Parrott *v.* 938
California; Pereles *v.* 963
California; Phillips *v.* 976
California; Price *v.* 1055
California; Raiolo *v.* 909
California; Ramos *v.* 975
California; Rogers *v.* 1028
California; Roybal *v.* 926
California; Salgado Soto *v.* 975
California; Stevenson *v.* 999
California; Sullivan *v.* 927
California; Tamale *v.* 1027
California; Tobias *v.* 951
California; Wallace *v.* 1055
California; Wishman *v.* 961
California; Won Ho Song *v.* 1052
California First Amendment Coalition; Woodford *v.* 939

Page
Camacho *v.* United States 951
Camarena *v.* Suter 934
Cambiano *v.* Ligon 1009
Cambra; Dewberry *v.* 937
Cambra; Jefferson *v.* 991
Cambra; Shellmon *v.* 1004
Campa-Fabela *v.* United States 1010
Campbell; Davidson *v.* 973
Campbell *v.* National Ed. Assn. 971
Campbell *v.* Williams 948
Campos *v.* United States 1074
Cannon, *In re* 940,1036
C. (Anonymous) *v.* Department of Social Services of N. Y. 942
Cape Savings Bank; Barth *v.* 1011
Cape Savings Bank; Fadael *v.* 1011
Capital Engineering, Inc.; Poteete *v.* 908,1014
Caraveo *v.* Johnson 997
Caraway *v.* Texas 963
Carbin *v.* Pirie 951
Card *v.* United States 913
Cardenas *v.* California 931
Cardenas *v.* United States 989
Carey; Taran *v.* 1056
Carlisle; Barrett *v.* 943,973
Carlson *v.* Bush 945
Carlson; Illinois *v.* 905
Carlson *v.* United States 983
Carlton; Ellis *v.* 967
Carmelo Torre *v.* Oregon 1067
Carmichael *v.* United States 974
Carrera-Reyes *v.* United States 1046
Carreras-Rosa *v.* Alves-Cruz 920
Carrillo-Quintero *v.* United States 1044
Carter, *In re* 957,1051
Carter; Bailey *v.* 910
Carter; Bridenbaugh *v.* 1002
Carter; Buhrman *v.* 1058
Carter *v.* Duncan 932,1035
Carter *v.* Puryear 927,1003
Carter *v.* Tessmer 930,1035
Caruso; Preston *v.* 961
Casarez-Herrera *v.* United States 985
Casey *v.* Michigan 946
Casper *v.* Gunite Corp. 945

Page
Cass *v.* Suffolk County 905
Castillo *v.* Johnson 1026
Castillo *v.* United States 965
Castro; Rose *v.* 999
Castro; Tarkington *v.* 1025
Caterina *v.* Unified Judicial System of Pa. 1008
Catoe; Green *v.* 1039
Caudill *v.* Williams 1042
Causor-Serrato *v.* United States 1072
Cayetano *v.* Chevron U. S. A. Inc. 942
C de Baca *v.* Colorado 921
Cedric Kushner Promotions, Ltd. *v.* King 940
Celestine *v.* Cain 997
Ceminchuk *v.* Rehnquist 990
Ceminchuk *v.* Tenet 990
Central States Pension Fund; Kroger Co. *v.* 990
Central States Pension Fund *v.* Reimer Express World Corp. . . . 943
Cermak *v.* Norton 1021
Cervantes *v.* United States 912
Cesario Rodriguez *v.* Texas 995
Chacon-Arvizo *v.* United States 986
Chaklader *v.* United States 937
Chaklos *v.* Reich 1023
Chaky *v.* Moore 1011
Chalmers *v.* Tennessee 925
Chamber of Commerce of U. S. *v.* Vollor 1058
Chambers *v.* Adams 1012
Chance Co.; Webb *v.* 923
Chancellor, Lee County Chancery Court; Crampton *v.* 1038
Chang *v.* United States 953
Chao *v.* Mallard Bay Drilling, Inc. 1017
Chao; McKinney *v.* 906
Chapman *v.* United States 932,1035,1074
Charleston; Ferguson *v.* 67
Charlesworth *v.* United States 1072
Chavez *v.* Williams 931
Chavez-Lopez *v.* United States 936
Chemical Banking Corp.; Francis *v.* 949
Chen *v.* Houston 1046
Chester; Ganey *v.* 1063
Chevron U. S. A. Inc.; Cayetano *v.* 942
Chicago; Endsley *v.* 972
Chicago Park Dist.; Thomas *v.* 1051
Chicago Steel & Pickling Co. *v.* Citizens for a Better Environment 994

Page
Chicago Transit Authority; Brown *v.* 969
Chickasaw Nation *v.* United States 917
Chief Judge, Court of Appeals of Md.; Bridges *v.* 1064
Chief Judge, Court of Appeals of N. Y.; Barth *v.* 990
Chief Justice of U. S.; Ceminchuk *v.* 990
Children's Healthcare is a Legal Duty, Inc. *v.* McMullan 957
Children, Youth and Families Dept.; Prince *v.* 929
Childs; Coleman *v.* 910,947
Childs *v.* Danzig 967
Childs *v.* United States 1068
Chino *v.* United States 1057
Chirinos *v.* United States 952
Choctaw Nation of Okla. *v.* United States 917
Choice *v.* Brogton 934
Christensen *v.* United States 987
Christie *v.* United States 988
Christy; Sloan *v.* 923
Chronister, *In re* 1018
Chubb & Son, Inc. *v.* Asiana Airlines 902
Chukwuezi *v.* United States 983
Chung *v.* Board of Patent Appeals and Interferences 956
Chuong Duong Tong *v.* Texas 1053
Churchwell *v.* Oklahoma 945
Churchwell *v.* Saffle 928
Churner; Booth *v.* 731
Ciccone, *In re* 1016
Circuit City Stores, Inc. *v.* Adams 105
Circuit City Stores, Inc. *v.* Ahmed 938
Circuit City Stores, Inc. *v.* Al-Safin 938
Circuit City Stores, Inc. *v.* Ingle 938
Citizen Band Potawatomi Tribe of Okla.; C & L Enterprises *v.* . . 411
Citizens for a Better Environment; Chicago Steel & Pickling Co. *v.* 994
Citizens for a Better Environment; Steel Co. *v.* 994
Citizens for Balanced Transportation *v.* Whitman 903
City. See name of city.
City Colleges of Chicago *v.* Westcap Enterprises, Inc. 939
Claiborne; Riddle *v.* 1067
Clardy *v.* McLemore 944
Clark; Fields *v.* 977
Clark *v.* Keohane 1054
Clark *v.* North Dakota 1043
Clark; United States *v.* 1005
Clark *v.* Witek 1049
Clark County School Dist. *v.* Breeden 268

Page
Clark County School Dist.; Hooks *v.* 971
Clarke *v.* Johnson 1042
Clarke; Merjil *v.* 1028
Clavette *v.* Maine Dept. of Defense and Veterans Services 1008
Clay *v.* Dormire 1039
Clayburn *v.* California 997
Cleaton, *In re* 957
Clem *v.* United States 967
Clemens *v.* Gavin de Becker, Inc. 1052
Clemons; Morrison *v.* 965
C & L Enterprises *v.* Citizen Band Potawatomi Tribe of Okla. . . . 411
Cleveland Indians Baseball Co.; United States *v.* 200
Clewis *v.* Johnson 928
Clifford *v.* Tice 1015
Cliffs on Bay Condominium Assn. *v.* Smith 1020
Clinton; Burnes *v.* 982
Clinton; Hall *v.* 995,1056
Coady *v.* Commissioner 972
Cobb; Texas *v.* 162
Cockburn *v.* Dahlberg 951,1049
Cofield *v.* United States 952
Coia, *In re* 1016
Cole *v.* Merkle 935
Coleman *v.* Childs 910,947
Coleman *v.* Johnson 926,979,1014,1076
Coleman *v.* State Farm Fire & Casualty Co. 936
Coleman *v.* United States 935
Coley *v.* Garraghty 1012
Coley *v.* Social Security Administration 1037
Collazo-Aponte *v.* United States 1036
Collins; Boggs *v.* 913
Collins *v.* FCC Card National Bank 927,1014
Collins *v.* Mac-Millan Bloedel, Inc. 1066
Collins; Martin *v.* 937
Collman *v.* Nevada 978
Colorado; C de Baca *v.* 921
Colorado; Harlan *v.* 979
Colorado; Kansas *v.* 902
Colorado; Poole *v.* 1038
Colorado; Shough *v.* 909
Colorado Secretary of State *v.* Campbell 973
Coltin *v.* Londonderry 980
Columbia/HCA Healthcare Corp.; Siegel *v.* 991
Columbia/Pentagon City National Orthopedic Hospital; Siegel *v.* 991

Page
Colvin *v.* United States 982
Comerica Securities, Inc.; Grumhaus *v.* 971
Commissioner; Coady *v.* 972
Commissioner; Czepiel *v.* 993
Commissioner; Powers *v.* 995
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents and Trademarks; Zachariah *v.* 974
Committee on Character, Sup. Ct. of N. Y., 2d Dept.; McDonnell *v.* 921
Commonwealth. See name of Commonwealth.
Community Health Care Plan, Inc.; Underkofler *v.* 1055
Compel *v.* Reliance Standard Life Ins. Co. 1041
Concan Cable TV *v.* Bandera Electric Cooperative, Inc. 972
Conley *v.* Ghee 927,1014
Conley *v.* Kansas 932
Conley; Marksberry *v.* 928
Connecticut; Fernandez *v.* 913
Connecticut *ex rel.* Blumenthal *v.* Department of Interior 1007
Connors *v.* United States 1033
Conroy; Holmes *v.* 954
Conroy; Jones *v.* 908
Console *v.* United States 1039
Consolidated Freightways Corp.; Feist *v.* 920
Contemporary Media, Inc. *v.* Federal Communications Comm'n . . 920
Contreras *v.* Williams 947
Cook *v.* Dormire 902
Cook; Reed *v.* 998
Cook *v.* United States 1052,1073
Cook County; Harris *v.* 963
Cooksey; Sacco *v.* 991
Coombs; Grine *v.* 1021
Cooper *v.* California 910,1035
Cooper Industries, Inc. *v.* Leatherman Tool Group, Inc. 424
Copeland, *In re* 1018
Copeland *v.* Washington 1024
Corbitt *v.* O'Sullivan 1029
Corcoran; Grandison *v.* 996
Corcoran; Mills *v.* 1058
Cordova; Allison *v.* 910
Coreil; Guillory *v.* 960
Corey *v.* Mendel 1036
Cornell; Driver *v.* 963
Cornyn; Fahle *v.* 1043
Corona *v.* California 1054
Correctional Services Corp. *v.* Malesko 902

Page

Corrections Commissioner. See name of commissioner.
Corrections Corp. of America; Salaam *v.* 1028
Cortellessa; Bowman *v.* 962
Coss; Lackawanna County District Attorney *v.* 394
Costley *v.* Maryland 928
Costner *v.* Zmuda 1021
Cothrum, *In re* 914
Coughlin; Wade *v.* 1065
Counterman *v.* Cain 1025
County. See name of county.
Courtney *v.* Robinson 996
Court of Appeals. See U. S. Court of Appeals.
Court of Common Pleas, Erie County; Schulze *v.* 1022
Cowan; Miller *v.* 1043
Cowan; Sanders *v.* 999
Cowan *v.* United States 951
Cowhey; Santorelli *v.* 1008
Cowley; Glass *v.* 959
Cowley *v.* United States 1001
Cox; Blank *v.* 1011
Cox *v.* United States 965
Coxe; Baker *v.* 995
Crabtree; Allen *v.* 1009
Craig; McGee *v.* 1016
Crain *v.* Unauthorized Practice of Law Comm., Sup. Ct. of Tex. 1067
Crampton *v.* Ervin 1038
Crane *v.* Kansas 930
Crane; Kansas *v.* 957
Crane; Kersey *v.* 914
Craven; Butler *v.* 1057
Crawford-THG, Inc.; Tarley *v.* 981
Creamer *v.* United States 917
Cris Realms, Inc. *v.* United States 904
Critical-Vac Filtration Corp. *v.* Minuteman International, Inc. . . . 1019
Crohan *v.* Williams 1025
Cromartie; Easley *v.* 234,1076
Cromartie; Hunt *v.* 234
Cromartie; Smallwood *v.* 234,1076
Cronin; Sierra Medical Center *v.* 921
Crosby; Hansen *v.* 909
Croskey *v.* Rice 929
Crowley; LaCoss *v.* 1010
Crume *v.* United States 1066
Cruz *v.* Deeds 927,1049

Page

Cruz *v.* United States 1074
Cryar *v.* United States 951
Crysen/Montenay Energy Co. *v.* Shell Oil Co. 920
Cube; Shivaee *v.* 914
Cuellar *v.* United States 917
Cuevas-Andrade *v.* United States 1014
Cuevas-Mendez *v.* United States 1000
Cuffley; Yarnell *v.* 903
Cullen *v.* Williams 949
Cummings, *In re* 991
Cummings *v.* North Carolina 997
Cummins *v.* Superior Court of Ariz., Yuma County 962
Cunningham *v.* Nazario 974
Cuomo; Jamal *v.* 963
Curiel-Torres *v.* United States 966
Curran; Bantam *v.* 928
Curry *v.* Johnson 944
Cyprus Amax Coal Co.; United States *v.* 1065
Czepiel *v.* Commissioner 993
Dabbas *v.* United States 966
Dadi *v.* United States 1072
Dae Hee Lee *v.* Hubbard 1012
Dahl; Matczak *v.* 973
Dahlberg; Butler *v.* 910,1014
Dahlberg; Cockburn *v.* 951,1049
Dahlberg; Singleton *v.* 1056
Dahlberg; Smith *v.* 969
Dahmer *v.* United States 1067
Dalkon Shield Claimants Trust; Fields *v.* 950,1015
Dallas *v.* Beecher 926
Dalton *v.* School Bd. of Norfolk 969,1053
D'Ambrosio *v.* Georgia 962
Dammerau *v.* Cain 934
Damper *v.* United States 907
Daniel *v.* Schriro 931
Daniel *v.* Texas 927
Daniels *v.* Dees 1071
Daniels *v.* Department of Interior 951
Daniels *v.* United States 374
Dansby *v.* Mitchem 961
Danzig; Childs *v.* 967
D'Arcangelo *v.* Moore 1013
Darnell *v.* Johnson 959
Darui; Atraqchi *v.* 901

Page

Davage *v.* Scott 1032
Davenport *v.* Northeast Ga. Medical Center, Inc. 969
Davenport *v.* United States 907
Davidson *v.* Campbell 973
Davies *v.* Indiana 945
Davila *v.* United States 983
Davila-Ortega *v.* United States 981
Davis, *In re* 1035
Davis *v.* DeKalb County School Dist. 1066
Davis; Jett *v.* 1027
Davis *v.* Kaiser 944
Davis *v.* Moore 999
Davis *v.* Nichols 920
Davis *v.* United States 912
Davis *v.* Williams 948
Dawley *v.* Mangel 914
Dawson *v.* Delaware 1004
Dawson *v.* Montana 928
Dawson *v.* Snyder 951
Dawson *v.* United States 965
Day; Hebrard *v.* 959
Day *v.* United States 1058
Day *v.* West Virginia 934
Dean, *In re* 1036
Dean *v.* United States 943
de Becker, Inc.; Clemens *v.* 1052
DeBlasio *v.* Moreno 1024
DeBoer; Bellingham *v.* 992
Decaro, *In re* 970
Deck *v.* Moore 933
Decker *v.* Texas 1025
Deeds; Cruz *v.* 927,1049
Deeds; Hughes *v.* 1042
Deere Ins. Co. *v.* Nueva 1050
Dees; Daniels *v.* 1071
DeKalb County School Dist.; Davis *v.* 1066
de la Fuente-Ramos *v.* United States 936
Delaney; Brown *v.* 925
Delaware; Dawson *v.* 1004
Delaware; Ferguson *v.* 924
Delaware; Hameen *v.* 924
Delaware; Illinois *v.* 1019
Delaware; Shearin *v.* 997
Delaware County Housing Authority *v.* Bishop 990

Page
Delespine *v.* Rodriguez 955,1017
Delgado *v.* New York City Bd. of Ed., Food and Nutrition Servs. 982
Delgado *v.* Shell Oil Co. 972
Delo; Ervin *v.* 954
DeLoach; Speer *v.* 927
Deloitte & Touche, L. L. P.; Whitlock Corp. *v.* 973
Delta Air Lines, Inc.; Air Line Pilots Assn., International *v.* 1019
Delta Air Lines, Inc.; Duncan *v.* 1066
Dembowski *v.* United States 987
de Medeiros *v.* Lewis 962,1063
Denison; Schaefer *v.* 1020
Dennis *v.* Lowe 1040
Department of Army; Johnson *v.* 1013
Department of Community and Economic Dev.; McAndrew *v.* . . . 1066
Department of Defense; Bigelow *v.* 971
Department of Family and Children's Services of Cal.; Gilkey *v.* . . . 1026
Department of Health and Human Services; Borge *v.* 934
Department of Housing and Urban Development; Hughes *v.* 1029
Department of Interior; Connecticut *ex rel.* Blumenthal *v.* 1007
Department of Interior; Daniels *v.* 951
Department of Interior *v.* Klamath Water Users Protective Assn. 1
Department of Interior, Bureau of Land Management; Reed *v.* . . 1019
Department of Justice, INS; Velazquez de Meza *v.* 1017
Department of Labor; Garner *v.* 906
Department of Labor; Kaiser Aluminum & Chemical Corp. *v.* . . . 919
Department of Social Servs. of N. Y.; Antonio C. (Anonymous) *v.* 942
Department of State; Hesse *v.* 991
Desaigoudar *v.* Meyercord 1021
DeSantis *v.* United States 1013
Desmond *v.* Snyder 945
DeStefano; Schaefer *v.* 998
DeTella; Hampton *v.* 995
DeTemple *v.* Allstate Ins. Co. 979
DeTemple *v.* Hedrick 979
Deucher *v.* United States 1075
DeVeaux *v.* Schriver 984,1064
Dewalt; Kimberlin *v.* 937,1005
Dewberry *v.* Cambra 937
Diaz *v.* Portuondo 1056
Diaz *v.* United States 966
Diaz-Lopez *v.* United States 987
Dick; Richardson *v.* 916
Dickens-Lawrence *v.* Kloster Cruise Ltd. 927
Dickerson; American General Finance, Inc. *v.* 972

Page
Dickinson; Swartz *v.* 922
Dickinson; Torrez *v.* 1010
Dicks *v.* United States 913
Diep *v.* Garcia 1029
Dillard *v.* Bumgarner 1028
Dillard *v.* United States 907
Dillon; Fuller *v.* 1072
Dillon *v.* United States 975
DiPinto *v.* United States 1030
Director of Central Intelligence; Ceminchuk *v.* 990
Director of penal or correctional institution. See name or title of director.
Disney Concert Hall No. 1; Wojciechowski *v.* 922
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
District of Columbia; Henry *v.* 1029
District of Columbia Bd. of Elections & Ethics; Marlin *v.* 1039
District of Columbia Court of Appeals; Stanton *v.* 943
District of Columbia Metropolitan Police; Reese *v.* 1055
Dixon *v.* California 948
Dixon; Pennington *v.* 962
Dixon *v.* Regents of Univ. of N. M. 923
Dixson *v.* United States 989
Dizelos *v.* United States 976
Dobelle *v.* Moore 962
Dodd *v.* United States 959
Dolenz *v.* United States 1003
Dominguez *v.* United States 1039
Dontigney *v.* Armstrong 953
Dooley *v.* Stubblefield 932
Doolittle *v.* Baugh 939
Dorch *v.* Moore 933
Doret *v.* United States 1030
Dormire; Boyd *v.* 1012
Dormire; Clay *v.* 1039
Dormire; Cook *v.* 902
Dormire; Dunn *v.* 928
Dormire; Loeblein *v.* 982
Dormire; Williams *v.* 931
Dormitory Authority of N. Y.; Jon-Nwakalo *v.* 1009
Dorris *v.* United States 986
Dorsey *v.* Johnson 910
Dorsey *v.* United States 1033
Dortch *v.* Illinois 929

Page
Dotson *v.* Williams 1025
Dougan; Howard *v.* 948
Doug Grant, Inc. *v.* Greate Bay Casino Corp. 1038
Doughtie *v.* Johnson 956
Dowdy, *In re* 1018
Downey *v.* Louisiana 959
Downs *v.* Hoyt 999
Downs *v.* Los Angeles Unified School Dist. 994
Dowthitt *v.* Johnson 915
Dowthitt *v.* Texas 915
Drain *v.* Snyder 910
Drayden *v.* White 984
Drew *v.* United States 1037
Drill South, Inc.; International Fidelity Ins. Co. *v.* 1020
Drinkard *v.* Baskerville 944
Driver *v.* Cornell 963
Duarte *v.* Aponte Figueroa 1021
Duckworth; Murphy *v.* 944,1076
Duenas-Ochoa *v.* United States 1074
Duffy; Olson *v.* 995
Dunbar *v.* United States 913
Duncan *v.* Booker 947
Duncan; Carter *v.* 932,1035
Duncan *v.* Delta Air Lines, Inc. 1066
Duncan *v.* Kansas City Southern R. Co. 992
Duncan; Schoenfeld *v.* 1026
Duncan *v.* United States 937
Duncan *v.* Workers' Compensation Appeals Bd. 1052
Dundas *v.* Hutchinson 1054
Dunkins *v.* United States 988
Dunlap *v.* Straub 1056
Dunmon *v.* Johnson 911,992
Dunn *v.* Dormire 928
Duong Tong *v.* Texas 1053
Du Pont de Nemours & Co.; Piner *v.* 1033
Du Pont de Nemours & Co.; Pollard *v.* 843,956
Dupre *v.* Touro Infirmary 1025
Dusenbery *v.* United States 940
Dutton *v.* Montgomery County Government 1040
Earley; Thomas *v.* 980
Easley; Adkins *v.* 981
Easley *v.* Cromartie 234,1076
East Bay Asian Local Development Corp. *v.* California 1008
East Lansing; Adams Outdoor Advertising *v.* 920

Page
Eastpointe; Kalasho *v.* 954
Eckerd Corp.; Newman *v.* 921
Ecolochem, Inc.; Southern Cal. Edison Co. *v.* 974
Edelman *v.* Lynchburg College 940
Edwards *v.* Bell 946,1035
Edwards *v.* Florida Dept. of Corrections 980
Edwards *v.* Moore 999
Edwards; Tallahassee *v.* 942
Edwards *v.* Williams 929
Efron *v.* Embassy Suites (P. R.), Inc. 905
Egelhoff *v.* Egelhoff 141
Egelhoff; Lillie *v.* 937
EG&G Fla., Inc.; Morice *v.* 906,1004
Eickleberry *v.* Keohane 1012
E. I. du Pont de Nemours & Co.; Piner *v.* 1033
E. I. du Pont de Nemours & Co.; Pollard *v.* 843,956
Eitel *v.* Washington Mut. Bank 1050
Elamir *v.* Magnet Resources, Inc. 920
Eldon *v.* Belk 1008
Electrical Workers *v.* Trig Electric Construction Co. 1002
Elhaj-Chehade *v.* Office of Chief Administrative Hearing Officer 1055
Elkhart *v.* Books 1058
Ellis *v.* Carlton 967
Ellis *v.* Norris 935
Elo; Gonzales *v.* 980
Elo; Mathison *v.* 948
El Paso County; Sweed *v.* 1035
Embassy Suites (P. R.), Inc.; Efron *v.* 905
Emeagwali *v.* University of Mich. Bd. of Regents 1025
EMSA Correctional Care, Inc.; Boles *v.* 948
Encarnacion *v.* United States 1073
Enciso-Aceves *v.* United States 966
Endsley *v.* Chicago 972
Entergy Electric Co.; Williams Lewis *v.* 908
Entergy Operations, Inc.; Boykin *v.* 906,922
EPA; Allied Local and Regional Mfrs. Caucus *v.* 1018
EPA; Appalachian Power Co. *v.* 903
EPA; Michigan *v.* 904,970
EPA; Ohio *v.* 904
EPA; Utility Solid Waste Activities Group *v.* 1065
Ephraim *v.* Neal 1054
Epps *v.* Iowa 950
Epps *v.* United States 951
Equal Employment Opportunity Comm'n *v.* Waffle House, Inc. . . 941

Page
Equitable Life Assurance Society of U. S.; Venezia *v.* 922
Erie County *v.* Erie County Retirees Assn. 913
Erie County Retirees Assn.; Erie County *v.* 913
Erion, *In re* 1016
Ervin; Crampton *v.* 1038
Ervin *v.* Delo 954
Escobar *v.* California 1053
Espinoza *v.* Ruiz 945,1049
Esponda-Ventura *v.* United States 966
Estes *v.* Supreme Court of Utah 969,1053
Estrada *v.* Bureau of Workers' Compensation 928
Etter *v.* Johnson 998
Evans, *In re* 918
Evans *v.* Bishop 999
Evans; Pennington *v.* 962
Evans *v.* Smith 925
Evans *v.* Yarbrough 1020
Executive Office of U. S. Attorneys; McSheffrey *v.* 1042
Ezer, *In re* 1016
Fadael *v.* Cape Savings Bank 1011
Fahle *v.* Cornyn 1043
Fails *v.* Texas 976
Fain *v.* Moore 911,1063
Fairchild *v.* Oklahoma 1039
Fairchild *v.* United States 1000
Falvo; Owasso Independent School Dist. No. I–011 *v.* 902
Falvo; Owasso Public Schools *v.* 902
Family Independence Agency; French *v.* 1025
Fannie Mae; Simpkins *v.* 996
Fantaye *v.* Georgia 929
Farrell-Francis *v.* United States 924
Farrey; Minniecheske *v.* 930,1035
Farris *v.* Johnson 946
Farris *v.* Poppell 1069
Farris *v.* Saffle 976
Farrish *v.* United States 1045
Fay *v.* United States 988
Feaster *v.* Beshears 1035
Feaster *v.* New Jersey 932
FCC Card National Bank; Collins *v.* 927,1014
Federal Communications Comm'n; Contemporary Media, Inc. *v.* 920
Federal Deposit Ins. Corp.; Sedgwick *v.* 938
Federal Election Comm'n; Nader *v.* 1007
Federal Energy Regulatory Comm'n; Norwood *v.* 993

Page
Feist *v.* Consolidated Freightways Corp. 920
Feliciano *v.* United States 943
Felix *v.* Artuz 1026
Fenton, *In re* 1016
Ferguson *v.* Charleston 67
Ferguson *v.* Delaware 924
Fernandez *v.* Connecticut 913
Fernandez *v.* United States 988
Ferreira *v.* Holt 975
Ferrin Navarrete *v.* United States 935
Fields *v.* Clark 977
Fields *v.* Dalkon Shield Claimants Trust 950,1015
Fields *v.* Stegall 960
Figueroa; Gonzalez Duarte *v.* 1021
Filbin *v.* United States 964
Filipos *v.* Sears, Roebuck & Co. 929,1049
Fine *v.* America Online, Inc. 942
Fink *v.* California 1063
Firefighters' Institute for Racial Equality *v.* St. Louis 921
First Bank; Greene *v.* 942
First National Bank; BITE, Inc. *v.* 1037
Fish, *In re* 940,1015
Fish *v.* Gainesville City School Dist. 924
Fisher; Boone *v.* 943
Fisher *v.* North Carolina 914,915
Fiskars, Inc.; Hunt Mfg. Co. *v.* 972
Fitts *v.* Williams 1072
Fitzgerald; Pellegrino *v.* 945
Fliam *v.* Tessmer 960
Flint; Reid *v.* 1026
Flores-Garcia *v.* United States 1001
Flores-Gonzalez *v.* United States 1000
Florez *v.* Williams 949
Florez-Granados *v.* United States 1045
Florida; Baber *v.* 1022
Florida; Battie *v.* 944
Florida; Booker *v.* 1033
Florida; Bowman *v.* 1071
Florida; Gadson *v.* 959
Florida; Glover *v.* 1013
Florida; Gross *v.* 948
Florida; Hawthorne *v.* 1014
Florida; Heilmann *v.* 960
Florida; Heiss *v.* 999

Page
Florida; Hobbs *v.* 1002
Florida; Hobby *v.* 985
Florida; Inciarrano *v.* 933
Florida; Kearse *v.* 945
Florida; Knight *v.* 1011
Florida; LaVenture *v.* 938
Florida; Mansfield *v.* 998
Florida; McDuffie *v.* 1029
Florida; Newgent *v.* 908
Florida; Owen *v.* 964
Florida; Petrick *v.* 932,1035
Florida; Reese *v.* 910
Florida; Reffuse *v.* 944
Florida; Rogers *v.* 934
Florida; Sears *v.* 1054
Florida *v.* Thomas 774,956
Florida; Watson *v.* 934
Florida; Wilson *v.* 1001
Florida Dept. of Corrections; Edwards *v.* 980
Florida Dept. of Corrections; Hollins *v.* 996
Florida Dept. of Corrections; Simpson *v.* 953
Floyd *v.* Johnson 948
Fogh *v.* Lane County Circuit Court 923
Forbes *v.* United States 1074
Ford *v.* Breslin 949
Ford *v.* Head 1068
Ford *v.* Johnson 911
Ford *v.* Rockford Bd. of Ed., School Dist. No. 205 981
Ford *v.* United States 968
Fordjour *v.* Schneider 961
Fordjour *v.* Sonchik 933
Ford Motor Co.; Oddi *v.* 921
Ford Motor Co.; Spearman *v.* 995
Ford Motor Credit Co.; Young *v.* 1044
Fort *v.* United States 1023
Foskin *v.* United States 986
Foster, *In re* 940
Foster; Louisiana Seafood Management Council *v.* 1008
Foster *v.* Neal 944
Foster *v.* Supreme Court of Ohio 1030
Foster *v.* United States 904,1003
Fountain *v.* United States 1053
Fowler *v.* Withrow 1069
Franchise Tax Bd. of Cal.; Buchbinder *v.* 973

Page
Francis *v.* Chemical Banking Corp. 949
Francis *v.* United States 1000
Franco *v.* Tulare County Dept. of Public Social Services 979
Frank; Land *v.* 981
Frank *v.* Louisiana 909
Frank; United Airlines, Inc. *v.* 914
Frankl; Gyadu *v.* 969,1051
Franklin *v.* Hightower 1009
Franklin County Adult Probation; Schilling *v.* 984
Franza *v.* Stinson 929,1035
Frazier *v.* Williams 949
Freed; Frisbey *v.* 1052
Freeh; Hollingsworth *v.* 911
Freeman *v.* Boone 960
Freeney *v.* Illinois 953
Free Speech Coalition; Ashcroft *v.* 917,1006,1017
French *v.* Family Independence Agency 1025
Fresnares-Torres *v.* United States 966
Friedemann *v.* McCormick 994
Frigidaire, Inc.; Kennedy *v.* 1003
Frisbey *v.* Freed 1052
Front Royal; Pennington *v.* 1038
Frye *v.* Mantello 976
Fryer *v.* Ayers 1069
Fryer *v.* Moore 1069
Fuertes-Ramos *v.* United States 966
Fugett *v.* Mack 934
Fuhr *v.* Kemna 1068
Fuller *v.* Dillon 1072
Fuller *v.* Johnson 1069
Fuller *v.* Spragins 1029
Fuller *v.* Welton 960
Fulton *v.* United States 912
Fulton County *v.* Webster 942
Fultz *v.* ABB Power T & D, Inc. 914
Gadson *v.* Florida 959
Gadson *v.* Walker 1003
Gainesville City School Dist.; Fish *v.* 924
Galaza; Bull *v.* 977
Gall *v.* United States 954
Gallegos *v.* Williams 949
Galvan-Zapata *v.* United States 1010
Gamble; Hinton *v.* 933
Gandy *v.* Texas 976,1064

Page
Ganey *v.* Chester 1063
Ganson; Koukios *v.* 990
Ganulin *v.* United States 973
Garate *v.* Hood 947
Garay *v.* United States 986
Garcia; Long Ngoc Diep *v.* 1029
Garcia; Pierce *v.* 1041
Garcia *v.* United States 984,1030
Garcia *v.* Williams 949
Garcia-Ayala *v.* United States 951
Garcia-Cavazos *v.* United States 988
Garcia-Contreras *v.* United States 966
Garcia Espinoza *v.* Ruiz 945,1049
Garcia-Guizar *v.* United States 984
Garcia-Lopez *v.* United States 935
Garcia-Torres *v.* United States 1032
Gardner *v.* Green 980
Garner *v.* Department of Labor 906
Garner; Harris *v.* 1065
Garner *v.* Nevada 929
Garner *v.* Williams 949
Garraghty; Coley *v.* 1012
Garrett; Phillips *v.* 946
Garrett *v.* United States 912
Garris; Norfolk Shipbuilding & Drydock Corp. *v.* 811
Garrison *v.* Braddock 959
Garrison *v.* Polisar 994
Garrott *v.* United States 1072
Garvey; Major League Baseball Players Assn. *v.* 504,1005
Gary *v.* Moore 1043
Gasho *v.* Schriro 933
Gaskins *v.* United States 1074
Gaston *v.* Angelone 911
Gaston *v.* Powell 1035
Gavin de Becker, Inc.; Clemens *v.* 1052
Gearin; Laster *v.* 996
Gearing *v.* Anderson 1042
G. E. Capital Mortgage Services, Inc.; Young *v.* 930
Gece *v.* Atlantic City Medical Center 938
Gee, *In re* 1064
Geidel *v.* Horn 985
General Bank Nederland, N. V.; Miller *v.* 906
General Motors Acceptance Corp.; Perrone *v.* 971
General Motors Corp.; James *v.* 973

Page
Genser; Grace *v.* 923
Geohagen *v.* United States 1032
Georgia; D'Ambrosio *v.* 962
Georgia; Fantaye *v.* 929
Georgia; Gissendaner *v.* 1003
Georgia; Heidler *v.* 1029
Georgia; Mauk *v.* 924
Georgia; Moore *v.* 1012
Georgia; Morrow *v.* 944,1049
Georgia; Pitts *v.* 1024
Georgia; Shorter *v.* 1041
Georgia; Sledge *v.* 1069
Georgia; Vanderpool *v.* 996
Georgia-Pacific Corp. Salaried Employees Ret. Plan *v.* Lyons . . . 967
Georgiou *v.* Halter 1028
G & G Fire Sprinklers, Inc.; Lujan *v.* 189,1006
Ghee; Becker *v.* 1043
Ghee; Conley *v.* 927,1014
Gibbons *v.* Menifee 1030
Gibson; Harjo *v.* 1024
Gibson; Johnson *v.* 945
Gibson; Valdez *v.* 979
Giddens; Kansas City Southern R. Co. *v.* 990
Gilbert *v.* Baltimore County 923
Gilchrist *v.* Bandera Electric Cooperative, Inc. 972
Gilchrist *v.* Weldon 1012
Gilkey *v.* Department of Family and Children's Services of Cal. . . 1026
Gilkey *v.* Santa Clara Cty. Dept. of Family and Children's Servs. . 1026
Gilless; Wash *v.* 1069
Gillis; Borrero Bejerano *v.* 948
Gillis; Muhammad *v.* 978
Gilson *v.* Oklahoma 962
Gissendaner *v.* Georgia 1003
Giuliani *v.* Yourman 923
Gladstone *v.* Lynch 944
Gladstone *v.* Merrill Lynch, Pierce, Fenner & Smith 1015
Glass *v.* Battles 911
Glass *v.* Cowley 959
Glass Enterprises, Inc. *v.* Arsenal, Inc. 1022
Glauner *v.* Grigas 1035
Glenn *v.* Moore 963
Glinsey *v.* United States 1002
Glover *v.* Florida 1013
Gober; Miller *v.* 914

Page
Godley *v.* North Carolina 964
Goff, *In re* 1004
Goff *v.* Johnson 1004
Goldman *v.* United States 1018
Gollehon *v.* Montana 963
Golphin *v.* North Carolina 931
Gomez; Stephens *v.* 984
Gomez *v.* United States 964,984,1032
Gomez *v.* Williams 933
Gomez-Infante *v.* United States 989
Gomez-Pineda *v.* United States 966
Gomez-Valdovinos *v.* United States 966
Goncalves *v.* Ryder 946
Gonzales *v.* Elo 980
Gonzales *v.* National Bd. of Medical Examiners 1038
Gonzales *v.* Williams 949
Gonzalez, *In re* 1037
Gonzalez *v.* United States 943
Gonzalez *v.* Williams 927,950
Gonzalez Duarte *v.* Aponte Figueroa 1021
Goord; Burr *v.* 935
Goord; Murray *v.* 931
Gorczyk; Bedell *v.* 1025
Gore *v.* Trans World Airlines 921
Gotcher *v.* Washington 1041
Gotchnik *v.* United States 1051
Governor of Ala.; Adkins *v.* 1026
Governor of Fla.; Carlson *v.* 945
Governor of Hawaii *v.* Chevron U. S. A. Inc. 942
Governor of Ill.; Hadley *v.* 1071
Governor of La.; Louisiana Seafood Management Council *v.* 1008
Governor of N. C. *v.* Cromartie 234,1076
Governor of Okla.; Shabazz *v.* 969,1064
Governor of Pa.; Robinson *v.* 1025
Governor of S. C.; Brown *v.* 926,991
Goya Foods, Inc.; Unanue *v.* 1022
Goya Foods, Inc.; Unanue-Casal *v.* 1022
Grace *v.* Genser 923
Grady *v.* United States 1057
Grandison *v.* Corcoran 996
Grant; Ricciardi *v.* 919
Grant *v.* Sales 1020
Gravatt *v.* Simpson & Brown, Inc. 957
Graves *v.* Jones 948

Page
Graves *v.* Rumsfeld 1072
Graves *v.* United States 923
Gray *v.* Nebraska 911
Gray *v.* Stewart 974
Gray *v.* Turner 977
Gray *v.* United States 919,1035
Gray *v.* Zavaras 947
Greate Bay Casino Corp.; Doug Grant, Inc. *v.* 1038
Great-West Life & Annuity Ins. Co. *v.* Knudson 917,1017
Green *v.* Cain 909
Green *v.* Catoe 1039
Green; Gardner *v.* 980
Green *v.* Scibana 1029
Green *v.* United States 968
Greene, *In re* 1064
Greene *v.* First Bank 942
Greene *v.* Nevada 911
Greene *v.* United States 1045
Greenspring Racquet Club, Inc. *v.* Baltimore County 957
Gregg *v.* United States 971
Gregory, *In re* 914
Greiner; Huntley *v.* 960
Greiner; Li Ah *v.* 1070
Greiner; Melendez *v.* 911
Greiner; Powell *v.* 950
Grievance Committee for Tenth Jud. Dist.; Solomon *v.* 906
Griffin; Alabama *v.* 953
Grigas; Glauner *v.* 1035
Grine *v.* Coombs 1021
Grisso *v.* Halter 963
Groesch; Purdle *v.* 914
Groose; Hutton *v.* 933
Gross *v.* Florida 948
Grumhaus *v.* Comerica Securities, Inc. 971
Grundy *v.* Norris 1057
GTE Fla., Inc.; Lee *v.* 958
Guanipa *v.* United States 1029
Guerrero *v.* United States 1074
Guess *v.* Ohio 960
Guidry *v.* Cain 908
Guillermo *v.* Williams 949
Guillory *v.* Cain 960
Guillory *v.* Coreil 960
Guinto *v.* Philip Morris, Inc. 964,1049

Page

Gundy *v.* Moore 991
Gunite Corp.; Casper *v.* 945
Gunn; White *v.* 1010
Gurley *v.* Mills 1009
Gutierrez *v.* Schomig 950
Gutierrez *v.* United States 1001
Gutierrez; Yei-Hwei Tong *v.* 905
Gutierrez-Martinez *v.* United States 1001
Guy *v.* Anderson 1011
Guy *v.* Lovell 961
Guzman *v.* California 1042
Guzman *v.* Welborn 1054
Gyadu *v.* Frankl 969,1051
Hadden *v.* United States 1035
Hadley *v.* Ryan 1071
Haggar Apparel Co. *v.* United States 906
Hakim *v.* Hicks 932
Hale *v.* Arkansas 1039
Haley *v.* Arthur 1004
Haley; Wilson *v.* 919
Hall; Brinson *v.* 1017
Hall *v.* Clinton 995,1056
Hall *v.* Ohio 1068
Hall; Philpot *v.* 998
Hall *v.* Superior Court of Cal., Santa Clara County 997
Hall *v.* United States 912
Hall *v.* Williams 948
Halstead *v.* Hoyt 961
Halter; Brito *v.* 933
Halter; Georgiou *v.* 1028
Halter; Grisso *v.* 963
Halter; Head *v.* 992
Halter; LaBlanche *v.* 991
Halter; McCarthy *v.* 923
Halter; McKenna *v.* 952
Halter; Schaffer *v.* 931,1049
Halter *v.* Sigmon Coal Co. 993
Halter; Wermers *v.* 934,1015
Hameen *v.* Delaware 924
Hamilton *v.* Honsted 946
Hamilton County Community Health Bd.; Steele *v.* 929
Hammer *v.* United States 959
Hammonds *v.* Alabama 907
Hampton *v.* DeTella 995

Page
Hancock; Pennington *v.* 962
Hancock *v.* United States 989
Handley *v.* United States 935
Hankins *v.* Moore 1042
Hanks; Zimmerman *v.* 1011
Hannaford *v.* United States 911
Hannibal *v.* Pennsylvania 1039
Hansen *v.* Crosby 909
Harbin *v.* United States 1001
Hardin *v.* Agua Caliente Band of Cahuilla Indians 958
Hargett; McClure *v.* 909
Hargett; Robbins *v.* 1054
Harjo *v.* Gibson 1024
Harlan *v.* Colorado 979
Harper *v.* Tompkins 961
Harper *v.* United States 1074
Harris *v.* Armstrong 958
Harris *v.* Cook County 963
Harris *v.* Garner 1065
Harris *v.* Johnson 959
Harris *v.* Neely 946
Harris *v.* New Jersey 1057
Harris *v.* North Carolina 1071
Harris *v.* Oklahoma 1025
Harris *v.* Stovall 947
Harris *v.* United States 964,988
Harrison, *In re* 918
Harrison *v.* Kainrad 942
Harrod *v.* United States 987,988
Hart; Sienkiewicz *v.* 1020,1076
Harter *v.* Vernon 1022
Harvest Foods; Mason *v.* 950
Harvey *v.* United States 936,954
Haskouri *v.* University of Tex. at Brownsville 922
Hasson *v.* Williams 933
Hatcher; Ashway *v.* 911,1035
Hatter; United States *v.* 557
Hawkins, *In re* 1018,1064
Hawkins *v.* Morse 939
Hawkins *v.* United States 1031
Hawk Sawyer; Myrick *v.* 1057
Hawthorne *v.* Florida 1014
Hayden *v.* Johnson 947
Hayes; Manning *v.* 941

Page
Hayes *v.* Mills 1015
Hayes *v.* United States 935
Hayes; Williams *v.* 1012
Haygood *v.* Moore 960
Hayhurst *v.* American Assn. of Naturopathic Physicians 1008
Haynes; Quinn *v.* 1024
Hazel *v.* South Carolina 999
Head; Ford *v.* 1068
Head *v.* Halter 992
Head; High *v.* 909
Head; McKibben *v.* 1003
Head; Mincey *v.* 926,1035
Hebrard *v.* Day 959
Heckard *v.* Williams 1042
Hedrick; DeTemple *v.* 979
Hee Lee *v.* Hubbard 1012
Heidler *v.* Georgia 1029
Heilmann *v.* Florida 960
Heinemann *v.* Wyoming 934
Heiss *v.* Florida 999
Helman; Massey *v.* 1065
Helwig *v.* Raycroft 946
Hembry *v.* Angelone 976
Henderson *v.* Johnson 959
Henderson; Lynch *v.* 981
Henderson; Noland *v.* 1019
Henderson; Taylor *v.* 923,1035
Henderson *v.* United States 986
Hendricks; Juarbe *v.* 1011
Henley *v.* United States 943
Hennessey *v.* Hickman 1054
Hennigan *v.* Cain 946
Henry *v.* District of Columbia 1029
Henry *v.* Leavenworth County Bd. of County Comm'rs 958
Henry *v.* Page 959
Hensley *v.* Moore 960
Henson *v.* Bromfield 954
Herbin *v.* Hoeffel 976
Herman *v.* Oklahoma 1007
Hermes *v.* Nebraska 957
Hernandez *v.* Pierson 1068
Hernandez-Alejandre *v.* United States 1044
Hernandez-Castanon *v.* United States 984
Hernandez-Dominguez *v.* United States 950

Page
Hernandez-Gomara *v.* United States 966
Hernandez-Rodriguez *v.* United States 984
Hernandez-Vega *v.* United States 1032
Herrera *v.* United States 1001,1057
Herrera-Herrera *v.* United States 966
Herrera-Pena *v.* United States 1001
Herrera-Ramirez *v.* United States 966
Hess *v.* Arizona 960
Hesse *v.* Department of State 991
Hessler *v.* Ohio 998
Hetherington *v.* United States 936
Hialeah Housing Authority; Jimenez *v.* 1020
Hickey *v.* Moore 947
Hickman; Hennessey *v.* 1054
Hickman; Hoover *v.* 964
Hickok; Brian B. *v.* 972
Hicks; Hakim *v.* 932
Hidalgo Rodrigue; Rodrigue *v.* 905
Hider *v.* Sheriff, Cumberland County 984
High *v.* Head 909
Hightower; Franklin *v.* 1009
Hilger *v.* Lawrence 1052
Hill, *In re* 993
Hill *v.* Johnson 1039
Hill *v.* Pennsylvania 968
Hill *v.* Texas 963
Hill *v.* United States 932,957,1019,1023,1032
Hilliard *v.* Louisiana 933
Hillside Rehabilitation Hospital; Saffold *v.* 923
Hilton *v.* Moore 967
Hinds *v.* United States 986
Hines *v.* Moore 948
Hinojosa *v.* Wachovia Bank of Ga. 946
Hinson *v.* United States 1044
Hinton *v.* Gamble 933
Hinton *v.* United States 1045
Hittson *v.* Turpin 1052
Ho Ahn *v.* United States 924
Hobbs *v.* Florida 1002
Hobbs *v.* Williams 949
Hobby *v.* Florida 985
Hodges; Brown *v.* 926,991
Hodson *v.* Johnson 976
Hoeffel; Herbin *v.* 976

Page

Holder *v.* Ohio 946
Holguin Caraveo *v.* Johnson 997
Holiday *v.* Texas 960
Holland *v.* Justak 983
Holleman *v.* U. S. District Court 1068
Hollingsworth *v.* Freeh 911
Hollingsworth *v.* Lane Community College 941
Hollins *v.* Florida Dept. of Corrections 996
Holloway *v.* Johnson 976
Holloway *v.* United States 976
Holmes *v.* Conroy 954
Holmes *v.* Indiana 1067
Holmes; South Carolina *v.* 906
Holt; Ferreira *v.* 975
Home Depot, U. S. A., Inc.; Mills *v.* 958
Home Place Batture Leasing, Inc.; Bayou Fleet, Inc. *v.* 905
Honsted; Hamilton *v.* 946
Hood; Garate *v.* 947
Hooks *v.* Clark County School Dist. 971
Hooper *v.* United States 985
Hoover *v.* Arkansas 1056
Hoover *v.* Hickman 964
Hopkins; Jackson *v.* 1010
Hopkins; McGuire *v.* 949
Horn *v.* Birmingham News Co. 1019
Horn; Geidel *v.* 985
Horn; McClain *v.* 1067
Hornkohl *v.* Beck 994
Hoskins *v.* Anderson 929
Ho Song *v.* California 1052
Houle *v.* United States 1074
Houston; Adult Video Megaplexxx *v.* 1067
Houston; Chen *v.* 1046
Houston *v.* Parker 934
Houston; Rosenblatt *v.* 1067
Houston *v.* Swanagin 1067
Howard *v.* Dougan 948
Howard *v.* New York 999
Howard *v.* United States 925
Howell; Arizona *v.* 994
Hoyt; Downs *v.* 999
Hoyt; Halstead *v.* 961
H&R Block Eastern Tax Services, Inc.; Berkley *v.* 971
Hu *v.* Leadership Council for Metropolitan Open Communities 959,1035

Page
Hubbard; Banning *v.* 997
Hubbard; Dae Hee Lee *v.* 1012
Huertas Laboy *v.* Puerto Rico 1066
Huggins *v.* United States 988,1000
Hughes *v.* Deeds 1042
Hughes *v.* Department of Housing and Urban Development 1029
Hughes *v.* United States 1033
Humana Health Plan, Inc.; Bekker *v.* 972
Humanitarian Law Project *v.* Ashcroft 904
Humanitarian Law Project; Ashcroft *v.* 904
Hunnell *v.* Lee 911
Hunt *v.* Cromartie 234
Hunt *v.* Register 1025
Hunt; Robinson *v.* 964
Hunter *v.* Smith 1068
Huntley *v.* Greiner 960
Hunt Mfg. Co. *v.* Fiskars, Inc. 972
Hurley *v.* Moore 1013
Hurley *v.* Motor Coach Industries, Inc. 990
Husbands *v.* United States 952
Hutchinson; Dundas *v.* 1054
Hutchinson *v.* Weiss, Peck & Greer, L. L. C. 1021
Hutton *v.* Groose 933
Hutzell *v.* United States 944
Hyde *v.* Alabama 907
Ibrahim *v.* United States 1045
Ida *v.* United States 1039
Idaho; Samuelson *v.* 1035
Idaho *v.* United States 956
Illig *v.* Moore 931
Illinois *v.* Carlson 905
Illinois *v.* Delaware 1019
Illinois; Dortch *v.* 929
Illinois; Freeney *v.* 953
Illinois; Kelly *v.* 958
Illinois; Lathon *v.* 1073
Illinois; Montgomery *v.* 1068
Illinois; Norris *v.* 1030
Illinois; Ramos *v.* 1073
Illinois; Rosario *v.* 981
Illinois; Searcy *v.* 952
Illinois; Skolnick *v.* 1011
Illinois; Williams *v.* 996
Illinois; Willing *v.* 1013

Page
Immigration and Naturalization Service; Bhatti *v.* 972
Immigration and Naturalization Service; Leybinsky *v.* 1053
Immigration and Naturalization Service; Nabatanzi *v.* 1036
Immigration and Naturalization Service; Wedderburn *v.* 904
Immigration and Naturalization Service; William *v.* 919
Inciarrano *v.* Florida 933
Independent School Dist. No. I–89 of Okla. Cty.; Barringer *v.* . . . 1020
Indiana; Blackwell *v.* 1023
Indiana; Davies *v.* 945
Indiana; Holmes *v.* 1067
Indiana; Scott *v.* 1066
Indiana Dept. of Revenue; Secor *v.* 999
Ingle; Circuit City Stores, Inc. *v.* 938
Ingle; Soltero *v.* 1068
Ingram *v.* South Carolina 1014
In re. See name of party.
International. For labor union, see name of trade.
International Fidelity Ins. Co. *v.* Drill South, Inc. 1020
International Fidelity Ins. Co. *v.* New Jersey 1052
Inwood International Co. *v.* Wal-Mart Stores, Inc. 1003
Iowa; Epps *v.* 950
Irby *v.* United States 988
Irving *v.* Braxton 948
Jackson, *In re* 918,1064
Jackson *v.* Alabama 934,962
Jackson *v.* Caddo Correctional Center 1003
Jackson *v.* Cain 1055
Jackson *v.* Hopkins 1010
Jackson *v.* Johnson 1042
Jackson *v.* Marlin Yacht Mfg., Inc. 983
Jackson; McCloud *v.* 1012
Jackson *v.* Moore 908,967
Jackson; Smith *v.* 985
Jackson *v.* Texas 1068
Jackson *v.* United States 910,988,1003
Jackson; Vaughn *v.* 914
Jackson Public Schools; Milton *v.* 938
Jacob *v.* United States 1072
Jacobs; Balawajder *v.* 1005
Jacobs; New Horizon of N. Y. LLC *v.* 1052
Jacobs *v.* North Carolina 1012
Jacobsen *v.* United States 1001
Jamal *v.* Cuomo 963
James *v.* Alabama 1040

Page
James *v.* General Motors Corp. 973
James; Jeffers *v.* 981
James *v.* Mazda Motor Corp. 921
James *v.* Scavoni 998
James *v.* Small 1069
James; Upper Arlington City School Dist. *v.* 995
James Byrd, Jr., Foundation for Racial Healing; Jason *v.* 925
Jamrog; Wilson *v.* 1067
Jarrett *v.* Moore 991
Jason *v.* James Byrd, Jr., Foundation for Racial Healing 925
Javier Narvaez *v.* United States 985
Jeffers *v.* James 981
Jefferson *v.* Cambra 991
Jefferson *v.* Rockett 945
Jefferson County; Acker *v.* 1051
Jeffs, *In re* 970
Jeter *v.* Warden, Winn Correctional Center 1055
Jett *v.* Davis 1027
Jimenez *v.* Hialeah Housing Authority 1020
Joel *v.* Orlando 978
Joelson *v.* United States 981
John Deere Ins. Co. *v.* Nueva 1050
Johns *v.* Missouri 1012
Johnson, *In re* 902,1050
Johnson; Ali *v.* 948,1015
Johnson *v.* Arkansas 944
Johnson; Baker *v.* 946
Johnson; Beasley *v.* 908
Johnson; Bellah *v.* 947
Johnson; Bellinger *v.* 979
Johnson; Brown *v.* 910
Johnson; Butcher *v.* 1027
Johnson; Cadoree *v.* 1040
Johnson; Castillo *v.* 1026
Johnson; Clarke *v.* 1042
Johnson; Clewis *v.* 928
Johnson; Coleman *v.* 926,979,1014,1076
Johnson; Curry *v.* 944
Johnson; Darnell *v.* 959
Johnson *v.* Department of Army 1013
Johnson; Dorsey *v.* 910
Johnson; Doughtie *v.* 956
Johnson; Dowthitt *v.* 915
Johnson; Dunmon *v.* 911,992

Page

Johnson; Etter *v.* 998
Johnson; Farris *v.* 946
Johnson; Floyd *v.* 948
Johnson; Ford *v.* 911
Johnson; Fuller *v.* 1069
Johnson *v.* Gibson 945
Johnson; Goff *v.* 1004
Johnson; Harris *v.* 959
Johnson; Hayden *v.* 947
Johnson; Henderson *v.* 959
Johnson; Hill *v.* 1039
Johnson; Hodson *v.* 976
Johnson; Holguin Caraveo *v.* 997
Johnson; Holloway *v.* 976
Johnson; Jackson *v.* 1042
Johnson *v.* Jones 980
Johnson; Killick *v.* 938
Johnson; Knox *v.* 975
Johnson *v.* Kyler 980
Johnson *v.* Larkins 908
Johnson; Lewis *v.* 1065
Johnson; Loften *v.* 1055
Johnson; Loper *v.* 1010
Johnson *v.* Louisiana 1069
Johnson *v.* Luebbers 934
Johnson; Massey *v.* 930
Johnson *v.* Mississippi 930
Johnson; Montgomery *v.* 975
Johnson; Montoya *v.* 1067
Johnson; Moore *v.* 949
Johnson; Nickerson *v.* 926
Johnson *v.* Pennsylvania 996
Johnson; Penry *v.* 782,916
Johnson; Powell *v.* 978
Johnson; Randell *v.* 971
Johnson; Rauch *v.* 925
Johnson; Reger *v.* 1043
Johnson; Rogers *v.* 1027
Johnson; Salinas Mestiza *v.* 991
Johnson; Schexnider *v.* 1042
Johnson; Scott *v.* 963
Johnson; Soliz *v.* 1042
Johnson; Sosa *v.* 963
Johnson *v.* Stegall 948

Page
Johnson; Terry *v.* 1071
Johnson *v.* Texas 975
Johnson; Trevino *v.* 930
Johnson *v.* United States 937,965,1024,1075
Johnson; Utley *v.* 910
Johnson; Vasquez *v.* 997
Johnson; Watley *v.* 914
Johnson; Wheat *v.* 1070
Johnson; Wicks *v.* 909,1035
Johnson; Woodson *v.* 1003
Johnson *v.* Wyoming 1036
Jonas *v.* Talley 1021
Jonas *v.* Unisun Ins. Co. 973
Jones *v.* Angelone 930
Jones *v.* Arizona 978
Jones; Baker *v.* 907
Jones *v.* Battle 1043
Jones *v.* Conroy 908
Jones; Graves *v.* 948
Jones; Johnson *v.* 980
Jones; Lavearn *v.* 962
Jones *v.* Lee 1029
Jones *v.* McDowell 1069
Jones *v.* Ohio 1054
Jones *v.* Pennsylvania Minority Business Development Authority 942
Jones *v.* Powell 914
Jones *v.* Schaefer 904
Jones *v.* Thompson 1056
Jones *v.* United States 952,982,1023,1053
Jones; Wheeler *v.* 1068
Jon-Nwakalo *v.* Dormitory Authority of N. Y. 1009
Jordan *v.* Brazil 1025
Joseph *v.* United States 913
Juarbe *v.* Hendricks 1011
Judge, Cir. Ct., Berkeley Cty.; W. Va. *ex rel.* Winchester Med. Ctr. *v.* 1020
Judge, Cir. Ct., 13th Judicial Circuit of Fla.; Stephens *v.* 984
Judge, Court of Common Pleas of Ohio, Franklin Cty.; Evans *v.* . . 1020
Judge, Court of Common Pleas of Ohio, Portage Cty.; Harrison *v.* 942
Judge, Minn. District Court, 4th Judicial Dist.; Olson *v.* 995
Judge, Superior Court of Ariz., Maricopa Cty.; Fordjour *v.* 961
Jusino; Williams *v.* 1002
Justak; Holland *v.* 983
Justice, Supreme Court of N. Y., Ninth Jud. Dist.; Santorelli *v.* . . 1008
Kafka *v.* United States 924

Page
Kagan *v.* United States 1037
Kainrad; Harrison *v.* 942
Kaiser; Davis *v.* 944
Kaiser Aluminum & Chemical Corp. *v.* Department of Labor 919
Kalasho *v.* Eastpointe 954
Kamuf; Schriro *v.* 919
Kansas *v.* Colorado 902
Kansas; Conley *v.* 932
Kansas *v.* Crane 957
Kansas; Crane *v.* 930
Kansas *v.* Nebraska 992
Kansas City Southern R. Co.; Duncan *v.* 992
Kansas City Southern R. Co. *v.* Giddens 990
Kansas Dept. of Revenue; Kroger Co. *v.* 1009
Kapture; Wojnicz *v.* 1055
Karls *v.* Wisconsin 930
Karuk Tribe of Cal. *v.* United States 941
Kashyap; Brown *v.* 979
Kassebaum *v.* New York 1069
Katz *v.* Regents of Univ. of Cal. 1033
Kaye; Barth *v.* 990
Kearney *v.* Oklahoma 1069
Kearse *v.* Florida 945
Keating; Shabazz *v.* 969,1064
Kee *v.* United States 986
Keen *v.* Tennessee 907
Keith *v.* United States 1057
Kelly *v.* Illinois 958
Kelly *v.* Memphis 997
Kelly; Simmons *v.* 977
Kemna; Fuhr *v.* 1068
Kemna; Lee *v.* 956
Kemna; Vivone *v.* 965,1036
Kemp *v.* New York 977
Kennedy *v.* Frigidaire, Inc. 1003
Kennedy *v.* United States 943
Kenney *v.* New Jersey 932
Kent Display Systems, Inc.; Advanced Display Systems, Inc. *v.* . . 904
Kentucky River Community Care, Inc.; NLRB *v.* 706
Keohane; Clark *v.* 1054
Keohane; Eickleberry *v.* 1012
Kersey *v.* Crane 914
Kevorkian *v.* American Medical Assn. 995
Key *v.* United States 988,1014

Page
Kiel *v.* Scott 1004
Killick *v.* Johnson 938
Kimberlin *v.* Dewalt 937,1005
King *v.* California 950
King; Cedric Kushner Promotions, Ltd. *v.* 940
King *v.* Ohio 994
Kinter *v.* United States 937
Klamath Water Users Protective Assn.; Department of Interior *v.* 1
Klein *v.* McDaniel 1029
Kloster Cruise Ltd.; Dickens-Lawrence *v.* 927
Knezevich *v.* Oregon 922
Knight *v.* Florida 1011
Knight-Ridder, Inc.; Townsend *v.* 922
Knights; United States *v.* 1018
Knowles; Leng Yu Vang *v.* 1054
Knox *v.* Johnson 975
Knudson; Great-West Life & Annuity Ins. Co. *v.* 917,1017
Koch *v.* Pennsylvania 1023
Kokoski *v.* United States 999
Kontny *v.* United States 1022
Kopp *v.* United States 1000
Koukios *v.* Ganson 990
Kraft; Anderson *v.* 929
Kraft *v.* California 908
Krause *v.* Otto Nemenz International, Inc. 1041
Krebs *v.* Superior Court of Cal., San Luis Obispo County 977
Krenke; Morgan *v.* 951
Kroger Co. *v.* Central States, S. E. & S. W. Areas Pension Fund 990
Kroger Co. *v.* Kansas Dept. of Revenue 1009
Kuhlmann; Rice *v.* 933
Kulas *v.* Mack 1041
Kupec; Brooks-Bey *v.* 952
Kushner Promotions, Ltd. *v.* King 940
Kyler; Johnson *v.* 980
LaBlanche *v.* Halter 991
Labor Union. See name of trade.
Laboy *v.* Puerto Rico 1066
Lackawanna County District Attorney *v.* Coss 394
LaCoss *v.* Crowley 1010
Lacy *v.* United States 965
Lady *v.* Outboard Marine Corp. 941
La Gatta *v.* United States 1002
Lago Vista; Atwater *v.* 318
Lake City Police Dept.; Muldrow *v.* 982

Page
Lambert *v.* Blackwell 919
Lambros *v.* United States 1075
Lampkin *v.* United States 991
Land *v.* Frank 981
Lane Community College; Hollingsworth *v.* 941
Lane County Circuit Court; Fogh *v.* 923
Lang *v.* Rogerson 1028
Lang *v.* Woodford 977
Langston *v.* Littlefield 1024
Laramie County Community College Bd. of Trustees; Phelan *v.* . . . 1020
Lareinaga-de la Guerra *v.* United States 989
Larkins; Johnson *v.* 908
Lasater; Baumer *v.* 1011
Laster *v.* Gearin 996
Lathon *v.* Illinois 1073
Latorre-Benavides *v.* United States 1045
Lavearn *v.* Jones 962
LaVenture *v.* Florida 938
Lavery *v.* Washington 960
Lawrence; Hilger *v.* 1052
Lawrence *v.* Luebbers 932,1015
Lawson *v.* Lawson 1038
Lawson *v.* Mississippi Dept. of Corrections 978
Lazaro Fernandez *v.* United States 988
Leadership Council for Metropolitan Open Communities; Hu *v.* 959,1035
Leatherman Tool Group, Inc.; Cooper Industries, Inc. *v.* 424
Leavenworth County Bd. of County Comm'rs; Henry *v.* 958
LeBlanc; Battle *v.* 1038
LeBlanc; Louisiana ACORN Fair Housing, Inc. *v.* 904
LeBlanc *v.* Miguez 972
LeCureux; Walton *v.* 947
Lee; Bacon *v.* 950
Lee *v.* GTE Fla., Inc. 958
Lee *v.* Hubbard 1012
Lee; Hunnell *v.* 911
Lee; Jones *v.* 1029
Lee *v.* Kemna 956
Lee; Parker *v.* 1028
Lee; Philip *v.* 924
Lee *v.* United States 907,994,1053
Lefkowitz *v.* Bank of N. Y. 1038
Legal Services Corp.; Velazquez *v.* 903
Lehto *v.* Texas 938
Lejano, *In re* 918

Page
Lejeune *v.* Texas 907
Leng Yu Vang *v.* Knowles 1054
Leonardo; Petrovich *v.* 981
Leonides Guanipa *v.* United States 1029
Leslie *v.* United States 986
Levels *v.* United States 1023
Levine *v.* United States 1013
Levi Strauss & Co. *v.* United States 906
Lewis; de Medeiros *v.* 962,1063
Lewis *v.* Entergy Electric Co. 908
Lewis *v.* Johnson 1065
Lewis *v.* Moore 954
Lexington 76 Auto Truck Stop *v.* McAlpin 905
Leybinsky *v.* Immigration and Naturalization Service 1053
Leyva *v.* United States 953
Li Ah *v.* Greiner 1070
Liberty Paper Co.; San Paolo U. S. Holding Co. *v.* 1050
Lightfoot *v.* United States 976
Ligon *v.* Bartis 1021
Ligon; Cambiano *v.* 1009
Lile; McKune *v.* 1018
Lillie *v.* Egelhoff 937
Lilly; Bradt *v.* 905
Lim *v.* Thomas & Betts Corp. 1012
Lindsey *v.* Louisiana 1010
Lindsey; Polk *v.* 982
Lindsey; Villegas *v.* 1041
Linton *v.* United States 935
Linville *v.* United States 996
Lira *v.* United States 1046
Litscher; Pazo-More *v.* 962
Littlefield; Langston *v.* 1024
Livingstone *v.* North Belle Vernon 906
Liz Claiborne; Riddle *v.* 1067
Lnu *v.* United States 952,1058
Local. For labor union, see name of trade.
Locascio *v.* United States 1073
Lockyer; Ashanti *v.* 1040
Lodge. For labor union, see name of trade.
Loeblein *v.* Dormire 982
Loften *v.* Johnson 1055
Logan *v.* Stewart 1033
Logan *v.* United States 983
Logan *v.* Williams 947

Page
Lomax *v.* Sears, Roebuck & Co. 1070
Londonderry; Coltin *v.* 980
Long Ngoc Diep *v.* Garcia 1029
Loper *v.* Johnson 1010
Lopez *v.* United States 971,1033
Lopez-Gonzalez *v.* United States 986
Lopez-Perdomo *v.* United States 1032
Lopez-Revi *v.* United States 950,1076
Lorillard Tobacco Co. *v.* Reilly 956
Los Angeles *v.* Alameda Books, Inc. 902
Los Angeles Cty.; Politi *v.* 1038
Los Angeles Cty. Dept. of Children and Family Servs.; Saxton *v.* 1054
Los Angeles Cty. Dept. of Children & Family Servs.; Warren W. *v.* 962
Los Angeles Unified School Dist.; Downs *v.* 994
Louisiana; Downey *v.* 959
Louisiana; Frank *v.* 909
Louisiana; Hilliard *v.* 933
Louisiana; Johnson *v.* 1069
Louisiana; Lindsey *v.* 1010
Louisiana; Tilley *v.* 959
Louisiana ACORN Fair Housing, Inc. *v.* LeBlanc 904
Louisiana Committee on Bar Admissions; Bester *v.* 906
Louisiana Seafood Management Council *v.* Foster 1008
Louisiana Secretary of State *v.* United States Fidelity & Guaranty 922
Love *v.* United States 1031
Lovell; Guy *v.* 961
Lovell; Thomas *v.* 961
Lowe; Dennis *v.* 1040
Lowery *v.* Anderson 959
Lownsbery *v.* United States 952
Loyd *v.* Withrow 997
Lozano *v.* Ohlrich 925
Lozano *v.* United States 1001
Lozano-Gutierrez *v.* United States 1001
Lozano-Hernandez *v.* United States 966
Lua *v.* Albritton 1070
Lubbock; Bibbs *v.* 1066
Lucabaugh *v.* Redevelopment Authority of Reading 1026
Lucero *v.* Williams 978
Lucey *v.* Moore 991
Luebbers; Johnson *v.* 934
Luebbers; Lawrence *v.* 932,1015
Luebbers *v.* Richardson 915
Luebbers; Richardson *v.* 915

Page
Luebbers; Smith *v.* 1049
Luebbers; Walker *v.* 944,1014
Luebbers; Ware *v.* 982
Luebbers; Williams *v.* 985
Luis Castillo *v.* United States 965
Lujan *v.* G & G Fire Sprinklers, Inc. 189,1006
Lujan-Garcia *v.* United States 1013
Luna-Almaraz *v.* United States 1073
Lundahl, *In re* 970
Lurie *v.* Wittner 943
Luttrell *v.* Wilson 942
Luviano *v.* United States 1014
Lyckman *v.* United States 986
Lynaugh; Moore *v.* 994
Lynch; Gladstone *v.* 944
Lynch *v.* Henderson 981
Lynchburg College; Edelman *v.* 940
Lyons; Georgia-Pacific Corp. Salaried Employees Ret. Plan *v.* . . . 967
Macarubbo *v.* Principi 951
MacElvain *v.* United States 1067
Machinists *v.* Pusey 1007
Macias *v.* United States 966
Mack; Fugett *v.* 934
Mack; Kulas *v.* 1041
Mack *v.* United States 1045
Mackey *v.* United States 943
Mac-Millan Bloedel, Inc.; Collins *v.* 1066
Macon *v.* California 1014
Maddock; Bayramoglu *v.* 1028
Madrid; Moreland *v.* 961
Madyun *v.* Memphis 1027
Magana-Urbanes *v.* United States 966
Maggio *v.* Norm Reeves Honda 1040
Magliocca *v.* United States 986
Magnet Resources, Inc.; Elamir *v.* 920
Maguire, *In re* 1036
Mahfouz; Bawazir *v.* 914
Maine; New Hampshire *v.* 742,917
Maine Dept. of Defense and Veterans Services; Clavette *v.* 1008
Major *v.* Port Townsend Police Dept. 958
Major League Baseball Players Assn. *v.* Garvey 504,1005
Malaktaris; Syvertson *v.* 947
Malesko; Correctional Services Corp. *v.* 902
Mallard Bay Drilling, Inc.; Chao *v.* 1017

Page
Mandel, *In re* 939
Mangel; Dawley *v.* 914
Mangone *v.* United States 936
Mann *v.* United States 974
Manna *v.* United States 1009
Manning *v.* Hayes 941
Manning *v.* Mississippi 907
Manning *v.* Smith 1043
Manning *v.* Williams 950
Mansfield *v.* Florida 998
Mantello; Frye *v.* 976
Manybeads *v.* United States 966
Maritime & Northeast Pipeline, L. L. C.; Mockler *v.* 1043
Market Hub Partners; Bath Petroleum Storage, Inc. *v.* 1037
Marketing Displays, Inc.; TrafFix Devices, Inc. *v.* 23
Marksberry *v.* Conley 928
Marlin *v.* District of Columbia Bd. of Elections & Ethics 1039
Marlin Yacht Mfg., Inc.; Jackson *v.* 983
Martin *v.* Collins 937
Martin; PGA TOUR, Inc. *v.* 661
Martin; Stuck *v.* 961
Martin *v.* Taylor 907
Martin *v.* Terhune 1042
Martin *v.* United States 1002
Martin Correctional Institution; Barron *v.* 1024
Martin Correctional Institution; Brown *v.* 1024
Martinez-Acosta *v.* United States 1057
Martinez Campos *v.* United States 1074
Martinez-Castro *v.* United States 987
Martinez-Guevara *v.* United States 1044
Martinez-Hernandez *v.* United States 983,988
Martinez-Lomeli *v.* United States 966
Martinez-Perez *v.* United States 1001
Martinez Rodriquez *v.* United States 965
Martini *v.* Boeing Co. 957
Maryland; Costley *v.* 928
Maryland; Sampson *v.* 1056
Maryland; Virginia *v.* 969
Masias *v.* Texas 979
Masko *v.* United States 958,1049
Mason *v.* Harvest Foods 950
Massachusetts *v.* American Trucking Assns., Inc. 901
Massachusetts; Petrillo *v.* 1030
Massachusetts; Sholley *v.* 980

Page
Massachusetts Labor Relations Comm'n; Belhumeur *v.* 904
Massey *v.* Helman 1065
Massey *v.* Johnson 930
Massey *v.* United States 975
Massie *v.* Woodford 939
Masvidal *v.* United States 953
Mata-Balderas *v.* United States 1033
Matczak *v.* Dahl 973
Matejka *v.* Wisconsin 1058
Mathias *v.* WorldCOM Technologies, Inc. 903
Mathis *v.* Bauer Buick Co. 1027
Mathis *v.* Shavers Chevrolet 950
Mathis *v.* United States 1030
Mathison *v.* Elo 948
Mauk *v.* Georgia 924
Maxfield *v.* Virginia 1008
May *v.* North Carolina 1069
May *v.* United States 974
Mayfield *v.* Williams 978
Maynard *v.* United States 989
Mayor of New York City *v.* Yourman 923
Mazda Motor Corp.; James *v.* 921
McAlpin; Lexington 76 Auto Truck Stop *v.* 905
McAndrew *v.* Department of Community and Economic Dev. 1066
McAndrew *v.* Pennsylvania State Civil Service Comm'n 1066
McCall *v.* United States 982,1076
McCarthy *v.* Halter 923
McCarver *v.* North Carolina 941,993,1064
McClain *v.* Horn 1067
McCloud *v.* Jackson 1012
McClure *v.* Hargett 909
McCormick; Friedemann *v.* 994
McCowin, *In re* 970
McCoy; Abou-Sakher *v.* 1021
McCoy *v.* Pinchak 926
McDaniel, *In re* 993
McDaniel; Klein *v.* 1029
McDaniel; Mitchell *v.* 1048
McDermott *v.* Boehner 1050
McDonald *v.* United States 990
McDonnell *v.* Comm. on Character, Sup. Ct. of N. Y., 2d Dept. . . . 921
McDougall; Sienkiewicz *v.* 1008,1048
McDow *v.* Apfel 1036
McDowell; Jones *v.* 1069

Page
McDuffie *v.* Florida 1029
McElroy *v.* United States 1044
McFarland *v.* United States 996
McFlynn, *In re* 1016
McGee *v.* Craig 1016
McGinnis; Reynoso *v.* 991
McGlynn *v.* United States 1038
McGuire *v.* Hopkins 949
McIntosh *v.* Texas 1011
McIntosh *v.* United States 1022
McKay *v.* United States 906
McKeithen *v.* United States Fidelity & Guaranty Co. 922
McKenna *v.* Halter 952
McKenzie, *In re* 918
McKenzie *v.* SETA Corp. 1066
McKibben *v.* Head 1003
McKinney *v.* Chao 906
McKinney *v.* United States 1013
McKune *v.* Lile 1018
McLemore; Clardy *v.* 944
McLemore; Neloms *v.* 908
McLeod *v.* Booker 930
McLoughlin; Rodriguez *v.* 1051
McMahon; Shipp *v.* 1052
McMeans *v.* Brigano 958
McMillan *v.* Roe 1036
McMinn, *In re* 940
McMullan; Children's Healthcare is a Legal Duty, Inc. *v.* 957
McMullen; S. S. *v.* 904
McPhaul *v.* Board of Comm'rs of Madison County 921
McQuirter *v.* Burke 1023
McSheffrey *v.* Executive Office of U. S. Attorneys 1042
McSheffrey *v.* United States 952,1076
McWhorter *v.* Alabama 976
Mechling; Sontag *v.* 1003
Medrano Ayala *v.* California 908
Meek *v.* Bishop 923
Meister *v.* Texas Adjutant General's Dept. 1052
Mejia *v.* United States 936
Melbourne; Raney *v.* 1008
Melecio-Rodriguez *v.* United States 1024
Melek *v.* State Bar of Cal. 956
Melendez *v.* Greiner 911
Melhem *v.* Pinchak 1074

Page
Meli *v.* United States 1073
Melka Marine, Inc. *v.* United States 902
Melson *v.* Alabama 907
Memphis; Kelly *v.* 997
Memphis; Madyun *v.* 1027
Mendel; Corey *v.* 1036
Mendez *v.* Senkowski 1029
Mendoza *v.* California 1040
Mendoza-De La Parra *v.* United States 913
Mengel; Thompson *v.* 990
Menifee; Gibbons *v.* 1030
Mensah *v.* Workers' Compensation Appeal Bd. of Pa. 954
Merit Systems Protection Bd.; Acierto *v.* 938
Merjil *v.* Clarke 1028
Merkle; Cole *v.* 935
Merrick *v.* Stewart 1033
Merrill; Oken *v.* 962
Merrill Lynch, Pierce, Fenner & Smith; Gladstone *v.* 1015
Merritt, *In re* 918
Mestiza *v.* Johnson 991
Metro Communications Co. *v.* Ameritech Corp. 1021
Metropolitan Pier and Exposition Auth.; Tri-State Coach Lines *v.* 994
Mettetal, *In re* 918,1004
Mettetal *v.* United States 987
Meyercord; Desaigoudar *v.* 1021
Meyers; Zilich *v.* 1028
Meza *v.* United States 1033
Michel-Diaz *v.* United States 986
Michigan; Andrewski *v.* 985
Michigan; Cain *v.* 921
Michigan; Casey *v.* 946
Michigan *v.* Environmental Protection Agency 904,970
Michigan; Munson *v.* 1010
Michigan; Reese *v.* 906
Michigan; Spice *v.* 997
Michigan; Thousand *v.* 958
Michigan Dept. of Corrections; West *v.* 1055
Mickens *v.* Taylor 970
Mid-States Electric; Banks *v.* 1056
Miguez; LeBlanc *v.* 972
Miles *v.* United States 957
Miller *v.* Amerada Hess Corp. 995
Miller *v.* California 922
Miller *v.* Cowan 1043

Page
Miller *v.* General Bank Nederland, N. V. 906
Miller *v.* Gober 914
Miller *v.* North Carolina 1040
Miller *v.* Ralph Wilson Plastics Co. 980
Miller; Reed *v.* 1027
Miller *v.* Southwestern Exposition & Live Stock 1024
Miller *v.* United States 912,1053
Mills *v.* Corcoran 1058
Mills; Gurley *v.* 1009
Mills; Hayes *v.* 1015
Mills *v.* Home Depot, U. S. A., Inc. 958
Mills *v.* Moore 1015
Milton *v.* Jackson Public Schools 938
Mincey *v.* Head 926,1035
Minerd *v.* United States 1076
Mines *v.* Texas 908
Mineta; Adarand Constructors, Inc. *v.* 941,967
Mingo *v.* Rathman 1003
Minnesota; Brown *v.* 995
Minniecheske *v.* Farrey 930,1035
Minuteman International, Inc.; Critical-Vac Filtration Corp. *v.* . . 1019
Miranda *v.* United States 965
Mississippi; Johnson *v.* 930
Mississippi; Manning *v.* 907
Mississippi; Montgomery *v.* 1070
Mississippi; Nicolaou *v.* 1026
Mississippi Dept. of Corrections; Lawson *v.* 978
Missouri; Johns *v.* 1012
Missouri; Ringo *v.* 932
Missouri; Robinson *v.* 980
Missouri; Roller *v.* 1040
Missouri; Smith *v.* 1003
Mitchell *v.* Anderson 1070
Mitchell *v.* McDaniel 1048
Mitchell *v.* United States 1007
Mitchem; Brown *v.* 946,1049
Mitchem; Dansby *v.* 961
Mizell *v.* United States 943
Mobley *v.* Anderson 1070
Mockler *v.* Maritime & Northeast Pipeline, L. L. C. 1043
Mojica-Baez *v.* United States 1065
Montana; Dawson *v.* 928
Montana; Gollehon *v.* 963
Montell *v.* United States 1057

Page
Montgomery *v.* Aetna Plywood, Inc. 1038
Montgomery; Becker *v.* 757,917
Montgomery *v.* Illinois 1068
Montgomery *v.* Johnson 975
Montgomery *v.* Mississippi 1070
Montgomery County Government; Dutton *v.* 1040
Montoya *v.* Johnson 1067
Monzione *v.* United States 1058
Moody *v.* United States 1031
Moore, *In re* 1064
Moore; Adams *v.* 1023
Moore; Bailey *v.* 932,989
Moore; Banes *v.* 1005
Moore; Beaubrum *v.* 908
Moore; Blount *v.* 945
Moore; Bolton *v.* 1002
Moore; Boufford *v.* 1050
Moore; Boyne *v.* 973
Moore; Brown *v.* 926,968,990
Moore; Chaky *v.* 1011
Moore; D'Arcangelo *v.* 1013
Moore; Davis *v.* 999
Moore; Deck *v.* 933
Moore; Dobelle *v.* 962
Moore; Dorch *v.* 933
Moore; Edwards *v.* 999
Moore; Fain *v.* 911,1063
Moore; Fryer *v.* 1069
Moore; Gary *v.* 1043
Moore *v.* Georgia 1012
Moore; Glenn *v.* 963
Moore; Gundy *v.* 991
Moore; Hankins *v.* 1042
Moore; Haygood *v.* 960
Moore; Hensley *v.* 960
Moore; Hickey *v.* 947
Moore; Hilton *v.* 967
Moore; Hines *v.* 948
Moore; Hurley *v.* 1013
Moore; Illig *v.* 931
Moore; Jackson *v.* 908,967
Moore; Jarrett *v.* 991
Moore *v.* Johnson 949
Moore; Lewis *v.* 954

Page

Moore; Lucey *v.* 991
Moore *v.* Lynaugh 994
Moore; Mills *v.* 1015
Moore *v.* New York State Bd. of Parole 1026
Moore *v.* Ohio 908
Moore; Padilla *v.* 1071
Moore; Paul *v.* 991
Moore; Persaud *v.* 1027
Moore; Rivas *v.* 1071
Moore; Robinson *v.* 925
Moore; Rodriguez *v.* 1040
Moore; Rogers *v.* 941,1008
Moore; Rose *v.* 938
Moore; St. Hilare *v.* 1054
Moore; Shea *v.* 1053
Moore; Smith *v.* 926
Moore; Steele *v.* 992
Moore; Stephens *v.* 1001
Moore; Taylor *v.* 1075
Moore; Tolley *v.* 1049
Moore; Tulloch *v.* 963
Moore; Tweed *v.* 1014
Moore *v.* United States 953,965
Moore; Varona *v.* 1071
Moore; Weber *v.* 956
Moore; Weeks *v.* 1072
Moore; Welch *v.* 1025
Moore; Wesley *v.* 909,999
Moore North America, Inc. *v.* Standard Register Co. 1008
Mora *v.* United States 953
Mora-Hinojos *v.* United States 1075
Morales Cervantes *v.* United States 912
Morales-Escobedo *v.* United States 1073
Moran; Rush Prudential HMO, Inc. *v.* 940
Moreland *v.* Madrid 961
Moreno; DeBlasio *v.* 1024
Moreno *v.* Virginia 979
Moreno-Cruz *v.* United States 1074
Moreno-Sandoval *v.* United States 964
Moreno-Zamarron *v.* United States 952
Moretti *v.* United Water Resources, Inc. 943
Morgan *v.* Krenke 951
Morgan *v.* Muro 910
Moriarty *v.* Svec 1066

Page
Morice *v.* EG&G Fla., Inc. 906,1004
Morris *v.* United States 996
Morris; Woodford *v.* 1075
Morrison *v.* Clemons 965
Morrow *v.* Georgia 944,1049
Morrow *v.* United States 976
Morse; Hawkins *v.* 939
Morton *v.* New Jersey 931
Moss *v.* United States 1013
Mossing; Tucker *v.* 964,1035
Motor Coach Industries, Inc.; Hurley *v.* 990
Mott *v.* California 1024
Mount Vernon; Szerlip *v.* 975
Moya; Sharkey *v.* 929
M. S. *v.* Board of Ed. of City School Dist. of Yonkers 942
M. T. A. New York City Transit Authority; Beharry *v.* 1041
Mueller *v.* United States 1013
Muhammad *v.* Gillis 978
Muldrow *v.* Lake City Police Dept. 982
Mungia *v.* United States 982
Munson *v.* Michigan 1010
Munster; Patin *v.* 957
Murillo *v.* United States 975
Muro; Morgan *v.* 910
Murphy *v.* Binion 906
Murphy *v.* Duckworth 944,1076
Murphy; Patterson *v.* 1011
Murphy; Shaw *v.* 223
Murphy *v.* United States 1044
Murray *v.* Goord 931
Murray *v.* Texas 926
Murray *v.* United States 1024
Muttalib, *In re* 1016
Myrick *v.* Hawk Sawyer 1057
Nabatanzi *v.* Immigration and Naturalization Service 1036
Nader *v.* Federal Election Comm'n 1007
Nagy *v.* United States 1074
Naha *v.* United States 984
Nance, *In re* 970
Narvaez *v.* United States 913,966,985
National Assn. for Advancement of Psychoanalysis *v.* O'Connor . . 972
National Bd. of Medical Examiners; Gonzales *v.* 1038
National Broadcasting Co.; Tolbert *v.* 933
National Ed. Assn.; Campbell *v.* 971

Page
National Football League; Primetime 24 Joint Venture *v.* 941
National Gypsum Co.; NGC Settlement Trust *v.* 1075
NLRB *v.* Kentucky River Community Care, Inc. 706
National Organization of Veterans' Advocates, Inc. *v.* Principi ... 973
Navarette *v.* United States 1030
Navarrete *v.* United States 935
Nazario; Cunningham *v.* 974
Neal; Ephraim *v.* 1054
Neal; Foster *v.* 944
Neal; Posada *v.* 945
Neal; Wilson *v.* 919
Nebraska; Gray *v.* 911
Nebraska; Hermes *v.* 957
Nebraska; Kansas *v.* 992
Nebraska *v.* Sheets 1019
Nebraska; Silvers *v.* 1030
Neely; Harris *v.* 946
Negron *v.* Ray 931
Neller *v.* United States 1010
Neloms *v.* McLemore 908
Nelson *v.* Notto & Hilliard Contracting Services, Inc. 942
Nelson *v.* United States 1031
Nemani *v.* St. Louis Univ. 981
Nemenz International, Inc.; Krause *v.* 1041
Nesbitt; Roddy *v.* 997
Nevada; Bolien *v.* 1028
Nevada; Collman *v.* 978
Nevada; Garner *v.* 929
Nevada; Greene *v.* 911
Nevada; Stone *v.* 1028
NevadaCare, Inc. *v.* Simkins 957
Nevius, *In re* 902
Newby *v.* Angelone 1031
Newcomb; Rodriguez Arbelaez *v.* 1066
Newgent *v.* Florida 908
New Hampshire *v.* Maine 742,917
New Horizon of N. Y. LLC *v.* Jacobs 1052
New Jersey; Adamson *v.* 1072
New Jersey; Beierle *v.* 922
New Jersey; Feaster *v.* 932
New Jersey; Harris *v.* 1057
New Jersey; International Fidelity Ins. Co. *v.* 1052
New Jersey; Kenney *v.* 932
New Jersey; Morton *v.* 931

Page
New Jersey; Theresa *v.* 922
Newland; Rhodes *v.* 1035
Newland; Torres Arboleda *v.* 908
Newman *v.* Eckerd Corp. 921
New Mexico *ex rel.* Children, Youth and Families Dept.; Prince *v.* 929
New Prime, Inc.; Bin Yang *v.* 1041
New York; Howard *v.* 999
New York; Kassebaum *v.* 1069
New York; Kemp *v.* 977
New York; Parsons *v.* 998
New York; Pearson *v.* 998
New York; Thompson *v.* 1055
New York; Valerio *v.* 981
New York City; Reaves *v.* 927
New York City Bd. of Ed., Food and Nutrition Servs.; Delgado *v.* 982
New York City Comm'n on Human Rights; Zhang *v.* 1070
New York City Transit Authority; Abidekun *v.* 973
New York State Bd. of Parole; Moore *v.* 1026
New York State Executive Division of Parole; Thomas *v.* 1043
New York Univ.; Zhang *v.* 1070
NGC Settlement Trust *v.* National Gypsum Co. 1075
Ngoc Diep *v.* Garcia 1029
Nicholas *v.* Taylor County Bd. of Ed. 1067
Nichols; Davis *v.* 920
Nichols *v.* United States 985,1064
Nicholson *v.* United States 912,1022
Nickerson *v.* Johnson 926
Nicolaou *v.* Mississippi 1026
Nielsen; Ag Services of America, Inc. *v.* 1021
Niemeyer *v.* Oroville Union High School Dist. 905
Nixon *v.* Pennsylvania 1008
Noble *v.* United States 985
Noland *v.* Henderson 1019
Norfolk Shipbuilding & Drydock Corp. *v.* Garris 811
Norfolk Southern Corp.; Scott *v.* 921
Norm Reeves Honda; Maggio *v.* 1040
Norrell Temp Agency; Mensah *v.* 954
Norris; Baxter *v.* 961
Norris; Ellis *v.* 935
Norris; Grundy *v.* 1057
Norris *v.* Illinois 1030
North Belle Vernon; Livingstone *v.* 906
North Carolina; Cummings *v.* 997
North Carolina; Fisher *v.* 914,915

Page
North Carolina; Godley *v.* 964
North Carolina; Golphin *v.* 931
North Carolina; Harris *v.* 1071
North Carolina; Jacobs *v.* 1012
North Carolina; May *v.* 1069
North Carolina; McCarver *v.* 941,993,1064
North Carolina; Miller *v.* 1040
North Carolina; Parker *v.* 1032
North Carolina; Purcell *v.* 1012
North Carolina; Smith *v.* 949
North Dakota; Clark *v.* 1043
North Dakota; Owens *v.* 1057
North Dakota; Syvertson *v.* 939,1006
Northeastern Univ.; Rasten *v.* 991
Northeast Ga. Medical Center, Inc.; Davenport *v.* 969
Northwest Airlines, Inc.; Tom *v.* 909
Norton; Cermak *v.* 1021
Norton; Rakhshan *v.* 932
Norwood *v.* Federal Energy Regulatory Comm'n 993
Notto & Hilliard Contracting Services, Inc.; Nelson *v.* 942
Ntreh *v.* University of Tex. at Dallas 1039
Nubine *v.* Stringfellow 967
Nueva; John Deere Ins. Co. *v.* 1050
Null *v.* Pennsylvania 998
Nunn; Scott *v.* 980
Nussle; Porter *v.* 1065
Nyhuis *v.* United States 938
NYNEX Corp.; Sonhouse *v.* 1040
Oakland; Rice *v.* 918,1039
Oakland Cannabis Buyers' Cooperative; United States *v.* 483,917
Oatman *v.* United States 974
Obermeyer *v.* Alaska Bar Assn. 922,1048
Ocampo *v.* United States 985
Ockenhouse *v.* Pennsylvania 932
O'Connor; National Assn. for Advancement of Psychoanalysis *v.* . . 972
Oddi *v.* Ford Motor Co. 921
O'Dea; Brown *v.* 1012
Odom *v.* United States 936
Office of Chief Administrative Hearing Officer; Elhaj-Chehade *v.* 1055
Office of Disciplinary Counsel of Supreme Court of Del.; Arons *v.* 1065
Oguaju *v.* United States 1044
Ohio *v.* Environmental Protection Agency 904
Ohio; Guess *v.* 960
Ohio; Hall *v.* 1068

Page

Ohio; Hessler *v.* 998
Ohio; Holder *v.* 946
Ohio; Jones *v.* 1054
Ohio; King *v.* 994
Ohio; Moore *v.* 908
Ohio; O'Neal *v.* 1037
Ohio *v.* Reiner 17
Ohio; Scott *v.* 1034
Ohio; Wellbaum *v.* 1074
Ohlrich; Lozano *v.* 925
Okafor *v.* United States 1031
O'Keefe *v.* California 1040
O'Keefe; Tarsney *v.* 924
Oken *v.* Merrill 962
Oklahoma; Bamburg *v.* 928
Oklahoma; Churchwell *v.* 945
Oklahoma; Fairchild *v.* 1039
Oklahoma; Gilson *v.* 962
Oklahoma; Harris *v.* 1025
Oklahoma; Herman *v.* 1007
Oklahoma; Kearney *v.* 1069
Oklahoma; Porter *v.* 1070
Oklahoma; Selsor *v.* 1039
Oklahoma; Smith *v.* 1011
Oklahoma; Wackerly *v.* 1028
Oklahoma *v.* Wood 1014
Oklahoma; Young *v.* 1055
Oklahoma Juvenile District Court; Brown *v.* 928
Olaniyi-Oke *v.* United States 985
Oldham *v.* Snyder 1027
Olinger *v.* United States Golf Assn. 1064
Oliver *v.* United States 967
Ollis *v.* United States 1001
Olson *v.* Duffy 995
Olup *v.* Allegheny County Dept. of Aviation 995
O'Neal *v.* Ohio 1037
O'Neill; Sandoval *v.* 1019
O'Neill; Smartt *v.* 974
O'Neill; Winslow *v.* 1043
Orange County; Steele *v.* 1015
Oregon; Boise Cascade Corp. *v.* 923
Oregon; Carmelo Torre *v.* 1067
Oregon; Knezevich *v.* 922
Oregon; Waters *v.* 1040

Page
Orlando; Joel *v.* 978
Orns *v.* United States 1001
Oroville Union High School Dist.; Niemeyer *v.* 905
Orozco-Mota *v.* United States 986
Orozco-Rangel *v.* United States 989
Ortega-Ramirez *v.* United States 966
Ortiz *v.* Pitcher 991
Ortiz *v.* Rodriguez 910
Osborne *v.* Senkowski 1041
Oser, *In re* 1065
O'Sullivan; Corbitt *v.* 1029
Osuna *v.* United States 1045
Otto Nemenz International, Inc.; Krause *v.* 1041
Outboard Marine Corp.; Lady *v.* 941
Overton *v.* Virginia 968
Owasso Independent School Dist. No. I–011 *v.* Falvo 902
Owasso Public Schools *v.* Falvo 902
Owen *v.* Florida 964
Owen *v.* United States 1046
Owens *v.* Allen 969
Owens *v.* North Dakota 1057
Owens *v.* Smiley 1053
Owens *v.* United States 1001
Ozerson *v.* Poole 980
Pacheco *v.* United States 989
Pacheco-Zepeda *v.* United States 966
Padilla *v.* Moore 1071
Pagan *v.* United States 943
Page; Henry *v.* 959
Page *v.* Schomig 1068
Page *v.* United States 1056
Page-Bey *v.* United States 991
Palacios *v.* United States 1002
Paladin *v.* Roe 946
Palmer *v.* Williams 998
Palmer Township; Telepo *v.* 1008
Palmieri *v.* United States 918,1010
Papachristou *v.* University of Tenn. 977
Papa John's International, Inc.; Pizza Hut, Inc. *v.* 920
Pardue, *In re* 1007
Parker *v.* Ashcroft 940
Parker; Houston *v.* 934
Parker *v.* Lee 1028
Parker *v.* North Carolina 1032

Page
Parker *v.* United States 1075
Parks *v.* United States 975
Parrott *v.* California 938
Parsons *v.* New York 998
Parten, *In re* 917
Patin *v.* Munster 957
Patino-Salazar *v.* United States 966
Patrick; Sanders *v.* 930
Patterson *v.* Murphy 1011
Patterson *v.* Stewart 951
Paul *v.* Moore 991
Paul *v.* United States 983
Payment *v.* Bureau of Prisons 950
Pazo-More *v.* Litscher 962
Pearson *v.* New York 998
Peavy *v.* WFAA–TV, Inc. 1051
Peavy; WFAA–TV, Inc. *v.* 1051
Peia *v.* United States 1009
Pellegrino *v.* Fitzgerald 945
Pellegrino *v.* South Dakota 979
Pendleton *v.* Bell 1070
Peniero *v.* United States 1001
Penn *v.* United States 1033
Pennington *v.* Bayoni 962
Pennington *v.* Dixon 962
Pennington *v.* Evans 962
Pennington *v.* Front Royal 1038
Pennington *v.* Hancock 962
Pennsylvania; Hannibal *v.* 1039
Pennsylvania; Hill *v.* 968
Pennsylvania; Johnson *v.* 996
Pennsylvania; Koch *v.* 1023
Pennsylvania; Nixon *v.* 1008
Pennsylvania; Null *v.* 998
Pennsylvania; Ockenhouse *v.* 932
Pennsylvania; Schwartz *v.* 918
Pennsylvania; Scott *v.* 949
Pennsylvania; Sortman *v.* 1022
Pennsylvania; Spotz *v.* 932
Pennsylvania Minority Business Development Authority; Jones *v.* 942
Pennsylvania State Civil Service Comm'n; McAndrew *v.* 1066
Penry *v.* Johnson 782,916
Perales *v.* United States 965
Pereles *v.* California 963

Page

Perez *v.* United States 974,989,1010
Perna *v.* ARCO Marine, Inc. 1063
Perrone *v.* General Motors Acceptance Corp. 971
Perrotte *v.* Terhune 1043
Perry, *In re* 919
Perry; Bartlett *v.* 905
Persaud *v.* Moore 1027
Petrick *v.* Florida 932,1035
Petrillo *v.* Massachusetts 1030
Petrovich *v.* Leonardo 981
PGA TOUR, Inc. *v.* Martin 661
Phelan *v.* Laramie County Community College Bd. of Trustees . . 1020
Philadelphia Church of God, Inc. *v.* Worldwide Church of God . . . 958
Philip *v.* Lee 924
Philip Morris, Inc.; Guinto *v.* 964,1049
Phillips *v.* California 976
Phillips *v.* Garrett 946
Philpot *v.* Hall 998
Phipps *v.* Washington 926,1076
Phu Xuan Bui *v.* Texas 928
Pickard *v.* Roe 1056
Pierce *v.* Garcia 1041
Pierce *v.* United States 969
Pierson; Hernandez *v.* 1068
Pimentel *v.* United States 1001
Pina-Cliville *v.* United States 1073
Pinchak; Baldwin *v.* 1043
Pinchak; McCoy *v.* 926
Pinchak; Melhem *v.* 1074
Pineda-Escobedo *v.* United States 1033
Piner *v.* E. I. du Pont de Nemours & Co. 1033
Pinnavaia *v.* United States 911,1003
Pinque *v.* United States 1044
Pirie; AEC Corp. *v.* 995
Pirie; Carbin *v.* 951
Pirie; Southwest Marine, Inc. *v.* 1007
Pirie; Strickland *v.* 1051
Pitcher; Ortiz *v.* 991
Pitt *v.* Virginia 978
Pittman *v.* Cain 982
Pitts *v.* Georgia 1024
Pizza Hut, Inc. *v.* Papa John's International, Inc. 920
Plantier; Zeidell *v.* 952
Plummer *v.* ABB Industrial Systems, Inc. 972

Page
Pogue *v.* Ratelle 964,1064
Polisar; Garrison *v.* 994
Politi *v.* Los Angeles County 1038
Polk *v.* Lindsey 982
Pollard *v.* E. I. du Pont de Nemours & Co. 843,956
Polunsky; Smith *v.* 1025
Poole *v.* Briley 950
Poole *v.* Colorado 1038
Poole; Ozerson *v.* 980
Poole *v.* United States 1024
Poppell; Farris *v.* 1069
Porter *v.* Nussle 1065
Porter *v.* Oklahoma 1070
Port Townsend Police Dept.; Major *v.* 958
Portuondo; Diaz *v.* 1056
Posada *v.* Neal 945
Postmaster General; Lynch *v.* 981
Postmaster General; Noland *v.* 1019
Postmaster General; Taylor *v.* 923,1035
Poteete *v.* Capital Engineering, Inc. 908,1014
Potts *v.* United States 1073
Pounds *v.* United States 984
Powell; Gaston *v.* 1035
Powell *v.* Greiner 950
Powell *v.* Johnson 978
Powell; Jones *v.* 914
Powell *v.* United States 936,984,1072
Powers *v.* Commissioner 995
Powers *v.* United States 1023
Pozo *v.* Bertrand 961
Prather, *In re* 1045
Prescott *v.* United States 1033
Prestera Center for Mental Health Services; Thompson *v.* 961,1049
Preston *v.* Caruso 961
Price *v.* California 1055
Pri-Har *v.* United States 1030
Primetime 24 Joint Venture *v.* National Football League 941
Prince *v.* New Mexico *ex rel.* Children, Youth and Families Dept. 929
Principi; Macarubbo *v.* 951
Principi; National Organization of Veterans' Advocates, Inc. *v.* . . 973
Principi; Wolfram *v.* 991
Proctor *v.* United States 985
Property Reserve, Inc.; Valdez *v.* 924
Proven *v.* United States 974

Page
Prunty; Rangel *v.* 977
Puerto Rico; Huertas Laboy *v.* 1066
Purcell *v.* North Carolina 1012
Purdle *v.* Groesch 914
Puryear; Carter *v.* 927,1003
Pusey; Machinists *v.* 1007
Quinn *v.* Haynes 1024
Quinn *v.* Robinson 1011
Quinn *v.* United States 913,935
Quinn; Wood *v.* 1021
Quinones-Mondragon *v.* United States 1073
Quintana-Torres *v.* United States 953
Quirino-Landeros *v.* United States 986
Racal NCS, Inc. *v.* Tidewater Marine International, Inc. 1051
Radovich *v.* United States 933
Rafael Aviles *v.* Small 927
Rahseparian *v.* United States 974
Raines *v.* United States 1073
Raiolo *v.* California 909
Rakhshan *v.* Norton 932
Ralph Wilson Plastics Co.; Miller *v.* 980
Ramirez; Rangel *v.* 1027
Ramirez *v.* Texas 945
Ramirez *v.* United States 983
Ramirez-Vargas *v.* United States 966
Ramos *v.* California 975
Ramos *v.* Illinois 1073
Ramos-Cartagena *v.* United States 1066
Randell *v.* Johnson 971
Randles *v.* United States 1045
Raney *v.* Aware Woman Center for Choice, Inc. 971
Raney *v.* Melbourne 1008
Rangel *v.* Prunty 977
Rangel *v.* Ramirez 1027
Rankin *v.* United States 984
Rasten *v.* Northeastern Univ. 991
Rasten *v.* Wells Fargo Security 1003
Ratelle; Pogue *v.* 964,1064
Rathman; Mingo *v.* 1003
Rauch *v.* Johnson 925
Raulerson, *In re* 1006
Ravelo *v.* United States 955
Ray; Negron *v.* 931
Ray *v.* United States 1045

Page
Raycroft; Helwig *v.* 946
Raygor *v.* Regents of Univ. of Minn. 1065
Rea; Wright *v.* 1021
Reaves *v.* New York City 927
Redevelopment Authority of Reading; Lucabaugh *v.* 1026
Reed *v.* Booker 925
Reed *v.* Cook 998
Reed *v.* Department of Interior, Bureau of Land Management . . 1019
Reed *v.* Miller 1027
Reed *v.* United States 912,989
Reese *v.* District of Columbia Metropolitan Police 1055
Reese *v.* Florida 910
Reese *v.* Michigan 906
Reeves *v.* Whiddon 931
Reeves Honda; Maggio *v.* 1040
Reffuse *v.* Florida 944
Regents of Univ. of Cal.; Katz *v.* 1033
Regents of Univ. of Minn.; Raygor *v.* 1065
Regents of Univ. of N. M.; Dixon *v.* 923
Reger *v.* Johnson 1043
Register; Hunt *v.* 1025
Register *v.* United States 932
Rehnquist; Ceminchuk *v.* 990
Reich; Chaklos *v.* 1023
Reid *v.* Flint 1026
Reilly; Altadis U. S. A. Inc. *v.* 956
Reilly; Lorillard Tobacco Co. *v.* 956
Reimer Express World Corp.; Central States Pension Fund *v.* . . . 943
Reiner; Ohio *v.* 17
Reliance Standard Life Ins. Co.; Compel *v.* 1041
Renteria *v.* Williams 929
Rettig, *In re* 918,1037
Reyes-Hernandez *v.* United States 1065
Reyes-Lugo *v.* United States 1073
Reyna-Moreno *v.* United States 985
Reynolds *v.* Alabama 1054
Reynolds *v.* Cain 909
Reynoso *v.* McGinnis 991
Rhodes *v.* Newland 1035
Rhodes *v.* Williams 1027
Ricciardi *v.* Grant 919
Rice; Croskey *v.* 929
Rice *v.* Kuhlmann 933
Rice *v.* Oakland 918,1039

Page
Rich, *In re* 938
Rich *v.* United States 1033
Richardson *v.* Dick 916
Richardson *v.* Luebbers 915
Richardson; Luebbers *v.* 915
Richardson *v.* United States 913,983,1057
Ricks *v.* United States 913
Riddle *v.* Liz Claiborne 1067
Ridge; Robinson *v.* 1025
Ridgley *v.* Williams 929
Rinaldi *v.* United States 912
Ringo *v.* Missouri 932
Rivas *v.* Moore 1071
Rivera-Becera *v.* United States 966
Roath, *In re* 1018
Robbins *v.* Hargett 1054
Roberts *v.* Sabine State Bank & Trust Co. 909
Roberts *v.* United States 936,1044
Robinson *v.* Albright 1022
Robinson; Courtney *v.* 996
Robinson *v.* Hunt 964
Robinson *v.* Missouri 980
Robinson *v.* Moore 925
Robinson; Quinn *v.* 1011
Robinson *v.* Ridge 1025
Robinson; Spencer *v.* 928,1063
Robinson; Starr *v.* 1041
Robinson *v.* Stegall 927
Robinson *v.* United States 1074
Robinson *v.* Wyoming 980
Robles-Frias *v.* United States 966
Robles-Macias *v.* United States 966
Rocca *v.* United States 937
Rocha *v.* Sparr 997
Rockett; Jefferson *v.* 945
Rockford Bd. of Ed., School Dist. No. 205; Ford *v.* 981
Roddy *v.* Nesbitt 997
Rodrigue *v.* Hidalgo Rodrigue 905
Rodrigue; Rodrigue *v.* 905
Rodriguez; Delespine *v.* 955,1017
Rodriguez *v.* McLoughlin 1051
Rodriguez *v.* Moore 1040
Rodriguez; Ortiz *v.* 910
Rodriguez *v.* Texas 995

Page
Rodriguez *v.* United States 924,976,996,1012
Rodriguez Arbelaez *v.* Newcomb 1066
Rodriguez Delgado *v.* Shell Oil Co. 972
Rodriguez-Rodriguez *v.* United States 1071
Rodriquez *v.* United States 965
Roe *v.* Aware Woman Center for Choice, Inc. 990
Roe; Broussard *v.* 945
Roe; McMillan *v.* 1036
Roe; Paladin *v.* 946
Roe; Pickard *v.* 1056
Roe; Sanchez *v.* 1071
Roe; Smith *v.* 996
Roe; Tran *v.* 947
Rogers *v.* California 1028
Rogers *v.* Florida 934
Rogers *v.* Johnson 1027
Rogers *v.* Moore 941,1008
Rogers *v.* Securities and Exchange Comm'n 921
Rogers *v.* Tennessee 451
Rogers *v.* United States 907,982
Rogers *v.* Wal-Mart Stores, Inc. 953
Rogers; Wal-Mart Stores, Inc. *v.* 953
Rogerson; Lang *v.* 1028
Rogers Processors, Inc. *v.* BOC Group, Inc. 920
Rojas-Flores *v.* United States 952
Rojas-Mendoza *v.* United States 912
Rolle *v.* United States 953
Roller *v.* Missouri 1040
Rollock *v.* U. S. Parole Comm'n 1014
Romero *v.* Williams 1042
Rosario *v.* Illinois 981
Rosario *v.* United States 1019
Rose *v.* Castro 999
Rose *v.* Moore 938
Rose *v.* United States 966
Rosello *v.* United States 1030
Rosenblatt *v.* Houston 1067
Ross *v.* University of S. C. 1038
Royal Dutch Petroleum Co. *v.* Wiwa 941
Roybal *v.* California 926
Rubinstein *v.* Administrators of Tulane Ed. Fund 937
Rubinstein; Administrators of Tulane Ed. Fund *v.* 937
Rubis *v.* United States 1023
Ruiz; Garcia Espinoza *v.* 945,1049

Page
Ruiz *v.* Williams 1042
Ruiz-Cisneros *v.* United States 986
Rumignani *v.* United States 1037
Rumsfeld; Graves *v.* 1072
Rural Development Agency; Stevens *v.* 950
Rush Prudential HMO, Inc. *v.* Moran 940
Rux *v.* United States 1032
Ryan *v.* Brown 969
Ryan; Hadley *v.* 1071
Ryan; Snyder *v.* 964
Ryan *v.* United States 1010
Ryder; Goncalves *v.* 946
S. *v.* Board of Ed. of City School Dist. of Yonkers 942
S. *v.* McMullen 904
Sabine State Bank & Trust Co.; Roberts *v.* 909
Sabur *v.* United States 936
Sacco *v.* Cooksey 991
Saffle; Churchwell *v.* 928
Saffle; Farris *v.* 976
Saffo *v.* United States 974
Saffold *v.* Hillside Rehabilitation Hospital 923
Safouane *v.* Washington 930
Sagastume-Portillo *v.* United States 988
Saint-Brice *v.* United States 1044
St. Hilare *v.* Moore 1054
St. Louis; Firefighters' Institute for Racial Equality *v.* 921
St. Louis Univ.; Nemani *v.* 981
Salaam *v.* Corrections Corp. of America 1028
Salazar *v.* United States 1044
Salcedo-Villanueva *v.* United States 912
Saldana-Mendoza *v.* United States 966
Saldivar-Gonzalez *v.* United States 988
Salerno *v.* United States 1009
Sales; Grant *v.* 1020
Salgado Soto *v.* California 975
Salinas Mestiza *v.* Johnson 991
Samjo Realty Corp.; Best *v.* 1026
Sampson *v.* Maryland 1056
Sampson *v.* United States 1074
Samuel, *In re* 918
Samuelson *v.* Idaho 1035
Sanabria *v.* Varner 909
Sanchez *v.* Roe 1071
Sanchez Lopez *v.* United States 1033

Page
Sanchez-Sanchez *v.* United States 966
Sanders *v.* Alford 1043
Sanders *v.* Cowan 999
Sanders *v.* Patrick 930
Sanders *v.* United States 1000
Sanders; West Virginia *ex rel.* Winchester Medical Center *v.* 1020
Sandoval; Alexander *v.* 275
Sandoval *v.* O'Neill 1019
Sandoval Rocca *v.* United States 937
Sanford *v.* United States 1000
San Paolo U. S. Holding Co. *v.* Liberty Paper Co. 1050
San Paolo U. S. Holding Co. *v.* Simon 1050
Santa Clara Cty. Dept. of Family and Children's Servs.; Gilkey *v.* . . 1026
Santiago *v.* United States 1046
Santorelli *v.* Cowhey 1008
Santos *v.* Adirondack Correctional Facility 946
Sarracino *v.* United States 1036
Sasser *v.* United States 1031
Sather *v.* United States 1001
Saulsgiver *v.* Angelone 1056
Saunders *v.* United States 1075
Savage *v.* Varner 998
Sawyer; Myrick *v.* 1057
Saxton *v.* Los Angeles Cty. Dept. of Children and Family Services 1054
Scavoni; James *v.* 998
Schachleiter, *In re* 1016
Schaefer *v.* Denison 1020
Schaefer *v.* DeStefano 998
Schaefer; Jones *v.* 904
Schaffer *v.* Halter 931,1049
Schapiro *v.* Schapiro 934
Schexnider *v.* Johnson 1042
Schilling *v.* Franklin County Adult Probation 984
Schlund *v.* United States 1052
Schneider; Fordjour *v.* 961
Schoenfeld *v.* Duncan 1026
Schomig; Gutierrez *v.* 950
Schomig; Page *v.* 1068
Schomig; Spreitzer *v.* 925
School Bd. of Norfolk; Dalton *v.* 969,1053
Schrader *v.* Texas 1040
Schriro; Daniel *v.* 931
Schriro; Gasho *v.* 933
Schriro *v.* Kamuf 919

Page
Schriver; DeVeaux *v.* 984,1064
Schuetzle; Syvertson *v.* 939,1006
Schulze *v.* Court of Common Pleas, Erie County 1022
Schwartz *v.* Pennsylvania 918
Scibana; Green *v.* 1029
Scientific Hygiene, Inc.; Seaton *v.* 1017
Scott; Davage *v.* 1032
Scott *v.* Indiana 1066
Scott *v.* Johnson 963
Scott; Kiel *v.* 1004
Scott *v.* Norfolk Southern Corp. 921
Scott *v.* Nunn 980
Scott *v.* Ohio 1034
Scott *v.* Pennsylvania 949
Scott *v.* Stout 1067
Scott *v.* United States 987
Scott *v.* U. S. Court of Appeals 1071
SDDS, Inc.; South Dakota *v.* 1007
Seaboard Surety Co. *v.* United States 1049
Seabold; Brandon *v.* 929
Seabold *v.* Vincent 1063
Searcy *v.* Illinois 952
Sears *v.* Florida 1054
Sears, Roebuck & Co.; Filipos *v.* 929,1049
Sears, Roebuck & Co.; Lomax *v.* 1070
Seaton *v.* Scientific Hygiene, Inc. 1017
Secor *v.* Indiana Dept. of Revenue 999
Secretary of Agriculture; Texas Comm. on Natural Resources *v.* 1051
Secretary of Defense; Graves *v.* 1072
Secretary of Health and Human Services; Baker *v.* 955
Secretary of Interior; Cermak *v.* 1021
Secretary of Interior; Rakhshan *v.* 932
Secretary of Labor *v.* Mallard Bay Drilling, Inc. 1017
Secretary of Labor; McKinney *v.* 906
Secretary of Navy; Childs *v.* 967
Secretary of State of Cal. *v.* Schaefer 904
Secretary of State of Fla. *v.* Armstrong 958
Secretary of Transportation; Adarand Constructors, Inc. *v.* 941,967
Secretary of Treasury; Sandoval *v.* 1019
Secretary of Treasury; Smartt *v.* 974
Secretary of Treasury; Winslow *v.* 1043
Secretary of Veterans Affairs; Macarubbo *v.* 951
Secretary of Veterans Affairs; National Org. of Vet. Advocates *v.* 973
Secretary of Veterans Affairs; Wolfram *v.* 991

Page
Secretary of Va. Bd. of Elections; Wood *v.* 1021
Securities and Exchange Comm'n; Bondage Breaker Ministries *v.* 905
Securities and Exchange Comm'n; Britton *v.* 971
Securities and Exchange Comm'n; Rogers *v.* 921
Securities and Exchange Comm'n; Springer *v.* 905
Sedgwick *v.* Federal Deposit Ins. Corp. 938
Segraves, *In re* 1016
Selsor *v.* Oklahoma 1039
Senkowski; Bowens *v.* 978
Senkowski; Mendez *v.* 1029
Senkowski; Osborne *v.* 1041
SETA Corp.; McKenzie *v.* 1066
Sevilla *v.* United States 1000
Seymour *v.* Walker 989
Shabazz *v.* Keating 969,1064
Shafer *v.* South Carolina 36
Shanghai Foreign Trade; Transatlantic Schiffahrtskontor GmbH *v.* 904
Shanu *v.* United States 1045
Sharkey *v.* Moya 929
Shavers Chevrolet; Mathis *v.* 950
Shaw *v.* Murphy 223
Shea *v.* Moore 1053
Shearin *v.* Delaware 997
Sheets; Nebraska *v.* 1019
Shellmon *v.* Cambra 1004
Shell Oil Co.; Crysen/Montenay Energy Co. *v.* 920
Shell Oil Co.; Rodriguez Delgado *v.* 972
Shelton; Alabama *v.* 1018
Shelton *v.* Smith 925
Shelton *v.* United States 1016
Sheriff, Cumberland County; Hider *v.* 984
Sherrills, *In re* 1007
Shinhoster *v.* United States 1031
Shipp *v.* McMahon 1052
Shirley; Atkinson Trading Co. *v.* 645,902
Shivaee *v.* Cube 914
Sholley *v.* Massachusetts 980
Shook; Smith *v.* 1070
Shorter *v.* Georgia 1041
Shortridge; Wagner *v.* 934
Shoshone-Bannock Tribes *v.* United States 1019
Shough *v.* Colorado 909
Showell *v.* United States 983
Shull *v.* Bexar County 975

Page
Siegel *v.* Columbia/HCA Healthcare Corp. 991
Siegel *v.* Columbia/Pentagon City National Orthopedic Hospital 991
Siegelman; Adkins *v.* 1026
Sienkiewicz *v.* Hart 1020,1076
Sienkiewicz *v.* McDougall 1008,1048
Sierra Medical Center *v.* Cronin 921
Sigmon Coal Co.; Halter *v.* 993
Sigsbey *v.* Wolford 926
Silvers *v.* Nebraska 1030
Simkins; NevadaCare, Inc. *v.* 957
Simmons *v.* Kelly 977
Simmons *v.* Texas 1041
Simmons *v.* United States 913
Simon; San Paolo U. S. Holding Co. *v.* 1050
Simpkins *v.* Fannie Mae 996
Simplicio *v.* Williams 977
Simpo *v.* United States 1001
Simpson *v.* Angelone 938
Simpson *v.* Florida Dept. of Corrections 953
Simpson & Brown, Inc.; Gravatt *v.* 957
Sims *v.* Williams 931
Sindram *v.* United States 1031
Singleton *v.* Dahlberg 1056
Skolnick *v.* Illinois 1011
Slaughter *v.* United States 1045
Sledge *v.* Georgia 1069
Sloan *v.* Christy 923
Small; James *v.* 1069
Small; Rafael Aviles *v.* 927
Smalls; Vallery *v.* 1028
Smallwood *v.* Cromartie 234,1076
Smartt *v.* O'Neill 974
Smektala *v.* United States 1031
Smialek *v.* United States 1056
Smiley; Owens *v.* 1053
Smith; Cliffs on Bay Condominium Assn. *v.* 1020
Smith *v.* Dahlberg 969
Smith; Evans *v.* 925
Smith; Hunter *v.* 1068
Smith *v.* Jackson 985
Smith *v.* Luebbers 1049
Smith; Manning *v.* 1043
Smith *v.* Missouri 1003
Smith *v.* Moore 926

Page
Smith *v.* North Carolina 949
Smith *v.* Oklahoma 1011
Smith *v.* Polunsky 1025
Smith *v.* Roe 996
Smith; Shelton *v.* 925
Smith *v.* Shook 1070
Smith *v.* Texas 997
Smith *v.* United States 964,995,1019,1057
Smith *v.* University of Wash. Law School 1051
Smith; Warthen *v.* 1052
Smith *v.* Washington 981,1064,1076
Smurfit-Stone Container Corp. *v.* United States 971
Snapp *v.* Unlimited Concepts, Inc. 975
Snell *v.* United States 924
Snow *v.* Ault 998
Snyder; Belasco *v.* 1016
Snyder; Dawson *v.* 951
Snyder; Desmond *v.* 945
Snyder; Drain *v.* 910
Snyder; Oldham *v.* 1027
Snyder *v.* Ryan 964
Snyder *v.* United States 1057
Soares; Swendra *v.* 909
Social Security Administration; Coley *v.* 1037
Sodexho USA, Inc.; Beasley *v.* 1052
Solan *v.* United States 986
Solis *v.* United States 1023
Solis-Garcia *v.* United States 987
Solis Perales *v.* United States 965
Soliz *v.* Johnson 1042
Solomon *v.* Grievance Committee for Tenth Jud. Dist. 906
Soltero *v.* Ingle 1068
Sonchik; Fordjour *v.* 933
Song *v.* California 1052
Sonhouse *v.* NYNEX Corp. 1040
Sontag *v.* Mechling 1003
Sortman *v.* Pennsylvania 1022
Sosa *v.* Johnson 963
Soto *v.* California 975
Soto *v.* United States 1031
South Bend Community School Corp.; Toth *v.* 922
South Carolina; Aleksey *v.* 1027
South Carolina; Hazel *v.* 999
South Carolina *v.* Holmes 906

Page
South Carolina; Ingram *v.* 1014
South Carolina; Shafer *v.* 36
South Carolina; Timmons *v.* 947
South Dakota; Pellegrino *v.* 979
South Dakota *v.* SDDS, Inc. 1007
Southern Cal. Edison Co. *v.* Ecolochem, Inc. 974
Southwestern Exposition & Live Stock; Miller *v.* 1024
Southwest Marine, Inc. *v.* Pirie 1007
Sparr; Rocha *v.* 997
Spearman *v.* Birkett 928
Spearman *v.* Ford Motor Co. 995
Speer *v.* DeLoach 927
Spence *v.* United States 1023,1044
Spencer *v.* Robinson 928,1063
Spice *v.* Michigan 997
Spitalieri *v.* Universal Maritime Service Corp. 1007
Spotz *v.* Pennsylvania 932
Spragins; Fuller *v.* 1029
Spreitzer *v.* Schomig 925
Springer *v.* Securities and Exchange Comm'n 905
Squillacote *v.* United States 971
S. S. *v.* McMullen 904
Stamper *v.* United States 983
Standard Register Co.; Moore North America, Inc. *v.* 1008
Stangel *v.* United States 910
Stanton *v.* District of Columbia Court of Appeals 943
Starr *v.* Robinson 1041
State. See also name of State.
State Bar of Cal.; Melek *v.* 956
State Farm Fire & Casualty Co.; Coleman *v.* 936
State Univ. of N. Y. at Buffalo; Bayon *v.* 926
Steel Co. *v.* Citizens for a Better Environment 994
Steele *v.* Beary 938
Steele *v.* Hamilton County Community Health Bd. 929
Steele *v.* Moore 992
Steele *v.* Orange County 1015
Stegall; Bell *v.* 977
Stegall; Broder *v.* 1072
Stegall; Fields *v.* 960
Stegall; Johnson *v.* 948
Stegall; Robinson *v.* 927
Stegall; Sudduth *v.* 905
Stegall; Turnboe *v.* 978
Stein *v.* United States 943

Page
Stephens *v.* Gomez 984
Stephens *v.* Moore 1001
Stern, *In re* 1015
Stevens, *In re* 970
Stevens *v.* Rural Development Agency 950
Stevenson *v.* California 999
Stevenson *v.* United States 919,983
Stewart *v.* Birmingham News Co. 1019
Stewart; Bogle *v.* 927
Stewart; Bruns *v.* 927
Stewart; Gray *v.* 974
Stewart; Logan *v.* 1033
Stewart; Merrick *v.* 1033
Stewart; Patterson *v.* 951
Stewart *v.* United States 982
Stier *v.* United States 964
Still *v.* Boone 1071
Stills; Trainer *v.* 914
Stinson; Franza *v.* 929,1035
Stone *v.* Nevada 1028
Stone *v.* Texas 901,1006
Stoneybrook Apartments; Banks *v.* 1022
Stout; Scott *v.* 1067
Stovall; Harris *v.* 947
Straub; Dunlap *v.* 1056
Strauss & Co. *v.* United States 906
Strickland *v.* Pirie 1051
Stringfellow; Nubine *v.* 967
Stubblefield; Dooley *v.* 932
Stubblefield; Toney *v.* 1011
Stuck *v.* Martin 961
Stull *v.* United States 986
Sturgill *v.* Tennessee 977
Sudduth *v.* Stegall 905
Suffolk County; Cass *v.* 905
Sullivan; Arkansas *v.* 769
Sullivan *v.* California 927
Sullivan *v.* Texas 1027
Summers; Workman *v.* 955
Summerville *v.* Trans World Airlines, Inc. 1019
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Ariz., Yuma County; Cummins *v.* 962
Superior Court of Cal., Los Angeles County; Wells *v.* 978

Page
Superior Court of Cal., San Luis Obispo County; Krebs *v.* 977
Superior Court of Cal., Santa Clara County; Hall *v.* 997
Supreme Court of Ohio; Foster *v.* 1030
Supreme Court of Utah; Estes *v.* 969,1053
Sustache-Rivera *v.* United States 924
Suter; Camarena *v.* 934
Sutton; Taylor *v.* 1055
Svec; Moriarty *v.* 1066
Swanagin; Houston *v.* 1067
Swann *v.* United States 1035
Swartz *v.* Dickinson 922
Sweed *v.* El Paso County 1035
Sweed *v.* Texas 1011
Swendra *v.* Soares 909
Swinford *v.* Williams 926
Syrax *v.* United States 988
Syvertson *v.* Malaktaris 947
Syvertson *v.* North Dakota 939,1006
Syvertson *v.* Schuetzle 939,1006
Szerlip *v.* Mount Vernon 975
Tackett, *In re* 918
Tallahassee *v.* Edwards 942
Talley; Jonas *v.* 1021
Tamale *v.* California 1027
Tampa Electric Co.; Utilities Comm'n, New Smyrna Beach *v.* ... 905
Taran *v.* Carey 1056
Tarkington *v.* Castro 1025
Tarley *v.* Crawford-THG, Inc. 981
Tarsney *v.* O'Keefe 924
Taylor *v.* Angelone 1029
Taylor; Caldwell *v.* 979
Taylor *v.* Henderson 923,1035
Taylor; Martin *v.* 907
Taylor; Mickens *v.* 970
Taylor *v.* Moore 1075
Taylor *v.* Sutton 1055
Taylor *v.* United States 913,1053
Taylor County Bd. of Ed.; Nicholas *v.* 1067
Telepo *v.* Palmer Township 1008
Templeton *v.* United States 984
Tenet; Ceminchuk *v.* 990
Tennessee; Abou-Sakher *v.* 1022
Tennessee; Chalmers *v.* 925
Tennessee; Keen *v.* 907

Page
Tennessee; Rogers *v.* 451
Tennessee; Sturgill *v.* 977
Terhune; Ashanti *v.* 962,967
Terhune; Martin *v.* 1042
Terhune; Perrotte *v.* 1043
Terrazas, *In re* 1064
Terry *v.* Johnson 1071
Terry *v.* United States 1023
Tessmer; Carter *v.* 930,1035
Tessmer; Fliam *v.* 960
Texas; Beaver *v.* 927
Texas; Bogany *v.* 978
Texas; Bridgers *v.* 1034
Texas; Caraway *v.* 963
Texas; Cesario Rodriguez *v.* 995
Texas; Chuong Duong Tong *v.* 1053
Texas *v.* Cobb 162
Texas; Daniel *v.* 927
Texas; Decker *v.* 1025
Texas; Dowthitt *v.* 915
Texas; Fails *v.* 976
Texas; Gandy *v.* 976,1064
Texas; Hill *v.* 963
Texas; Holiday *v.* 960
Texas; Jackson *v.* 1068
Texas; Johnson *v.* 975
Texas; Lehto *v.* 938
Texas; Lejeune *v.* 907
Texas; Masias *v.* 979
Texas; McIntosh *v.* 1011
Texas; Mines *v.* 908
Texas; Murray *v.* 926
Texas; Phu Xuan Bui *v.* 928
Texas; Ramirez *v.* 945
Texas; Schrader *v.* 1040
Texas; Simmons *v.* 1041
Texas; Smith *v.* 997
Texas; Stone *v.* 901,1006
Texas; Sullivan *v.* 1027
Texas; Sweed *v.* 1011
Texas; Thompson *v.* 1039
Texas; VonSchounmacher *v.* 1024
Texas; Washington *v.* 1027
Texas; Wesbrook *v.* 944

Page
Texas; Ysleta del Sur Pueblo *v.* 1066
Texas Adjutant General's Dept.; Meister *v.* 1052
Texas Committee on Natural Resources *v.* Veneman 1051
Texas Dept. of Criminal Justice, Institutional Division; Barnes *v.* 1026
Textron Funding Corp. *v.* Bessette 1048
Theologis *v.* United States 1075
Theresa *v.* New Jersey 922
Thomas *v.* Chicago Park Dist. 1051
Thomas *v.* Earley 980
Thomas; Florida *v.* 774,956
Thomas *v.* Lovell 961
Thomas *v.* New York State Executive Division of Parole 1043
Thomas *v.* United States 935,1073
Thomas & Betts Corp.; Lim *v.* 1012
Thomas F. White & Co.; Wheeler *v.* 973
Thompson, *In re* 1018
Thompson; Baker *v.* 955
Thompson *v.* Cain 928
Thompson; Jones *v.* 1056
Thompson *v.* Mengel 990
Thompson *v.* New York 1055
Thompson *v.* Prestera Center for Mental Health Services 961,1049
Thompson *v.* Texas 1039
Thompson *v.* United States 912,974,987,996,1000,1058
Thompson *v.* U. S. Postal Service 911
Thousand *v.* Michigan 958
Tice; Clifford *v.* 1015
Tidewater Marine International, Inc.; Racal NCS, Inc. *v.* 1051
Tidwell, *In re* 1050
Tiffany *v.* United States 993,1068
Tilley *v.* Louisiana 959
Timmons *v.* South Carolina 947
Tipp *v.* AmSouth Bank, N. A. 991
Tirado Garcia *v.* United States 1030
Tobias *v.* California 951
Tolbert *v.* National Broadcasting Co. 933
Tolley *v.* Moore 1049
Tom *v.* Northwest Airlines, Inc. 909
Tomas *v.* United States 1075
Tomlinson *v.* United States 1013
Tompkins; Harper *v.* 961
Toney *v.* Stubblefield 1011
Toney *v.* Williams 977
Tong *v.* Gutierrez 905

Page
Tong *v.* Texas 1053
Tonn *v.* United States 990
Torpey; Bullock *v.* 1071
Torre *v.* Oregon 1067
Torres *v.* United States 1010
Torres Arboleda *v.* Newland 908
Torres-Castillo *v.* United States 966
Torrez *v.* Dickinson 1010
Toth *v.* South Bend Community School Corp. 922
Touro Infirmary; Dupre *v.* 1025
Tovar-Torres *v.* United States 966
Town. See name of town.
Townsend *v.* Knight-Ridder, Inc. 922
Townsend; Wells *v.* 1067
Toyota Motor Mfg., Ky., Inc. *v.* Williams 970
Tracy *v.* Baptist Healthcare System, Inc. 920
TrafFix Devices, Inc. *v.* Marketing Displays, Inc. 23
Trainer *v.* Stills 914
Tran *v.* Roe 947
Transatlantic Schiffahrtskontor GmbH *v.* Shanghai Foreign Trade 904
Trans World Airlines; Gore *v.* 921
Trans World Airlines, Inc.; Summerville *v.* 1019
Trevino *v.* Johnson 930
Trevino *v.* United States 924
Trevino Mungia *v.* United States 982
Trevino Tunchez *v.* United States 1032
Trig Electric Construction Co.; Electrical Workers *v.* 1002
Tripp; Boulineau *v.* 991
Tri-State Coach Lines *v.* Metropolitan Pier and Exposition Auth. 994
Trivedi *v.* United States 989
Trobaugh *v.* United States 925
Trudel *v.* Vaughn 1006
TRW Inc. *v.* Andrews 902,1017
Tuck *v.* United States 1044
Tucker *v.* Mossing 964,1035
Tucker *v.* United States 952,1068
Tulare County; Widmer *v.* 960
Tulare County Dept. of Public Social Services; Franco *v.* 979
Tulloch *v.* Moore 963
Tunchez *v.* United States 1032
Tunstall *v.* Bergeson 920
Turnboe *v.* Stegall 978
Turner; Gray *v.* 977
Turner *v.* United States 1024

Page
Turpin; Hittson *v.* 1052
Tutt *v.* United States 1075
Tweed *v.* Moore 1014
Twillie *v.* Brennan 991
Tyler *v.* Cain 940
Tyson *v.* Alabama 1040
Ufom, *In re* 938
Ulloa-Porras *v.* United States 1032
Unanue *v.* Goya Foods, Inc. 1022
Unanue-Casal *v.* Goya Foods, Inc. 1022
Unauthorized Practice of Law Comm., Sup. Ct. of Tex.; Crain *v.* 1067
Underkofler *v.* Community Health Care Plan, Inc. 1055
Unified Judicial System of Pa.; Caterina *v.* 1008
Union. For labor union, see name of trade.
Unisun Ins. Co.; Jonas *v.* 973
United Airlines, Inc. *v.* Frank 914
United Dominion Industries, Inc. *v.* United States 822
United International Holdings, Inc.; Wharf (Holdings) Ltd. *v.* . . . 588
United States. See name of other party.
U. S. Court of Appeals; Scott *v.* 1071
U. S. District Court; Alford *v.* 916
U. S. District Court; Ashanti *v.* 967
U. S. District Court; Bogle *v.* 927
U. S. District Court; Holleman *v.* 1068
U. S. District Judge; Rocha *v.* 997
U. S. District Judge; United States *v.* 557
United States Fidelity & Guaranty Co.; McKeithen *v.* 922
United States Golf Assn.; Olinger *v.* 1064
United States Information Agency; Brundage *v.* 1022
U. S. Parole Comm'n; Rollock *v.* 1014
U. S. Postal Service; Thompson *v.* 911
United Water Resources, Inc.; Moretti *v.* 943
Universal Maritime Service Corp.; Spitalieri *v.* 1007
University of Mich. Bd. of Regents; Emeagwali *v.* 1025
University of Minn.; Waddell *v.* 924
University of S. C.; Ross *v.* 1038
University of Tenn.; Papachristou *v.* 977
University of Tex. at Brownsville; Haskouri *v.* 922
University of Tex. at Dallas; Ntreh *v.* 1039
University of Wash. Law School; Smith *v.* 1051
Unlimited Concepts, Inc.; Snapp *v.* 975
Upper Arlington City School Dist. *v.* James 995
Urrabazo *v.* United States 1046
US Airways, Inc. *v.* Barnett 970

Page
Utah; Vessey *v.* 1029
Utilities Comm'n, New Smyrna Beach *v.* Tampa Electric Co. 905
Utility Solid Waste Activities Group *v.* EPA 1065
Utley *v.* Johnson 910
Valdez *v.* Gibson 979
Valdez *v.* Property Reserve, Inc. 924
Valdez *v.* United States 996
Valdez *v.* Walker 1027
Valensia *v.* United States 901
Valentine *v.* United States 1014
Valerio *v.* New York 981
Vallery *v.* Smalls 1028
Valle-Tovar *v.* United States 1075
Vallone *v.* United States 914
Vanderpool *v.* Georgia 996
Vang *v.* Knowles 1054
Van Wert City Bd. of Ed.; Boroff *v.* 920
Vargas-Lopez *v.* Ashcroft 999
Varner; Sanabria *v.* 909
Varner; Savage *v.* 998
Varona *v.* Moore 1071
Vasquez *v.* Johnson 997
Vasta *v.* United States 1068
Vaughn *v.* Jackson 914
Vaughn; Trudel *v.* 1006
Vaughn; Werts *v.* 980
Veale *v.* United States 925,1049
Velasco *v.* United States 987
Velasquez *v.* United States 1053
Velasquez-Rivera *v.* United States 983
Velazquez *v.* Legal Services Corp. 903
Velazquez de Meza *v.* Department of Justice, INS 1017
Veneman; Texas Committee on Natural Resources *v.* 1051
Venezia *v.* Equitable Life Assurance Society of U. S. 922
Vergara-Sosa *v.* United States 1032
Vernon; Harter *v.* 1022
Vessey *v.* Utah 1029
Vey, *In re* 993,1063
Vicuna *v.* United States 937,1015
Viehe, *In re* 1016
Vigil *v.* Williams 979
Villanueva *v.* United States 987
Villegas *v.* Lindsey 1041
Vincent; Seabold *v.* 1063

Page
Viramontes-Urguidi *v.* United States 1074
Virginia; Bustillo *v.* 1072
Virginia *v.* Maryland 969
Virginia; Maxfield *v.* 1008
Virginia; Moreno *v.* 979
Virginia; Overton *v.* 968
Virginia; Pitt *v.* 978
Vivone *v.* Kemna 965,1036
Vollor; Chamber of Commerce of U. S. *v.* 1058
Von Bressensdorf *v.* United States 965
VonSchounmacher *v.* Texas 1024
Vopper; Bartnicki *v.* 514
Vopper; United States *v.* 514
W. *v.* Los Angeles County Dept. of Children and Family Services 962
Wachovia Bank of Ga.; Hinojosa *v.* 946
Wackerly *v.* Oklahoma 1028
Waddell *v.* University of Minn. 924
Wade *v.* Coughlin 1065
Waffle House, Inc.; Equal Employment Opportunity Comm'n *v.* . . 941
Wager *v.* United States 983
Wagner *v.* Shortridge 934
Wailehua *v.* United States 1000
Walker; Gadson *v.* 1003
Walker *v.* Luebbers 944,1014
Walker; Seymour *v.* 989
Walker *v.* United States 944
Walker; Valdez *v.* 1027
Wallace *v.* California 1055
Walls *v.* Bargery 1070
Wal-Mart Stores, Inc.; Binns *v.* 937
Wal-Mart Stores, Inc.; Inwood International Co. *v.* 1003
Wal-Mart Stores, Inc. *v.* Rogers 953
Wal-Mart Stores, Inc.; Rogers *v.* 953
Walsh, *In re* 1016
Walt Disney Concert Hall No. 1; Wojciechowski *v.* 922
Walter; Bright *v.* 1070
Walter *v.* United States 953
Walters *v.* United States 1030
Walton *v.* LeCureux 947
Ward *v.* Broyles 1054
Warden. See also name of warden.
Warden, Winn Correctional Center; Jeter *v.* 1055
Ware *v.* Luebbers 982
Warren W. *v.* Los Angeles Cty. Dept. of Children & Family Servs. 962

Page
Warthen *v.* Smith 1052
Wash *v.* Gilless 1069
Wash *v.* United States 1057
Washington; Bright *v.* 1070
Washington; Copeland *v.* 1024
Washington; Gotcher *v.* 1041
Washington; Lavery *v.* 960
Washington; Phipps *v.* 926,1076
Washington; Safouane *v.* 930
Washington; Smith *v.* 981,1064,1076
Washington *v.* Texas 1027
Washington; Wilson *v.* 1020
Washington Mut. Bank; Eitel *v.* 1050
Washlefske *v.* Winston 983
Waters *v.* Oregon 1040
Watkis *v.* American National Ins. Co. 992
Watley *v.* Johnson 914
Watson *v.* Florida 934
Webb *v.* A B Chance Co. 923
Webb *v.* Board of Trustees of Ball State Univ. 942
Weber *v.* Moore 956
Webster; Fulton County *v.* 942
Wedderburn *v.* Immigration and Naturalization Service 904
Weeks *v.* Moore 1072
Weiss, Peck & Greer, L. L. C.; Hutchinson *v.* 1021
Welborn; Guzman *v.* 1054
Welch *v.* Moore 1025
Weldon; Gilchrist *v.* 1012
Wellbaum *v.* Ohio 1074
Wells *v.* Superior Court of Cal., Los Angeles County 978
Wells *v.* Townsend 1067
Wells Fargo Security; Rasten *v.* 1003
Welton; Fuller *v.* 960
Wermers *v.* Halter 934,1015
Werts *v.* Vaughn 980
Wesbrook *v.* Texas 944
Wesley *v.* Moore 909,999
West *v.* American Telephone & Telegraph Technical Services, Inc. 967
West *v.* Michigan Dept. of Corrections 1055
Westcap Enterprises, Inc.; City Colleges of Chicago *v.* 939
Westine, *In re* 1037
West Virginia; Beaver *v.* 967
West Virginia; Day *v.* 934
West Virginia Dept. of H. H. R.; Buckhannon Bd. & Care Home *v.* 598

Page

West Virginia *ex rel.* Winchester Medical Center *v.* Sanders 1020
WFAA–TV, Inc., *v.* Peavy 1051
WFAA–TV, Inc.; Peavy *v.* 1051
Wharf (Holdings) Ltd. *v.* United International Holdings, Inc. 588
Wheat *v.* Johnson 1070
Wheaton; Zoglauer *v.* 1055
Wheeler *v.* Jones 1068
Wheeler *v.* Thomas F. White & Co. 973
Whiddon; Reeves *v.* 931
White, *In re* 970
White *v.* Angelone 1013
White; Drayden *v.* 984
White *v.* Gunn 1010
White *v.* United States 1009,1074
White & Co.; Wheeler *v.* 973
Whitehead *v.* Alabama 907
Whitlock Corp. *v.* Deloitte & Touche, L. L. P. 973
Whitman; Appalachian Power Co. *v.* 903
Whitman; Citizens for Balanced Transportation *v.* 903
Wicks *v.* Johnson 909,1035
Widmer *v.* Tulare County 960
William *v.* Immigration and Naturalization Service 919
Williams, *In re* 940,1006
Williams *v.* Anderson 1041
Williams *v.* Angelone 1010
Williams; Armijo *v.* 928
Williams; Arreola *v.* 1028
Williams; Arviso *v.* 963
Williams; Ballejos *v.* 978
Williams; Bartnicki *v.* 514
Williams; Beach *v.* 931
Williams; Begay *v.* 1071
Williams *v.* Booker 1069
Williams *v.* Cain 961
Williams; Campbell *v.* 948
Williams; Caudill *v.* 1042
Williams; Chavez *v.* 931
Williams; Contreras *v.* 947
Williams; Crohan *v.* 1025
Williams; Cullen *v.* 949
Williams; Davis *v.* 948
Williams *v.* Dormire 931
Williams; Dotson *v.* 1025
Williams; Edwards *v.* 929

Page
Williams; Fitts *v.* 1072
Williams; Florez *v.* 949
Williams; Frazier *v.* 949
Williams; Gallegos *v.* 949
Williams; Garcia *v.* 949
Williams; Garner *v.* 949
Williams; Gomez *v.* 933
Williams; Gonzales *v.* 949
Williams; Gonzalez *v.* 927,950
Williams; Guillermo *v.* 949
Williams; Hall *v.* 948
Williams; Hasson *v.* 933
Williams *v.* Hayes 1012
Williams; Heckard *v.* 1042
Williams; Hobbs *v.* 949
Williams *v.* Illinois 996
Williams *v.* Jusino 1002
Williams; Logan *v.* 947
Williams; Lucero *v.* 978
Williams *v.* Luebbers 985
Williams; Manning *v.* 950
Williams; Mayfield *v.* 978
Williams; Palmer *v.* 998
Williams; Renteria *v.* 929
Williams; Rhodes *v.* 1027
Williams; Ridgley *v.* 929
Williams; Romero *v.* 1042
Williams; Ruiz *v.* 1042
Williams; Simplicio *v.* 977
Williams; Sims *v.* 931
Williams; Swinford *v.* 926
Williams; Toney *v.* 977
Williams; Toyota Motor Mfg., Ky., Inc. *v.* 970
Williams *v.* United States 912,953,982,987,988,1000,1053,1073
Williams; United States *v.* 514
Williams; Vigil *v.* 979
Williams *v.* Williams 909
Williams Lewis *v.* Entergy Electric Co. 908
Williamson *v.* United States 985
Willing *v.* Illinois 1013
Willis *v.* Atchison, T. & S. F. R. Co. 1009
Willis *v.* Burlington N. S. F. R. Co. 1009
Willoughby *v.* United States 957
Wilson *v.* Florida 1001

Page
Wilson *v.* Haley 919
Wilson *v.* Jamrog 1067
Wilson; Luttrell *v.* 942
Wilson *v.* Neal 919
Wilson *v.* United States 912,991,1058
Wilson *v.* Washington 1020
Wilson Plastics Co.; Miller *v.* 980
Winchester Medical Center *v.* Sanders 1020
Winfield *v.* United States 1044
Winslow *v.* O'Neill 1043
Winston; Washlefske *v.* 983
Wisconsin; Karls *v.* 930
Wisconsin; Matejka *v.* 1058
Wise *v.* United States 959,987
Wishman *v.* California 961
Witek; Clark *v.* 1049
Withrow; Fowler *v.* 1069
Withrow; Loyd *v.* 997
Wittner; Lurie *v.* 943
Wiwa; Royal Dutch Petroleum Co. *v.* 941
Wojciechowski *v.* Walt Disney Concert Hall No. 1 922
Wojnicz *v.* Kapture 1055
Wolfe; Arnold *v.* 930
Wolford; Sigsbey *v.* 926
Wolfram *v.* Principi 991
Womack *v.* United States 1002
Won Ho Song *v.* California 1052
Wood; Oklahoma *v.* 1014
Wood *v.* Quinn 1021
Wood *v.* United States 924,1049
Woodcox *v.* Anderson 977
Wooden *v.* United States 964,1063
Woodford *v.* California First Amendment Coalition 939
Woodford; Lang *v.* 977
Woodford; Massie *v.* 939
Woodford *v.* Morris 1075
Woodson *v.* Johnson 1003
Workers' Compensation Appeal Bd. of Pa.; Mensah *v.* 954
Workers' Compensation Appeals Bd.; Duncan *v.* 1052
Workman, *In re* 954
Workman *v.* Bell 955
Workman *v.* Summers 955
WorldCOM Technologies, Inc.; Mathias *v.* 903
Worldwide Church of God; Philadelphia Church of God, Inc. *v.* . . 958

Page
Wright *v.* Rea 1021
Wright *v.* United States 936,975
Wyoming; Heinemann *v.* 934
Wyoming; Johnson *v.* 1036
Wyoming; Robinson *v.* 980
Xuan Bui *v.* Texas 928
Yang *v.* New Prime, Inc. 1041
Yarbrough; Evans *v.* 1020
Yarnell *v.* Cuffley 903
Yei-Hwei Tong *v.* Gutierrez 905
Yonamine *v.* Artuz 1041
Yong Ho Ahn *v.* United States 924
Young *v.* Ford Motor Credit Co. 1044
Young *v.* G. E. Capital Mortgage Services, Inc. 930
Young *v.* Oklahoma 1055
Yourman; Giuliani *v.* 923
Ysleta del Sur Pueblo *v.* Texas 1066
Yukins; Calbert *v.* 1054
Yu Vang *v.* Knowles 1054
Zachariah *v.* Commissioner of Patents and Trademarks 974
Zambrano-Gavidia *v.* United States 989
Zapata *v.* United States 936
Zavaras; Gray *v.* 947
Zebrowski *v.* United States 987
Zeidell *v.* Plantier 952
Zeirei Agudath Israel Bookstore *v.* Avis Rent-A-Car System, Inc. 919
Zenthofer *v.* Anderson 945
Zhang *v.* New York City Comm'n on Human Rights 1070
Zhang *v.* New York Univ. 1070
Zilich *v.* Meyers 1028
Zimmerman *v.* Hanks 1011
Ziskis *v.* United States 991
Zmuda; Costner *v.* 1021
Zoglauer *v.* Wheaton 1055

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2000

DEPARTMENT OF THE INTERIOR ET AL. *v.* KLAMATH WATER USERS PROTECTIVE ASSOCIATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–1871. Argued January 10, 2001—Decided March 5, 2001

The Department of the Interior's Bureau of Reclamation (Reclamation) administers the Klamath Irrigation Project (Project), which uses water from the Klamath River Basin to irrigate parts of Oregon and California. After the Department began developing the Klamath Project Operation Plan (Plan) to provide water allocations among competing uses and users, the Department asked the Klamath and other Indian Tribes (Basin Tribes or Tribes) to consult with Reclamation on the matter. A memorandum of understanding between those parties called for assessment, in consultation with the Tribes, of the impacts of the Plan on tribal trust resources. During roughly the same period, the Department's Bureau of Indian Affairs (Bureau) filed claims on behalf of the Klamath Tribe in an Oregon state-court adjudication intended to allocate water rights. Since the Bureau is responsible for administering land and water held in trust for Indian tribes, it consulted with the Klamath Tribe, and the two exchanged written memorandums on the appropriate scope of the claims ultimately submitted by the Government for the benefit of the Tribe. Respondent Klamath Water Users Protective Association (Association) is a nonprofit group, most of whose members receive water from the Project and have interests adverse to the tribal interests owing to scarcity of water. The Association filed a series of requests with the Bureau under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, seeking access to communications between the

Bureau and the Basin Tribes. The Bureau turned over several documents, but withheld others under the attorney work-product and deliberative process privileges that are said to be incorporated in FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," § 552(b)(5). The Association then sued the Bureau under FOIA to compel release of the documents. The District Court granted the Government summary judgment. The Ninth Circuit reversed, ruling out any application of Exemption 5 on the ground that the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations. The court said that to hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department.

Held: The documents at issue are not exempt from FOIA's disclosure requirements as "inter-agency or intra-agency memorandums or letters." Pp. 7–16.

(a) Consistent with FOIA's goal of broad disclosure, its exemptions have been consistently given a narrow compass. *E. g.*, *Department of Justice* v. *Tax Analysts*, 492 U. S. 136, 151. Pp. 7–8.

(b) To qualify under Exemption 5's express terms, a document must satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds the document. This Court's prior Exemption 5 cases have addressed the second condition, and have dealt with the incorporation of civil discovery privileges. So far as they matter here, those privileges include the privilege for attorney work product and the so-called "deliberative process" privilege, which covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 150. The point of Exemption 5 is not to protect Government secrecy pure and simple, and the Exemption's first condition is no less important than the second; the communication must be "inter-agency or intra-agency," 5 U. S. C. § 552(b)(5). "[A]gency" is defined to mean "each authority of the Government," § 551(1), and includes entities such as Executive Branch departments, military departments, Government corporations, Government-controlled corporations, and independent regulatory agencies, § 552(f). Although Exemption 5's terms and the statutory definitions say nothing about communications with outsiders, some Courts of Appeals have held that a document prepared for a Government agency by an outside consultant qualifies as an

"intra-agency" memorandum. In such cases, the records submitted by outside consultants played essentially the same part in an agency's deliberative process as documents prepared by agency personnel. The fact about the consultant that is constant in the cases is that the consultant does not represent its own interest, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects it functions just as an employee would be expected to do. Pp. 8–11.

(c) The Department misplaces its reliance on this consultant corollary to Exemption 5. The Department's argument skips a necessary step, for it ignores the first condition of Exemption 5, that the communication be "intra-agency or inter-agency." There is no textual justification for draining that condition of independent vitality. Once the intra-agency condition is applied, it rules out any application of Exemption 5 to tribal communications on analogy to consultants' reports (assuming, which the Court does not decide, that these reports may qualify as intra-agency under Exemption 5). Consultants whose communications have typically been held exempt have not communicated with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant. In that regard, consultants may be enough like the agency's own personnel to justify calling their communications "intra-agency." The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples recognized by several Circuits, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone. As to those documents bearing on the Plan, the Tribes are obviously in competition with nontribal claimants, including those irrigators represented by the respondent. While the documents at issue may not take the formally argumentative form of a brief, their function is quite apparently to support the tribal claims. The Court rejects the Department's assertion that the Klamath Tribe's consultant-like character is clearer in the circumstances of the Oregon adjudication, where the Department merely represents the interests of the Tribe before a state court that will make any decision about the respective rights of the contenders. Again, the dispositive point is that the apparent object of the Tribe's communications is a decision by a Government agency to support a claim by the Tribe that is necessarily adverse to the interests of competitors because there is not enough water to satisfy everyone. The position of the Tribe as Government beneficiary is a far cry from the position of the paid consultant. The

Court also rejects the Department's argument that compelled release of the documents at issue would impair the Department's performance of its fiduciary obligation to protect the confidentiality of communications with tribes. This boils down to requesting that the Court read an "Indian trust" exemption into the statute. There is simply no support for that exemption in the statutory text, which must be read strictly to serve FOIA's mandate of broad disclosure. Pp. 11–16.

189 F. 3d 1034, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

Malcolm L. Stewart argued the cause for petitioners. With him on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, *Leonard Schaitman*, *Matthew M. Collette*, *John Leshy*, and *Scott Bergstrom.*

Andrew M. Hitchings argued the cause for respondent. With him on the brief were *Paul S. Simmons* and *Donald B. Ayer.**

JUSTICE SOUTER delivered the opinion of the Court.

Documents in issue here, passing between Indian Tribes and the Department of the Interior, addressed tribal interests subject to state and federal proceedings to determine water allocations. The question is whether the documents are exempt from the disclosure requirements of the Freedom of Information Act, as "intra-agency memorandums or

*Briefs of *amici curiae* urging reversal were filed for the Campo Band of Mission Indians et al. by *Susan M. Williams* and *Gwenellen P. Janov;* and for the Klamath Tribes et al. by *Tracy A. Labin*, *Carl Ullman*, *Curtis Berkey*, *Thomas P. Schlosser*, *Reid Peyton Chambers*, *Jill E. Grant*, *Dan Rey-Bear*, *Alice E. Walker*, *John B. Carter*, *Peter C. Chestnut*, *Rodney B. Lewis*, *Stephen V. Quesenberry*, and *Gregory M. Quinlan.*

Lucy A. Dalglish, *Gregg P. Leslie*, and *Bruce W. Sandford* filed a brief for the Reporters Committee for Freedom of the Press et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the City of Tacoma, Washington, by *J. Richard Creatura;* and for United South and Eastern Tribes, Inc., by *William W. Taylor III*, *Michael R. Smith*, and *Eleanor H. Smith.*

letters" that would normally be privileged in civil discovery. 5 U. S. C. § 552(b)(5). We hold they are not.

I

Two separate proceedings give rise to this case, the first a planning effort within the Department of the Interior's Bureau of Reclamation, and the second a state water rights adjudication in the Oregon courts. Within the Department of the Interior, the Bureau of Reclamation (Reclamation) administers the Klamath Irrigation Project (Klamath Project or Project), which uses water from the Klamath River Basin to irrigate territory in Klamath County, Oregon, and two northern California counties. In 1995, the Department began work to develop a long-term operations plan for the Project, to be known as the Klamath Project Operation Plan (Plan), which would provide for allocation of water among competing uses and competing water users. The Department asked the Klamath as well as the Hoopa Valley, Karuk, and Yurok Tribes (Basin Tribes) to consult with Reclamation on the matter, and a memorandum of understanding between the Department and the Tribes recognized that "[t]he United States Government has a unique legal relationship with Native American tribal governments," and called for "[a]ssessment, in consultation with the Tribes, of the impacts of the [Plan] on Tribal trust resources." App. 59, 61.

During roughly the same period, the Department's Bureau of Indian Affairs (Bureau) filed claims on behalf of the Klamath Tribe alone in an Oregon state-court adjudication intended to allocate water rights. Since the Bureau is responsible for administering land and water held in trust for Indian tribes, 25 U. S. C. § 1a; 25 CFR subch. H, pts. 150–181 (2000), it consulted with the Klamath Tribe, and the two exchanged written memorandums on the appropriate scope of the claims ultimately submitted by the United States for the benefit of the Klamath Tribe. The Bureau does not, how-

ever, act as counsel for the Tribe, which has its own lawyers and has independently submitted claims on its own behalf.[1]

Respondent, the Klamath Water Users Protective Association (Association), is a nonprofit association of water users in the Klamath River Basin, most of whom receive water from the Klamath Project, and whose interests are adverse to the tribal interests owing to scarcity of water. The Association filed a series of requests with the Bureau under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, seeking access to communications between the Bureau and the Basin Tribes during the relevant time period. The Bureau turned over several documents but withheld others as exempt under the attorney work-product and deliberative process privileges. These privileges are said to be incorporated in FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). The Association then sued the Bureau under FOIA to compel release of the documents.

By the time of the District Court ruling, seven documents remained in dispute, three of them addressing the Plan, three concerned with the Oregon adjudication, and the seventh relevant to both proceedings. See 189 F. 3d 1034, 1036 (CA9 1999), App. to Pet. for Cert. 41a–49a. Six of the documents were prepared by the Klamath Tribe or its representative and were submitted at the Government's behest to the Bureau or to the Department's Regional Solicitor; a Bureau official prepared the seventh document and gave it to lawyers for the Klamath and Yurok Tribes. See *ibid.*

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[1] The Government is "not technically acting as [the Tribes'] attorney. That is, the Tribes have their own attorneys, but the United States acts as trustee." Tr. of Oral Arg. 5. "The United States has also filed claims on behalf of the Project and on behalf of other Federal interests" in the Oregon adjudication. *Id.*, at 6. The Hoopa Valley, Karuk, and Yurok Tribes are not parties to the adjudication. Brief for Respondent 7.

The District Court granted the Government's motion for summary judgment. It held that each document qualified as an inter-agency or intra-agency communication for purposes of Exemption 5, and that each was covered by the deliberative process privilege or the attorney work-product privilege, as having played a role in the Bureau's deliberations about the Plan or the Oregon adjudication. See 189 F. 3d, at 1036, App. to Pet. for Cert. 31a–32a, 56a–65a.

The Court of Appeals for the Ninth Circuit reversed. 189 F. 3d 1034 (1999). It recognized that some Circuits had adopted a "functional" approach to Exemption 5, under which a document generated outside the Government might still qualify as an "intra-agency" communication. See *id.*, at 1037–1038. The court saw no reason to go into that, however, for it ruled out any application of Exemption 5 on the ground that "the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations." *Id.*, at 1038. The court said that "[t]o hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department." *Ibid.* Judge Hawkins dissented, for he saw the documents as springing "from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.*, at 1045. He saw the proper enquiry as going not to a document's source, but to the role it plays in agency decisionmaking. See *id.*, at 1039. We granted certiorari in view of the decision's significant impact on the relationship between Indian tribes and the Government, 530 U. S. 1304 (2000), and now affirm.

II

Upon request, FOIA mandates disclosure of records held by a federal agency, see 5 U. S. C. § 552, unless the documents fall within enumerated exemptions, see § 552(b). "[T]hese

limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," *Department of Air Force* v. *Rose*, 425 U. S. 352, 361 (1976); "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass," *Department of Justice* v. *Tax Analysts*, 492 U. S. 136, 151 (1989); see also *FBI* v. *Abramson*, 456 U. S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed").

A

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552(b)(5). To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.

Our prior cases on Exemption 5 have addressed the second condition, incorporating civil discovery privileges. See, *e. g.*, *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 799–800 (1984); *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 148 (1975) ("Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency"). So far as they might matter here, those privileges include the privilege for attorney work-product and what is sometimes called the "deliberative process" privilege. Work product protects "mental processes of the attorney," *United States* v. *Nobles*, 422 U. S. 225, 238 (1975), while deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U. S., at 150 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among them-

selves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.*, at 151, by protecting open and frank discussion among those who make them within the Government, see *EPA* v. *Mink*, 410 U. S. 73, 86–87 (1973); see also *Weber Aircraft Corp., supra*, at 802.

The point is not to protect Government secrecy pure and simple, however, and the first condition of Exemption 5 is no less important than the second; the communication must be "inter-agency or intra-agency." 5 U. S. C. § 552(b)(5). Statutory definitions underscore the apparent plainness of this text. With exceptions not relevant here, "agency" means "each authority of the Government of the United States," § 551(1), and "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency," § 552(f).

Although neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders, some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an "intra-agency" memorandum under Exemption 5. See, *e. g.*, *Hoover* v. *Dept. of Interior*, 611 F. 2d 1132, 1137–1138 (CA5 1980); *Lead Industries Assn.* v. *OSHA*, 610 F. 2d 70, 83 (CA2 1979); *Soucie* v. *David*, 448 F. 2d 1067 (CADC 1971). In *Department of Justice* v. *Julian*, 486 U. S. 1 (1988), JUSTICE SCALIA, joined by JUSTICES O'CONNOR and White, explained that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency," *id.*, at 18, n. 1 (dissenting opinion). But his opinion also acknowledged the more expansive reading by some Courts of Appeals:

> "It is textually possible and . . . in accord with the purpose of the provision, to regard as an intra-agency mem-

> orandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e. g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency." *Ibid.*[2]

Typically, courts taking the latter view have held that the exemption extends to communications between Government agencies and outside consultants hired by them. See, *e. g.*, *Hoover*, *supra*, at 1138 ("In determining value, the government may deem it necessary to seek the objective opinion of outside experts rather than rely solely on the opinions of government appraisers"); *Lead Industries Assn.*, *supra*, at 83 (applying Exemption 5 to cover draft reports "prepared by outside consultants who had testified on behalf of the agency rather than agency staff"); see also *Government Land Bank* v. *GSA*, 671 F. 2d 663, 665 (CA5 1982) ("Both parties agree that a property appraisal, performed under contract by an independent professional, is an 'intra-agency' document for purposes of the exemption"). In such cases, the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done. To be sure, the consultants in these cases were independent contractors and were not assumed to be subject to the degree of control that agency employment could have entailed; nor do we read the cases as necessarily assuming that an outside consultant must be devoid of a definite point of view when the agency contracts for its services. But the fact

[2] The majority in *Julian* did not address the question whether the documents at issue were "inter-agency or intra-agency" records within the meaning of Exemption 5, because it concluded that the documents would be routinely discoverable in civil litigation and therefore would not be covered by Exemption 5 in any event. 486 U. S., at 11–14.

about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

B

The Department purports to rely on this consultant corollary to Exemption 5 in arguing for its application to the Tribe's communications to the Bureau in its capacity of fiduciary for the benefit of the Indian Tribes. The existence of a trust obligation is not, of course, in question, see *United States* v. *Cherokee Nation of Okla.*, 480 U. S. 700, 707 (1987); *United States* v. *Mitchell*, 463 U. S. 206, 225 (1983); *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942). The fiduciary relationship has been described as "one of the primary cornerstones of Indian law," F. Cohen, Handbook of Federal Indian Law 221 (1982), and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. See, *e. g.*, *Mitchell*, *supra*, at 225. Nor is there any doubt about the plausibility of the Government's assertion that the candor of tribal communications with the Bureau would be eroded without the protections of the deliberative process privilege recognized under Exemption 5. The Department is surely right in saying that confidentiality in communications with tribes is conducive to a proper discharge of its trust obligation.

From the recognition of this interest in frank communication, which the deliberative process privilege might protect, the Department would have us infer a sufficient justification for applying Exemption 5 to communications with the Tribes, in the same fashion that Courts of Appeals have found sufficient reason to favor a consultant's advice that

way. But the Department's argument skips a necessary step, for it ignores the first condition of Exemption 5, that the communication be "intra-agency or inter-agency." The Department seems to be saying that "intra-agency" is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential.

There is, however, no textual justification for draining the first condition of independent vitality, and once the intra-agency condition is applied,[3] it rules out any application of Exemption 5 to tribal communications on analogy to consultants' reports (assuming, which we do not decide, that these reports may qualify as intra-agency under Exemption 5). As mentioned already, consultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant. In that regard, consultants may be enough like the agency's own personnel to justify calling their communications "intra-agency." The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.[4]

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[3] Because we conclude that the documents do not meet this threshold condition, we need not reach step two of the Exemption 5 analysis and enquire whether the communications would normally be discoverable in civil litigation. See *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 799 (1984).

[4] Courts of Appeals have recognized at least two instances of intra-agency consultants that arguably extend beyond what we have characterized as the typical examples. In *Public Citizen, Inc.* v. *Department of Justice*, 111 F. 3d 168 (CADC 1997), former Presidents were so treated in

As to those documents bearing on the Plan, the Tribes are obviously in competition with nontribal claimants, including those irrigators represented by the respondent. App. 66–71. The record shows that documents submitted by the Tribes included, among others, "a position paper that discusses water law legal theories" and "addresses issues related to water rights of the tribes," App. to Pet. for Cert. 42a–43a, a memorandum "contain[ing] views on policy the BIA could provide to other governmental agencies," "views concerning trust resources," *id.*, at 44a, and a letter "conveying the views of the Klamath Tribes concerning issues involved in the water rights adjudication," *id.*, at 47a. While these documents may not take the formally argumentative form of a brief, their function is quite apparently to support the tribal claims. The Tribes are thus urging a position necessarily adverse to the other claimants, the water being inadequate to satisfy the combined demand. As the Court of Appeals said, "[t]he Tribes' demands, if satisfied, would lead to reduced water allocations to members of the Association and have been protested by Association members who fear water shortages and economic injury in dry years." 189 F. 3d, at 1035.

The Department insists that the Klamath Tribe's consultant-like character is clearer in the circumstances of the Oregon adjudication, since the Department merely represents the interests of the Tribe before a state court that will

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their communications with the National Archives and Records Administration, even though the Presidents had their own, independent interests, *id.*, at 171. And in *Ryan* v. *Department of Justice*, 617 F. 2d 781 (CADC 1980), Senators' responses to the Attorney General's questionnaires about the judicial nomination process were held exempt, even though we would expect a Senator to have strong personal views on the matter. We need not decide whether either instance should be recognized as intra-agency, even if communications with paid consultants are ultimately so treated. As explained above, the intra-agency condition excludes, at the least, communications to or from an interested party seeking a Government benefit at the expense of other applicants.

make any decision about the respective rights of the contenders. Brief for Petitioners 42–45; Reply Brief for Petitioners 4–6. But it is not that simple. Even if there were no rival interests at stake in the Oregon litigation, the Klamath Tribe would be pressing its own view of its own interest in its communications with the Bureau. Nor could that interest be ignored as being merged somehow in the fiduciary interest of the Government trustee; the Bureau in its fiduciary capacity would be obliged to adopt the stance it believed to be in the beneficiary's best interest, not necessarily the position espoused by the beneficiary itself. Cf. Restatement (Second) of Trusts § 176, Comment *a* (1957) ("[I]t is the duty of the trustee to exercise such care and skill to preserve the trust property as a man of ordinary prudence would exercise in dealing with his own property . . .").

But, again, the dispositive point is that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors. Since there is not enough water to satisfy everyone, the Government's position on behalf of the Tribe is potentially adverse to other users, and it might ask for more or less on behalf of the Tribe depending on how it evaluated the tribal claim compared with the claims of its rivals. The ultimately adversarial character of tribal submissions to the Bureau therefore seems the only fair inference, as confirmed by the Department's acknowledgment that its "obligation to represent the Klamath Tribe necessarily coexists with the duty to protect other federal interests, including in particular its interests with respect to the Klamath Project." Reply Brief for Petitioners 8; cf. *Nevada* v. *United States*, 463 U. S. 110, 142 (1983) ("[W]here Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be

controlling for purposes of evaluating the authority of the United States to represent different interests"). The position of the Tribe as beneficiary is thus a far cry from the position of the paid consultant.

Quite apart from its attempt to draw a direct analogy between tribes and conventional consultants, the Department argues that compelled release of the documents would itself impair the Department's performance of a specific fiduciary obligation to protect the confidentiality of communications with tribes.[5] Because, the Department argues, traditional fiduciary standards forbid a trustee to disclose information acquired as a trustee when it should know that disclosure would be against the beneficiary's interests, excluding the Tribes' submissions to the Department from Exemption 5 would handicap the Department in doing what the law requires. Brief for Petitioners 36–37.[6] And in much the same vein, the Department presses the argument that "FOIA is intended to cast light on existing government practices; it should not be interpreted and applied so as to compel federal agencies to perform their assigned substantive functions in other than the normal manner." *Id.*, at 29.

All of this boils down to requesting that we read an "Indian trust" exemption into the statute, a reading that is out

[5] The Department points out that the Plan-related documents submitted by the Tribes were furnished to the Bureau rather than to Reclamation, a fact which the Department claims reinforces the conclusion that the documents were provided to the Department in its capacity as trustee. Brief for Petitioners 47. This fact does not alter our analysis, however, because we think that even communications made in support of the trust relationship fail to fit comfortably within the statutory text.

[6] We note that the Department cites the Restatement for the proposition that a "'trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary.'" Brief for Petitioners 36 (quoting Restatement (Second) of Trusts § 170, Comment *s* (1957)). It is unnecessary for us to decide if the Department's duties with respect to its communications with Indian tribes fit this pattern.

of the question for reasons already explored. There is simply no support for the exemption in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA's mandate of broad disclosure,[7] which was obviously expected and intended to affect Government operations. In FOIA, after all, a new conception of Government conduct was enacted into law, "'a general philosophy of full agency disclosure.'" *Department of Justice* v. *Tax Analysts*, 492 U. S., at 142 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'" 492 U. S., at 142 (quoting *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 242 (1978)). Congress had to realize that not every secret under the old law would be secret under the new.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[7] The Department does not attempt to argue that Congress specifically envisioned that Exemption 5 would cover communications pursuant to the Indian trust responsibility, or any other trust responsibility. Although as a general rule we are hesitant to construe statutes in light of legislative inaction, see *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 600 (1983), we note that Congress has twice considered specific proposals to protect Indian trust information, see Indian Amendment to Freedom of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976); Indian Trust Information Protection Act of 1978, S. 2773, 95th Cong., 2d Sess. (1978). We do so because these proposals confirm the commonsense reading that we give Exemption 5 today, as well as to emphasize that nobody in the Federal Government should be surprised by this reading.

Syllabus

OHIO *v.* REINER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 00–1028. Decided March 19, 2001

Respondent was tried for involuntary manslaughter in the death of his infant son Alex, who died from "shaken baby syndrome." His defense theory was that Alex was injured while in the care of the family's babysitter, Susan Batt. Batt informed the Ohio trial court before testifying that she intended to assert her Fifth Amendment privilege, and the court granted her transactional immunity. She then testified to the jury that she had refused to testify without a grant of immunity on the advice of counsel, although she had done nothing wrong. The jury convicted respondent, and he appealed. The appeals court reversed, and the State Supreme Court affirmed the reversal on the ground that Batt had no valid Fifth Amendment privilege because she asserted innocence and that the trial court's grant of immunity was therefore unlawful. The court found that the wrongful grant of immunity prejudiced respondent, because it effectively told the jury that Batt did not cause Alex's injuries.

Held: Batt had a valid Fifth Amendment privilege against self-incrimination. This Court has jurisdiction over the Ohio Supreme Court's judgment, which rests, as a threshold matter, on a determination of federal law. See *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 816. The Fifth Amendment privilege's protection extends only to witnesses who have a reasonable cause to apprehend danger from a direct answer. *Hoffman* v. *United States*, 341 U. S. 479, 486. That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. This Court has never held, however, that the privilege is unavailable to those who claim innocence. To the contrary, the Court has emphasized that one of the Fifth Amendment's basic functions is to protect innocent persons who might otherwise be ensnared by ambiguous circumstances. *Grunewald* v. *United States*, 353 U. S. 391, 421. Batt had "reasonable cause" to apprehend danger from her answers if questioned at respondent's trial. Thus, it was reasonable for her to fear that answers to possible questions might tend to incriminate her.

Certiorari granted; 89 Ohio St. 3d 342, 731 N. E. 2d 662, reversed and remanded.

PER CURIAM.

The Supreme Court of Ohio here held that a witness who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination. Because our precedents dictate that the privilege protects the innocent as well as the guilty, and that the facts here are sufficient to sustain a claim of privilege, we grant the petition for certiorari and reverse.

Respondent was charged with involuntary manslaughter in connection with the death of his 2-month-old son Alex. The coroner testified at trial that Alex died from "shaken baby syndrome," the result of child abuse. He estimated that Alex's injury most likely occurred minutes before the child stopped breathing. Alex died two days later when he was removed from life support. Evidence produced at trial revealed that Alex had a broken rib and a broken leg at the time of his death. His twin brother Derek, who was also examined, had several broken ribs. Respondent had been alone with Alex for half an hour immediately before Alex stopped breathing. Respondent's experts testified that Alex could have been injured several hours before his respiratory arrest. Alex was in the care of the family's babysitter, Susan Batt, at that time. Batt had cared for the children during the day for about two weeks prior to Alex's death. The defense theory was that Batt, not respondent, was the culpable party.

Batt informed the court in advance of testifying that she intended to assert her Fifth Amendment privilege. At the State's request, the trial court granted her transactional immunity from prosecution pursuant to Ohio Rev. Code Ann. §2945.44 (1999). She then testified to the jury that she had refused to testify without a grant of immunity on the advice of counsel, although she had done nothing wrong. Batt denied any involvement in Alex's death. She testified that she had never shaken Alex or his brother at any time, specifically on the day Alex suffered respiratory arrest. She said she

was unaware of and had nothing to do with the other injuries to both children. The jury found respondent guilty of involuntary manslaughter, and he appealed.

The Court of Appeals of Ohio, Sixth District, reversed respondent's conviction on grounds not relevant to our decision here. The Supreme Court of Ohio affirmed the reversal, on the alternative ground that Batt had no valid Fifth Amendment privilege and that the trial court's grant of immunity under § 2945.44 was therefore unlawful.* 89 Ohio St. 3d 342, 358, 731 N. E. 2d 662, 677 (2000). The court found that the wrongful grant of immunity prejudiced respondent, because it effectively told the jury that Batt did not cause Alex's injuries.

The court recognized that the privilege against self-incrimination applies where a witness' answers "could reasonably 'furnish a link in the chain of evidence' " against him, *id.*, at 352, 731 N. E. 2d, at 673 (quoting *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951)). *Hoffman*, it noted, requires the trial court to determine whether the witness has correctly asserted the privilege, and to order the witness to answer questions if the witness is mistaken about the danger of incrimination. *Ibid.* The court faulted the trial judge for failing to question sufficiently Batt's assertion of the privilege. It noted that the Court of Appeals, in finding a valid privilege, failed to consider the prosecutor's suggestion that Batt's testimony would not incriminate her, and Batt's denial of involvement in Alex's abuse when questioned by the Children's Services Board. The court held that "Susan Batt's

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*Ohio Rev. Code Ann. § 2945.44 (1999) states in pertinent part: "In any criminal proceeding . . . if a witness refuses to answer or produce information *on the basis of his privilege against self-incrimination*, the court of common pleas . . . unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if . . . [the prosecuting attorney so requests and] . . . [t]he court . . . informs the witness that by answering, or producing the information he will receive [transactional] immunity . . . ." (Emphasis added.)

[trial] testimony did not incriminate her, because she denied *any* involvement in the abuse. Thus, she did not have a valid Fifth Amendment privilege." 89 Ohio St. 3d, at 355, 731 N. E. 2d, at 675 (emphasis in original). The court emphasized that the defense's theory of Batt's guilt was not grounds for a grant of immunity, "when the witness continues to deny any self-incriminating conduct." *Ibid.*

The Supreme Court of Ohio's decision that Batt was wrongly granted immunity under § 2945.44 (and consequently, that reversal of respondent's conviction was required) rested on the court's determination that Batt did not have a valid Fifth Amendment privilege. In discussing the contours of that privilege, the court relied on our precedents. We have observed that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984). The decision at issue "fairly appears . . . to be interwoven with the federal law," and no adequate and independent state ground is clear from the face of the opinion. *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983). We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law. See *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 816 (1986) ("[T]his Court retains power to review the decision of a federal issue in a state cause of action"); *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281, 293–294 (1908).

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. As the Supreme Court of Ohio acknowledged, this privilege not only extends "to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman*, 341 U. S., at 486. "[I]t need only be evident from the

implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.*, at 486–487.

We have held that the privilege's protection extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer." *Id.*, at 486. That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. *Ibid.* A danger of "imaginary and unsubstantial character" will not suffice. *Mason* v. *United States*, 244 U. S. 362, 366 (1917). But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's "basic functions . . . is to protect *innocent* men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Grunewald* v. *United States*, 353 U. S. 391, 421 (1957) (quoting *Slochower* v. *Board of Higher Ed. of New York City*, 350 U. S. 551, 557–558 (1956)) (emphasis in original). In *Grunewald*, we recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth. 353 U. S., at 421–422.

The Supreme Court of Ohio's determination that Batt did not have a valid Fifth Amendment privilege because she denied any involvement in the abuse of the children clearly conflicts with *Hoffman* and *Grunewald*. Batt had "reasonable cause" to apprehend danger from her answers if questioned at respondent's trial. *Hoffman*, *supra*, at 486. Batt spent extended periods of time alone with Alex and his brother in the weeks immediately preceding discovery of their injuries. She was with Alex within the potential timeframe of the fatal trauma. The defense's theory of the case was that Batt, not respondent, was responsible for Alex's death and his brother's uncharged injuries. In this setting, it was reasonable for Batt to fear that answers to

possible questions might tend to incriminate her. Batt therefore had a valid Fifth Amendment privilege against self-incrimination.

We do not, of course, address the question whether immunity from suit under § 2945.44 was appropriate. Because the Supreme Court of Ohio mistakenly held that the witness' assertion of innocence deprived her of her Fifth Amendment privilege against self-incrimination, the petition for a writ of certiorari is granted, the court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

TRAFFIX DEVICES, INC. *v.* MARKETING DISPLAYS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99–1571. Argued November 29, 2000—Decided March 20, 2001

Respondent, Marketing Displays, Inc. (MDI), holds now-expired utility patents for a "dual-spring design" mechanism that keeps temporary road and other outdoor signs upright in adverse wind conditions. MDI claims that its sign stands were recognizable to buyers and users because the patented design was visible near the sign stand's base. After the patents expired and petitioner TrafFix Devices, Inc., began marketing sign stands with a dual-spring mechanism copied from MDI's design, MDI brought suit under the Trademark Act of 1946 for, *inter alia*, trade dress infringement. The District Court granted TrafFix's motion for summary judgment, holding that no reasonable trier of fact could determine that MDI had established secondary meaning in its alleged trade dress, *i. e.*, consumers did not associate the dual-spring design's look with MDI; and, as an independent reason, that there could be no trade dress protection for the design because it was functional. The Sixth Circuit reversed. Among other things, it suggested that the District Court committed legal error by looking only to the dual-spring design when evaluating MDI's trade dress because a competitor had to find some way to hide the design or otherwise set it apart from MDI's; explained, relying on *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 165, that exclusive use of a feature must put competitors at a significant non-reputation-related disadvantage before trade dress protection is denied on functionality grounds; and noted a split among the Circuits on the issue whether an expired utility patent forecloses the possibility of trade dress protection in the product's design.

Held: Because MDI's dual-spring design is a functional feature for which there is no trade dress protection, MDI's claim is barred. Pp. 28–35.

(a) Trade dress can be protected under federal law, but the person asserting such protection in an infringement action must prove that the matter sought to be protected is not functional, 15 U. S. C. § 1125(a)(3). Trade dress protection must subsist with the recognition that in many instances there is no prohibition against copying goods and products. An expired utility patent has vital significance in resolving a trade dress claim, for a utility patent is strong evidence that the features therein claimed are functional. The central advance claimed in the expired util-

ity patents here is the dual-spring design, which is an essential feature of the trade dress MDI now seeks to protect. However, MDI did not, and cannot, carry the burden of overcoming the strong evidentiary inference of functionality based on the disclosure of the dual-spring design in the claims of the expired patents. The springs are necessary to the device's operation, and they would have been covered by the claims of the expired patents even though they look different from the embodiment revealed in those patents, see *Sarkisian* v. *Winn-Proof Corp.*, 697 F. 2d 1313. The rationale for the rule that the disclosure of a feature in a utility patent's claims constitutes strong evidence of functionality is well illustrated in this case. The design serves the important purpose of keeping the sign upright in heavy wind conditions, and statements in the expired patent applications indicate that it does so in a unique and useful manner and at a cost advantage over alternative designs. Pp. 28–32.

(b) In reversing the summary judgment against MDI, the Sixth Circuit gave insufficient weight to the importance of the expired utility patents, and their evidentiary significance, in establishing the device's functionality. The error was likely caused by its misinterpretation of trade dress principles in other respects. "'In general terms a product feature is functional,' and cannot serve as a trademark, 'if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.'" *Qualitex*, *supra*, at 165 (quoting *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 850, n. 10). This Court has expanded on that meaning, observing that a functional feature is one "the exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage," *Qualitex*, *supra*, at 165, but that language does not mean that competitive necessity is a necessary test for functionality. Where the design is functional under the *Inwood* formulation there is no need to proceed further to consider competitive necessity. This Court has allowed trade dress protection to inherently distinctive product features on the assumption that they were not functional. *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 774. Here, however, beyond serving the purpose of informing consumers that the sign stands are made by MDI, the design provides a unique and useful mechanism to resist the wind's force. Functionality having been established, whether the design has acquired secondary meaning need not be considered. Nor is it necessary to speculate about other design possibilities. Finally, this Court need not resolve here the question whether the Patent Clause of the Constitution, of its own force, prohibits the holder of an expired utility patent from claiming trade dress protection. Pp. 32–35.

200 F. 3d 929, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

John G. Roberts, Jr., argued the cause for petitioner. With him on the briefs were *Gregory G. Garre* and *Jeanne-Marie Marshall.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Ogden*, *Jeffrey A. Lamken*, *Anthony J. Steinmeyer*, and *Mark S. Davies.*

John A. Artz argued the cause for respondent. With him on the brief were *John S. Artz, Robert P. Renke*, and *Lisa A. Sarkisian.**

JUSTICE KENNEDY delivered the opinion of the Court.

Temporary road signs with warnings like "Road Work Ahead" or "Left Shoulder Closed" must withstand strong gusts of wind. An inventor named Robert Sarkisian obtained two utility patents for a mechanism built upon two springs (the dual-spring design) to keep these and other outdoor signs upright despite adverse wind conditions. The holder of the now-expired Sarkisian patents, respondent Marketing Displays, Inc. (MDI), established a successful business in the manufacture and sale of sign stands incorporating the patented feature. MDI's stands for road signs were recognizable to buyers and users (it says) because the dual-spring design was visible near the base of the sign.

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*Briefs of *amici curiae* urging reversal were filed for the Holmes Group, Inc., by *James W. Dabney;* for Panduit Corp. by *Roy E. Hofer*, *Jerome Gilson*, *Cynthia A. Homan*, and *Philip A. Jones;* and for *Malla Pollack*, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Association by *Louis T. Pirkey;* and for Thomas & Betts Corp. by *Sidney David* and *Roy H. Wepner.*

Theodore H. Davis, Jr., *Marie V. Driscoll*, and *Helen Hill Minsker* filed a brief for the International Trademark Association as *amicus curiae.*

This litigation followed after the patents expired and a competitor, TrafFix Devices, Inc., sold sign stands with a visible spring mechanism that looked like MDI's. MDI and TrafFix products looked alike because they were. When TrafFix started in business, it sent an MDI product abroad to have it reverse engineered, that is to say copied. Complicating matters, TrafFix marketed its sign stands under a name similar to MDI's. MDI used the name "WindMaster," while TrafFix, its new competitor, used "WindBuster."

MDI brought suit under the Trademark Act of 1946 (Lanham Act), 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, against TrafFix for trademark infringement (based on the similar names), trade dress infringement (based on the copied dual-spring design), and unfair competition. TrafFix counterclaimed on antitrust theories. After the United States District Court for the Eastern District of Michigan considered cross-motions for summary judgment, MDI prevailed on its trademark claim for the confusing similarity of names and was held not liable on the antitrust counterclaim; and those two rulings, affirmed by the Court of Appeals, are not before us.

I

We are concerned with the trade dress question. The District Court ruled against MDI on its trade dress claim. 971 F. Supp. 262 (ED Mich. 1997). After determining that the one element of MDI's trade dress at issue was the dual-spring design, *id.*, at 265, it held that "no reasonable trier of fact could determine that MDI has established secondary meaning" in its alleged trade dress, *id.*, at 269. In other words, consumers did not associate the look of the dual-spring design with MDI. As a second, independent reason to grant summary judgment in favor of TrafFix, the District Court determined the dual-spring design was functional. On this rationale secondary meaning is irrelevant because there can be no trade dress protection in any event. In ruling on the functional aspect of the design, the District Court

noted that Sixth Circuit precedent indicated that the burden was on MDI to prove that its trade dress was nonfunctional, and not on TrafFix to show that it was functional (a rule since adopted by Congress, see 15 U. S. C. § 1125(a)(3) (1994 ed., Supp. V)), and then went on to consider MDI's arguments that the dual-spring design was subject to trade dress protection. Finding none of MDI's contentions persuasive, the District Court concluded MDI had not "proffered sufficient evidence which would enable a reasonable trier of fact to find that MDI's vertical dual-spring design is *non*-functional." 971 F. Supp., at 276. Summary judgment was entered against MDI on its trade dress claims.

The Court of Appeals for the Sixth Circuit reversed the trade dress ruling. 200 F. 3d 929 (1999). The Court of Appeals held the District Court had erred in ruling MDI failed to show a genuine issue of material fact regarding whether it had secondary meaning in its alleged trade dress, *id.*, at 938, and had erred further in determining that MDI could not prevail in any event because the alleged trade dress was in fact a functional product configuration, *id.*, at 940. The Court of Appeals suggested the District Court committed legal error by looking only to the dual-spring design when evaluating MDI's trade dress. Basic to its reasoning was the Court of Appeals' observation that it took "little imagination to conceive of a hidden dual-spring mechanism or a tri or quad-spring mechanism that might avoid infringing [MDI's] trade dress." *Ibid.* The Court of Appeals explained that "[i]f TrafFix or another competitor chooses to use [MDI's] dual-spring design, then it will have to find *some other way* to set its sign apart to avoid infringing [MDI's] trade dress." *Ibid.* It was not sufficient, according to the Court of Appeals, that allowing exclusive use of a particular feature such as the dual-spring design in the guise of trade dress would "hinde[r] competition somewhat." Rather, "[e]xclusive use of a feature must 'put competitors at a *significant* non-reputation-related disadvantage' before trade

dress protection is denied on functionality grounds." *Ibid.* (quoting *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 165 (1995)). In its criticism of the District Court's ruling on the trade dress question, the Court of Appeals took note of a split among Courts of Appeals in various other Circuits on the issue whether the existence of an expired utility patent forecloses the possibility of the patentee's claiming trade dress protection in the product's design. 200 F. 3d, at 939. Compare *Sunbeam Products, Inc.* v. *West Bend Co.*, 123 F. 3d 246 (CA5 1997) (holding that trade dress protection is not foreclosed), *Thomas & Betts Corp.* v. *Panduit Corp.*, 138 F. 3d 277 (CA7 1998) (same), and *Midwest Industries, Inc.* v. *Karavan Trailers, Inc.*, 175 F. 3d 1356 (CA Fed 1999) (same), with *Vornado Air Circulation Systems, Inc.* v. *Duracraft Corp.*, 58 F. 3d 1498, 1500 (CA10 1995) ("Where a product configuration is a significant inventive component of an invention covered by a utility patent . . . it cannot receive trade dress protection"). To resolve the conflict, we granted certiorari. 530 U. S. 1260 (2000).

II

It is well established that trade dress can be protected under federal law. The design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source; and a design or package which acquires this secondary meaning, assuming other requisites are met, is a trade dress which may not be used in a manner likely to cause confusion as to the origin, sponsorship, or approval of the goods. In these respects protection for trade dress exists to promote competition. As we explained just last Term, see *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205 (2000), various Courts of Appeals have allowed claims of trade dress infringement relying on the general provision of the Lanham Act which provides a cause of action to one who is injured when a person uses "any word, term name, symbol, or device, or any

combination thereof . . . which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods." 15 U. S. C. § 1125(a)(1)(A). Congress confirmed this statutory protection for trade dress by amending the Lanham Act to recognize the concept. Title 15 U. S. C. § 1125(a)(3) (1994 ed., Supp. V) provides: "In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional." This burden of proof gives force to the well-established rule that trade dress protection may not be claimed for product features that are functional. *Qualitex*, *supra*, at 164–165; *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 775 (1992). And in *Wal-Mart*, *supra*, we were careful to caution against misuse or overextension of trade dress. We noted that "product design almost invariably serves purposes other than source identification." *Id.*, at 213.

Trade dress protection must subsist with the recognition that in many instances there is no prohibition against copying goods and products. In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying. As the Court has explained, copying is not always discouraged or disfavored by the laws which preserve our competitive economy. *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 160 (1989). Allowing competitors to copy will have salutary effects in many instances. "Reverse engineering of chemical and mechanical articles in the public domain often leads to significant advances in technology." *Ibid.*

The principal question in this case is the effect of an expired patent on a claim of trade dress infringement. A prior patent, we conclude, has vital significance in resolving the trade dress claim. A utility patent is strong evidence that the features therein claimed are functional. If trade dress protection is sought for those features the strong evidence

of functionality based on the previous patent adds great weight to the statutory presumption that features are deemed functional until proved otherwise by the party seeking trade dress protection. Where the expired patent claimed the features in question, one who seeks to establish trade dress protection must carry the heavy burden of showing that the feature is not functional, for instance by showing that it is merely an ornamental, incidental, or arbitrary aspect of the device.

In the case before us, the central advance claimed in the expired utility patents (the Sarkisian patents) is the dual-spring design; and the dual-spring design is the essential feature of the trade dress MDI now seeks to establish and to protect. The rule we have explained bars the trade dress claim, for MDI did not, and cannot, carry the burden of overcoming the strong evidentiary inference of functionality based on the disclosure of the dual-spring design in the claims of the expired patents.

The dual springs shown in the Sarkisian patents were well apart (at either end of a frame for holding a rectangular sign when one full side is the base) while the dual springs at issue here are close together (in a frame designed to hold a sign by one of its corners). As the District Court recognized, this makes little difference. The point is that the springs are necessary to the operation of the device. The fact that the springs in this very different-looking device fall within the claims of the patents is illustrated by MDI's own position in earlier litigation. In the late 1970's, MDI engaged in a long-running intellectual property battle with a company known as Winn-Proof. Although the precise claims of the Sarkisian patents cover sign stands with springs "spaced apart," U. S. Patent No. 3,646,696, col. 4; U. S. Patent No. 3,662,482, col. 4, the Winn-Proof sign stands (with springs much like the sign stands at issue here) were found to infringe the patents by the United States District Court for the District of Oregon, and the Court of Appeals for the

Ninth Circuit affirmed the judgment. *Sarkisian* v. *Winn-Proof Corp.*, 697 F. 2d 1313 (1983). Although the Winn-Proof traffic sign stand (with dual springs close together) did not appear, then, to infringe the literal terms of the patent claims (which called for "spaced apart" springs), the Winn-Proof sign stand was found to infringe the patents under the doctrine of equivalents, which allows a finding of patent infringement even when the accused product does not fall within the literal terms of the claims. *Id.*, at 1321–1322; see generally *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17 (1997). In light of this past ruling—a ruling procured at MDI's own insistence—it must be concluded the products here at issue would have been covered by the claims of the expired patents.

The rationale for the rule that the disclosure of a feature in the claims of a utility patent constitutes strong evidence of functionality is well illustrated in this case. The dual-spring design serves the important purpose of keeping the sign upright even in heavy wind conditions; and, as confirmed by the statements in the expired patents, it does so in a unique and useful manner. As the specification of one of the patents recites, prior art "devices, in practice, will topple under the force of a strong wind." U. S. Patent No. 3,662,482, col. 1. The dual-spring design allows sign stands to resist toppling in strong winds. Using a dual-spring design rather than a single spring achieves important operational advantages. For example, the specifications of the patents note that the "use of a pair of springs . . . as opposed to the use of a single spring to support the frame structure prevents canting or twisting of the sign around a vertical axis," and that, if not prevented, twisting "may cause damage to the spring structure and may result in tipping of the device." U. S. Patent No. 3,646,696, col. 3. In the course of patent prosecution, it was said that "[t]he use of a pair of spring connections as opposed to a single spring connection . . . forms an important part of this combination" because it

"forc[es] the sign frame to tip along the longitudinal axis of the elongated ground-engaging members." App. 218. The dual-spring design affects the cost of the device as well; it was acknowledged that the device "could use three springs but this would unnecessarily increase the cost of the device." *Id.*, at 217. These statements made in the patent applications and in the course of procuring the patents demonstrate the functionality of the design. MDI does not assert that any of these representations are mistaken or inaccurate, and this is further strong evidence of the functionality of the dual-spring design.

III

In finding for MDI on the trade dress issue the Court of Appeals gave insufficient recognition to the importance of the expired utility patents, and their evidentiary significance, in establishing the functionality of the device. The error likely was caused by its misinterpretation of trade dress principles in other respects. As we have noted, even if there has been no previous utility patent the party asserting trade dress has the burden to establish the nonfunctionality of alleged trade dress features. MDI could not meet this burden. Discussing trademarks, we have said "'[i]n general terms, a product feature is functional,' and cannot serve as a trademark, 'if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.'" *Qualitex*, 514 U. S., at 165 (quoting *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 850, n. 10 (1982)). Expanding upon the meaning of this phrase, we have observed that a functional feature is one the "exclusive use of [which] would put competitors at a significant non-reputation-related disadvantage." 514 U. S., at 165. The Court of Appeals in the instant case seemed to interpret this language to mean that a necessary test for functionality is "whether the particular product configuration is a competitive necessity." 200 F. 3d, at 940. See also *Vornado*, 58 F. 3d, at 1507 ("Functionality, by contrast, has been defined

both by our circuit, and more recently by the Supreme Court, in terms of competitive need"). This was incorrect as a comprehensive definition. As explained in *Qualitex*, *supra*, and *Inwood*, *supra*, a feature is also functional when it is essential to the use or purpose of the device or when it affects the cost or quality of the device. The *Qualitex* decision did not purport to displace this traditional rule. Instead, it quoted the rule as *Inwood* had set it forth. It is proper to inquire into a "significant non-reputation-related disadvantage" in cases of esthetic functionality, the question involved in *Qualitex*. Where the design is functional under the *Inwood* formulation there is no need to proceed further to consider if there is a competitive necessity for the feature. In *Qualitex*, by contrast, esthetic functionality was the central question, there having been no indication that the green-gold color of the laundry press pad had any bearing on the use or purpose of the product or its cost or quality.

The Court has allowed trade dress protection to certain product features that are inherently distinctive. *Two Pesos*, 505 U. S., at 774. In *Two Pesos*, however, the Court at the outset made the explicit analytic assumption that the trade dress features in question (decorations and other features to evoke a Mexican theme in a restaurant) were not functional. *Id.*, at 767, n. 6. The trade dress in those cases did not bar competitors from copying functional product design features. In the instant case, beyond serving the purpose of informing consumers that the sign stands are made by MDI (assuming it does so), the dual-spring design provides a unique and useful mechanism to resist the force of the wind. Functionality having been established, whether MDI's dual-spring design has acquired secondary meaning need not be considered.

There is no need, furthermore, to engage, as did the Court of Appeals, in speculation about other design possibilities, such as using three or four springs which might serve the same purpose. 200 F. 3d, at 940. Here, the functionality of the spring design means that competitors need not explore

whether other spring juxtapositions might be used. The dual-spring design is not an arbitrary flourish in the configuration of MDI's product; it is the reason the device works. Other designs need not be attempted.

Because the dual-spring design is functional, it is unnecessary for competitors to explore designs to hide the springs, say, by using a box or framework to cover them, as suggested by the Court of Appeals. *Ibid.* The dual-spring design assures the user the device will work. If buyers are assured the product serves its purpose by seeing the operative mechanism that in itself serves an important market need. It would be at cross-purposes to those objectives, and something of a paradox, were we to require the manufacturer to conceal the very item the user seeks.

In a case where a manufacturer seeks to protect arbitrary, incidental, or ornamental aspects of features of a product found in the patent claims, such as arbitrary curves in the legs or an ornamental pattern painted on the springs, a different result might obtain. There the manufacturer could perhaps prove that those aspects do not serve a purpose within the terms of the utility patent. The inquiry into whether such features, asserted to be trade dress, are functional by reason of their inclusion in the claims of an expired utility patent could be aided by going beyond the claims and examining the patent and its prosecution history to see if the feature in question is shown as a useful part of the invention. No such claim is made here, however. MDI in essence seeks protection for the dual-spring design alone. The asserted trade dress consists simply of the dual-spring design, four legs, a base, an upright, and a sign. MDI has pointed to nothing arbitrary about the components of its device or the way they are assembled. The Lanham Act does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity. The Lanham Act, furthermore, does not protect trade dress in a functional design simply

because an investment has been made to encourage the public to associate a particular functional feature with a single manufacturer or seller. The Court of Appeals erred in viewing MDI as possessing the right to exclude competitors from using a design identical to MDI's and to require those competitors to adopt a different design simply to avoid copying it. MDI cannot gain the exclusive right to produce sign stands using the dual-spring design by asserting that consumers associate it with the look of the invention itself. Whether a utility patent has expired or there has been no utility patent at all, a product design which has a particular appearance may be functional because it is "essential to the use or purpose of the article" or "affects the cost or quality of the article." *Inwood*, 456 U. S., at 850, n. 10.

TrafFix and some of its *amici* argue that the Patent Clause of the Constitution, Art. I, § 8, cl. 8, of its own force, prohibits the holder of an expired utility patent from claiming trade dress protection. Brief for Petitioner 33–36; Brief for Panduit Corp. as *Amicus Curiae* 3; Brief for Malla Pollack as *Amicus Curiae* 2. We need not resolve this question. If, despite the rule that functional features may not be the subject of trade dress protection, a case arises in which trade dress becomes the practical equivalent of an expired utility patent, that will be time enough to consider the matter. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

SHAFER *v.* SOUTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 00–5250. Argued January 9, 2001—Decided March 20, 2001

Under recent amendments to South Carolina law, capital jurors face two questions at the sentencing phase of the trial. They decide first whether the State has proved beyond a reasonable doubt the existence of any statutory aggravating circumstance. If the jury fails to agree unanimously on the presence of a statutory aggravator, it cannot make a sentencing recommendation. In that event, the trial judge is charged with sentencing the defendant to either life imprisonment or a mandatory minimum 30-year prison term. If, on the other hand, the jury unanimously finds a statutory aggravator, it then recommends one of two potential sentences—death or life imprisonment without the possibility of parole. No other sentencing option is available to the jury.

A South Carolina jury found petitioner Shafer guilty of murder, armed robbery, and conspiracy. During the trial's sentencing phase, Shafer's counsel and the prosecutor disagreed on the application of *Simmons* v. *South Carolina,* 512 U. S. 154, to this case. This Court held in *Simmons* that where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process requires that the jury be informed of the defendant's parole ineligibility. Shafer's counsel maintained that *Simmons* required the trial judge to instruct the jury that under South Carolina law a life sentence carries no possibility of parole. The prosecutor, in opposition, urged that no *Simmons* instruction was required because the State did not plan to argue to the jury that Shafer would be a danger in the future. Shafer's counsel replied that the State had in fact put future dangerousness at issue by introducing evidence of a postarrest assault by Shafer and jail rules violations. The judge refused to charge on parole ineligibility, stating that future dangerousness had not been argued. The judge also denied Shafer's counsel leave to read in his closing argument lines from the controlling statute stating plainly that a life sentence in South Carolina carries no possibility of parole. After the prosecution's closing argument, Shafer's counsel renewed his plea for a life without parole instruction on the ground that the State had placed future dangerousness at issue by repeating the statements of an alarmed witness at the crime scene that Shafer and his accomplices "might come back." The trial judge again denied the request. Quoting a passage from the relevant

statute but not the full text, the judge twice told the jury that "life imprisonment means until the death of the defendant." During its sentencing deliberations, the jury asked the judge whether, and under what circumstances, someone convicted of murder could become eligible for parole. The judge responded that "[p]arole eligibility or ineligibility is not for your consideration." The jury unanimously found beyond a reasonable doubt the aggravating factor of murder while attempting armed robbery, and recommended the death penalty, which the judge imposed.

The South Carolina Supreme Court affirmed. Without considering whether the prosecutor's evidentiary submissions or closing argument in fact placed Shafer's future dangerousness at issue, the court held *Simmons* generally inapplicable to the State's "new sentencing scheme." *Simmons* is not triggered, the South Carolina court said, unless life without parole is the only legally available sentence alternative to death. Currently, the court observed, when a capital jury begins its sentencing deliberations, three alternative sentences are available: (1) death, (2) life without the possibility of parole, or (3) a mandatory minimum 30-year sentence. Since an alternative to death other than life without the possibility of parole exists, the court concluded, *Simmons* no longer constrains capital sentencing in South Carolina.

Held:

1. The South Carolina Supreme Court incorrectly interpreted *Simmons* when it declared the case inapplicable to South Carolina's current sentencing scheme. That court's reasoning might be persuasive if the jury's sentencing discretion actually encompassed the three choices the court identified: death, life without the possibility of parole, or a mandatory minimum 30-year sentence. But, that is not how the State's new scheme works. Under the law now governing sentencing proceedings, if the jury finds an aggravating circumstance, it must recommend a sentence, and its choices are limited to death and life without parole. When the jury makes the threshold determination whether a statutory aggravator exists, a tightly circumscribed factual inquiry, none of *Simmons*' due process concerns yet arise. At that stage, there are no "misunderstanding[s]" to avoid, no "false choice[s]" to guard against. See *Simmons*, 512 U. S., at 161 (plurality opinion). The jury, as aggravating circumstance factfinder, exercises no sentencing discretion itself. If no aggravator is found, the judge takes over and has sole authority to impose the mandatory minimum so heavily relied upon by the State Supreme Court. It is only when the jury endeavors the moral judgment whether to impose the death penalty that parole eligibility may become critical. Correspondingly, it is only at that stage that *Simmons* comes

into play, a stage at which South Carolina law provides no third choice, no 30-year mandatory minimum, just death or life without parole. See *Ramdass* v. *Angelone*, 530 U. S. 156, 169. Thus, whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole. Pp. 48–51.

2. South Carolina's other grounds in support of the trial judge's refusal to give Shafer's requested parole ineligibility instruction are unavailing. Pp. 52–55.

(a) The State's argument that the jury was properly informed of the law on parole ineligibility by the trial court's instructions and by defense counsel's own argument is unpersuasive. To support that contention, the State sets out defense counsel's closing pleas that, if Shafer's life is spared, he will die in prison after spending his natural life there, as well as passages from the trial judge's instructions reiterating that life imprisonment means until the death of the defendant. Displacement of the longstanding practice of parole availability remains a relatively recent development, and common sense indicates that many jurors might not know whether a life sentence carries with it the possibility of parole. *Simmons*, 512 U. S., at 177–178 (O'Connor, J., concurring in judgment). Indeed, until two years before Shafer's trial, South Carolina's law did not categorically preclude parole for capital defendants sentenced to life imprisonment. Most plainly contradicting the State's contention, the jury's written request for further instructions on the question left no doubt about the jury's failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means. Cf., *e. g.*, *id.*, at 178. The jury's comprehension was hardly aided by the court's final instruction declaring that parole eligibility was not for the jury's consideration. That instruction did nothing to ensure that the jury was not misled and may well have been taken to mean that parole *was* available but that the jury, for some unstated reason, should be blind to this fact. *E. g.*, *id.*, at 170 (plurality opinion). Thus, although a life sentence for Shafer would permit no parole or other release under current state law, this reality was not conveyed to Shafer's jury by the court's instructions or by the arguments defense counsel was allowed to make. Pp. 52–54.

(b) The State's contention that no parole ineligibility instruction was required under *Simmons* because the State never argued that Shafer would pose a future danger to society presents an issue that is not ripe for this Court's resolution. The State Supreme Court, in order to rule broadly that *Simmons* no longer governs capital sentencing in the State, apparently assumed, *arguendo*, that future dangerousness had been shown at Shafer's sentencing proceeding. Because that court did

not home in on the question whether the prosecutor's evidentiary submissions or closing argument in fact placed Shafer's future dangerousness at issue, the question is left open for the state court's attention and disposition. Pp. 54–55.

340 S. C. 291, 531 S. E. 2d 524, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. SCALIA, J., *post*, p. 55, and THOMAS, J., *post*, p. 55, filed dissenting opinions.

David I. Bruck, by appointment of the Court, 531 U. S. 1009, argued the cause for petitioner. With him on the briefs was *William N. Nettles.*

Donald J. Zelenka, Assistant Deputy Attorney General of South Carolina, argued the cause for respondent. With him on the brief were *Charlie Condon*, Attorney General, *John W. McIntosh*, Chief Deputy Attorney General, and *S. Creighton Waters*, Assistant Attorney General.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the right of a defendant in a capital case to inform the jury that, under the governing state law, he would not be eligible for parole in the event that the jury sentences him to life imprisonment. In *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), this Court held that where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel." *Ramdass* v. *Angelone*, 530 U. S. 156, 165 (2000) (plurality opinion) (describing *Simmons*' premise and plurality opinion). The case we now confront involves a death sentence returned by a jury instructed both that "life imprison-

**Sheri Lynn Johnson* and *John H. Blume* filed a brief for the Cornell Death Penalty Project as *amicus curiae.*

ment means until death of the offender," and that "[p]arole eligibility or ineligibility is not for your consideration." 340 S. C. 291, 297, 531 S. E. 2d 524, 527 (2000). It presents the question whether the South Carolina Supreme Court misread our precedent when it declared *Simmons* inapplicable to South Carolina's current sentencing scheme. We hold that South Carolina's Supreme Court incorrectly limited *Simmons* and therefore reverse that court's judgment.

I

In April 1997, in the course of an attempted robbery in Union County, South Carolina, then-18-year-old Wesley Aaron Shafer, Jr., shot and killed a convenience store cashier. A grand jury indicted Shafer on charges of murder, attempted armed robbery, and criminal conspiracy. App. 2–4. Prior to trial, the prosecutor notified Shafer that the State would seek the death penalty for the murder. App. 4–5. In that pursuit, the prosecutor further informed Shafer, the State would present evidence of Shafer's "prior bad acts," as well as his "propensity for [future] violence and unlawful conduct." App. 6, 8.

Under South Carolina law, juries in capital cases consider guilt and sentencing in separate proceedings. S. C. Code Ann. §§16–3–20(A), (B) (2000 Cum. Supp.). In the initial (guilt phase) proceeding, the jury found Shafer guilty on all three charges. Governing the sentencing proceeding, South Carolina law instructs: "[T]he jury . . . shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. . . . The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed." §16–3–20(B).

Under amendments effective January 1, 1996, South Carolina capital jurors face two questions at sentencing. They decide first whether the State has proved beyond a reasonable doubt the existence of any statutory aggravating circumstance. If the jury fails to agree unanimously on

the presence of a statutory aggravator, "it shall not make a sentencing recommendation." § 16–3–20(C). "[T]he trial judge," in that event, "shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years." *Ibid.;* see § 16–3–20(B). If, on the other hand, the jury unanimously finds a statutory aggravator, it then recommends one of two potential sentences—death or life imprisonment without the possibility of parole. §§ 16–3–20(A), (B). No sentencing option other than death or life without parole is available to the jury.

During the sentencing proceeding in Shafer's case, the State introduced evidence of his criminal record, past aggressive conduct, probation violations, and misbehavior in prison. The State urged the statutory aggravating circumstance that Shafer had committed the murder in the course of an attempted robbery while armed with a deadly weapon. See § 16–3–20(C)(a)(1)(d). The defense presented evidence of Shafer's abusive childhood and mental problems.

Near the completion of the parties' sentencing presentations, the trial judge conducted an *in camera* hearing on jury instructions. Shafer's counsel maintained that due process, and our decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), required the judge to instruct that under South Carolina law a life sentence carries no possibility of parole. The prosecutor, in opposition, urged that Shafer was not entitled to a *Simmons* instruction because "the State has not argued at any point . . . that he would be a danger to anybody in the future, nor will we argue [that] in our closing argument . . . ." App. 161. Shafer's counsel replied: "The State cannot introduce evidence of future dangerousness, and then say we are not going to argue it and [thereby avoid] a charge on the law. . . . They have introduced [evidence of a] post arrest assault, [and] post arrest violations of the rules of the jail . . . . If you put a jailer on to say that [Shafer] is charged with assault . . . on [the jailer], that is future dangerousness." App. 162. Ruling that "the matter of parole

ineligibility will not be charged," the trial judge stated: "I find that future dangerousness [was] not argued[;] if it's argued [in the prosecutor's closing], it may become different." App. 164.

Unsuccessful in his effort to gain a court instruction on parole ineligibility, Shafer's counsel sought permission to impart the information to the jury himself. He sought leave to read in his closing argument lines from the controlling statute, § 16–3–20(A), stating plainly that a life sentence in South Carolina carries no possibility of parole. App. 164–165.[1] In accord with the State's motion "to prevent the defense from arguing in their closing argument anything to the effect that [Shafer] will never get out of prison," App. 161, the judge denied the defense permission to read the statute's text to the jury. App. 165.

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[1] Section 16–3–20(A) reads: "A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. . . . When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection."

After the prosecution's closing argument, and out of the presence of the jury, Shafer's counsel renewed his plea for "a life without parole charge." App. 188. He referred to his earlier submissions and urged, in addition, that the State had placed future dangerousness at issue during closing argument by repeating the words of an alarmed witness at the crime scene: "[T]hey [Shafer and his two accomplices] might come back, they might come back." App. 188. The trial judge denied the request. The judge "admit[ted he] had some concern [as to whether the State's] argument . . . had crossed the line," but in the end he found "that it comes close, but did not." App. 191–192.

Instructing the jury, the judge explained:

> "If you do not unanimously find the existence of the aggravating circumstance as set forth on the form [murder during the commission of an attempted armed robbery], you do not need to go any further.
>
> "If you find unanimously the existence of a statutory aggravating circumstance . . . you will go further and continue your deliberations.
>
> "Once you have unanimously found and signed as to the presence of an aggravated circumstance, you then further deliberate, and determine whether or not Wesley Aaron Shafer should be sentence[d] to life imprisonment or death." App. 202.

The judge twice told the jury, quoting words from § 16–3–20(A), that "life imprisonment means until the death of the defendant." App. 201; see App. 209. In line with his prior rulings, the judge did not instruct that a life sentence, if recommended by the jury, would be without parole. In the concluding portion of his charge, he told the jury that "the sentence you send to me by way of a recommendation will in fact be the sentence that the court imposes on the defendant." App. 215. After the judge instructed the jury, the defense once more renewed its "objection to the statutory

language [on parole ineligibility] not being charged," App. 221, and the judge again overruled the objection, App. 222.

Three hours and twenty-five minutes into its sentencing deliberations, the jury sent a note to the trial judge containing two questions:

> "1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole?
>
> "2) Under what conditions would someone convicted for murder be elig[i]ble." App. 253.

Shafer's counsel urged the court to read to the jury the following portion of § 16–3–20(A):

> "If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . . and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, '*life imprisonment*' *means until death of the offender.* **No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.**" App. 226 (emphasis added).

He argued that the court's charge, which partially quoted from § 16–3–20 (above in italics), but omitted the provision's concluding sentence (above in boldface), had left the jurors confused about Shafer's parole eligibility. App. 226. The State adhered to its position that "the jury should not be informed as to any parole eligibility." App. 223. South Carolina law, the prosecutor insisted, required the judge to "instruct the jury that it shall not consider parole eligibility in reaching its decision, and that the term life imprisonment and a death sentence should be understood in their ordinary and plain meaning." App. 223–224.

The trial judge decided "not . . . to charge the jury about parole ineligibility," App. 229, and informed counsel that he would instruct:

> "Your consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16–3–20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration." App. 236.

Shafer's counsel asked the judge "to take off the language of parole eligibility." App. 236. The statement that "parole eligibility is not to be considered by [the jury]," counsel argued, "impl[ies] that it is available." App. 236; see App. 239 (Shafer's counsel reiterated: "[I]f you tell them they can't consider parole eligibility . . . that certainly implies that he may be eligible.").

Following counsels' arguments, and nearly an hour after the jury tendered its questions, the trial judge instructed:

> "Section 16–3–20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section life imprisonment means until the death of the offender, end quote.
>
> "Parole eligibility or ineligibility is not for your consideration." App. 240.

The jury returned some 80 minutes later. It unanimously found beyond a reasonable doubt the aggravating factor of murder while attempting armed robbery, and recommended the death penalty. App. 242–243. The jury was polled, and each member indicated his or her assent to the aggravated circumstance finding and to the death penalty recommendation. App. 243–248. Defense counsel asked that the jury be polled on "the specific question as to whether parole eligibility, their belief therein, gave rise to the verdict," and "whether juror number 233 who works for probation and pa-

role, expressed personal knowledge in the jury's deliberation outside of the evidence and the law given." App. 248. The judge denied both requests and imposed the death sentence. App. 248, 251.[2]

Shafer appealed his death sentence to the South Carolina Supreme Court. Noting our decision in *Simmons*, the South Carolina Supreme Court acknowledged that "[w]hen the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible." 340 S. C., at 297–298, 531 S. E. 2d, at 528. Without considering whether the prosecutor's evidentiary submissions or closing argument in fact placed Shafer's future dangerousness at issue, the court held *Simmons* generally inapplicable to South Carolina's "new sentencing scheme." Under that scheme, life without the possibility of parole and death are not the only authorized sentences, the court said, for there is a third potential sentence, "a mandatory minimum thirty year sentence." 340 S. C., at 298, 531 S. E. 2d, at 528 (citing *State* v. *Starnes*, 340 S. C. 312, 531 S. E. 2d 907 (2000) (decided the same day as *Shafer*)).[3]

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[2] The judge also sentenced Shafer to consecutive terms of 20 years in prison for the attempted armed robbery and 5 years in prison for the criminal conspiracy. App. 251–252.

[3] South Carolina's "new" sentencing scheme changed the punishments available for a capital murder conviction that did not result in a death sentence. The capital sentencing law in effect at the time we decided *Simmons* read: "A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt . . . , and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years." S. C. Code Ann. § 16–3–20(A) (Supp. 1993). What made Simmons parole ineligible was the provision stating: "The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for vio-

Shafer had urged that a *Simmons* instruction was warranted under the new sentencing scheme, for when the jury serves as sentencer, *i. e.*, when it finds a statutory aggravating circumstance, sentencing discretion is limited to death or life without the possibility of parole. See 340 S. C., at 298, 531 S. E. 2d, at 528. The South Carolina Supreme Court read *Simmons* differently. In its view, "*Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant." 340 S. C., at 298, 531 S. E. 2d, at 528 (emphasis in original) (citing *Simmons*, 512 U. S., at 178 (O'Connor, J., concurring in judgment)). "At the time [Shafer's] jury began its deliberations," the court observed, "three alternative sentences were available"; "[s]ince one of these alternatives to death was not life without the possibility of parole," the court concluded, "*Simmons* was inapplicable." 340 S. C., at 299, 531 S. E. 2d, at 528.

Chief Justice Finney dissented. "[T]he overriding principle to be drawn from *[Simmons]*," he stated, "is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected." *Id.*, at 310, 531 S. E. 2d, at 534. Due process mandates reversal here, he concluded, because "the jury's inquiry prompted a misleading response which suggested parole was a possibility." *Ibid.* Moreover, Chief Justice Finney added, when "a capital jury inquires about parole," *id.*, at 310, n. 2, 531 S. E. 2d, at 534, n. 2, even if the question "is simply one of policy, as the majority suggests [it is], then why not adopt a policy which gives the jurors the simpl[e] truth: no parole." *Id.*, at 311, 531 S. E. 2d, at 534.

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lent crimes . . . ." §24–21–640. This latter provision has not been amended; however, it did not apply to Shafer. Here, we consider whether South Carolina's wholesale elimination of parole for capital defendants sentenced to life in prison, see S. C. Code Ann. §16–3–20 (2000 Cum. Supp.), described *supra*, at 40–41, requires a *Simmons* instruction in all South Carolina capital cases in which future dangerousness is "at issue."

We granted certiorari, 530 U. S. 1306 (2000), to determine whether the South Carolina Supreme Court properly held *Simmons* inapplicable to the State's current sentencing regime. We conclude that South Carolina's Supreme Court misinterpreted *Simmons*, and we therefore reverse that court's judgment.

II

South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status.[4] We first confronted this practice in *Simmons*. The South Carolina sentencing scheme then in effect, S. C. Code Ann. §§ 16–3–20(A) and 24–21–610 (Supp. 1993), did not categorically preclude parole for capital defendants sentenced to life imprisonment, see *supra*, at 46–47, n. 3. Simmons, however, was parole ineligible under that scheme because of prior convictions for crimes of violence. See § 24–21–640; *Simmons*, 512 U. S., at 156 (plurality opinion); *id.*, at 176 (O'CONNOR, J., concurring in judgment). Simmons' jury, in a note to the judge during the penalty phase deliberations, asked: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.*, at 160 (plurality opinion). Over defense counsel's objection, the trial judge in *Simmons* instructed: "Do not consider parole or parole eligibility [in reaching your

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[4] At the time we decided *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), South Carolina was one of only three States—Pennsylvania and Virginia were the others—that "ha[d] a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse[d] to inform sentencing juries of th[at] fact." *Id.*, at 168, n. 8. Since *Simmons*, Virginia has abandoned this practice. *Yarbrough* v. *Commonwealth*, 258 Va. 347, 374, 519 S. E. 2d 602, 616 (1999) ("[W]e hold that in the penalty-determination phase of a trial where the defendant has been convicted of capital murder, in response to a proffer of a proper instruction from the defendant prior to submitting the issue of penalty-determination to the jury or where the defendant asks for such an instruction following an inquiry from the jury during deliberations, the trial court shall instruct the jury that the words 'imprisonment for life' mean 'imprisonment for life without possibility of parole.' ").

verdict]. That is not a proper issue for your consideration." *Ibid.* After receiving this response from the court, Simmons' jury returned a sentence of death, which Simmons unsuccessfully sought to overturn on appeal to the South Carolina Supreme Court. *Id.*, at 160–161.

Mindful of the "longstanding practice of parole availability," *id.*, at 177 (O'CONNOR, J.), we recognized that Simmons' jury, charged to chose between death and life imprisonment, may have been misled. Given no clear definition of "life imprisonment" and told not to consider parole eligibility, that jury "reasonably may have believed that [Simmons] could be released on parole if he were not executed." *Id.*, at 161 (plurality opinion); see *id.*, at 177–178 (O'CONNOR, J.). It did not comport with due process, we held, for the State to "secur[e] a death sentence on the ground, at least in part, of [defendant's] future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its [only] noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.*, at 162 (plurality opinion); see *id.*, at 178 (O'CONNOR, J.) ("Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.").

As earlier stated, see *supra*, at 46–47, the South Carolina Supreme Court held *Simmons* "inapplicable under the [State's] new sentencing scheme," 340 S. C., at 298, 531 S. E. 2d, at 528. *Simmons* is not triggered, the South Carolina court said, unless life without parole is "the only legally available sentence alternative to death." 340 S. C., at 298, 531 S. E. 2d, at 528. Currently, the court observed, when a capital case jury begins its sentencing deliberations, three alternative sentences are available: "1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence." *Ibid.* "Since one of these alternatives to

death [is] not life without the possibility of parole," the court concluded, *Simmons* no longer constrains capital sentencing in South Carolina. 340 S. C., at 299, 531 S. E. 2d, at 528.

This reasoning might be persuasive if the jury's sentencing discretion encompassed the three choices the South Carolina court identified. But, that is not how the State's new scheme works. See *supra,* at 40–41. Under the law now governing, in any case in which the jury does not unanimously find a statutory aggravator, death is not a permissible sentence and *Simmons* has no relevance. In such a case, the judge alone becomes the sentencer. S. C. Code Ann. § 16–3–20(C) (2000 Cum. Supp.). Only if the jury finds an aggravating circumstance does it decide on the sentence. *Ibid.* And when it makes that decision, as was the case in *Simmons,* only two sentences are legally available under South Carolina law: death or life without the possibility of parole. § 16–3–20(C).

The South Carolina Supreme Court was no doubt correct to this extent: At the time the trial judge instructed the jury in Shafer's case, it was indeed possible that Shafer would receive a sentence other than death or life without the possibility of parole. That is so because South Carolina, in line with other States, gives capital juries, at the penalty phase, discrete and sequential functions. Initially, capital juries serve as factfinders in determining whether an alleged aggravating circumstance exists. Once that factual threshold is passed, the jurors exercise discretion in determining the punishment that ought to be imposed. The trial judge in Shafer's case recognized the critical difference in the two functions. He charged that "[a] statutory aggravating circumstance is a fact, an incident, a detail or an occurrence," the existence of which must be found beyond a reasonable doubt. App. 203. Turning to the sentencing choice, he referred to considerations of "fairness and mercy," and the defendant's "moral culpability." App. 204. He also instructed

that the jury was free to decide "whether . . . for any reason or no reason at all Mr. Shafer should be sentenced to life imprisonment rather than to death." App. 203.

In sum, when the jury determines the existence of a statutory aggravator, a tightly circumscribed factual inquiry, none of *Simmons*' due process concerns arise. There are no "misunderstanding[s]" to avoid, no "false choice[s]" to guard against. See *Simmons*, 512 U. S., at 161 (plurality opinion). The jury, as aggravating circumstance factfinder, exercises no sentencing discretion itself. If no aggravator is found, the judge takes over and has sole authority to impose the mandatory minimum so heavily relied upon by the South Carolina Supreme Court. See *supra*, at 46–47, 49–50. It is only when the jury endeavors the moral judgment whether to impose the death penalty that parole eligibility may become critical. Correspondingly, it is only at that stage that *Simmons* comes into play, a stage at which South Carolina law provides no third choice, no 30-year mandatory minimum, just death or life without parole. See *Ramdass*, 530 U. S., at 169 (*Simmons* applies where "as a legal matter, there is no possibility of parole if the *jury* decides the appropriate sentence is life in prison." (emphasis added)).[5] We therefore hold that whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole.

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[5] Tellingly, the State acknowledged at oral argument that if future dangerousness was a factor, and the jury first reported finding an aggravator before going on to its sentencing recommendation, a *Simmons* charge would at that point be required. Tr. of Oral Arg. 32. We see no significant difference between that situation and the one presented here. Nor does JUSTICE THOMAS' dissent in this case plausibly urge any such distinction. See *post*, at 56–58. If the jurors should be told life means no parole in the hypothesized bifurcated sentencing proceeding, they should be equally well informed in the actual uninterrupted proceeding.

III

South Carolina offers two other grounds in support of the trial judge's refusal to give Shafer's requested parole ineligibility instruction. First, the State argues that the jury was properly informed of the law on parole ineligibility by the trial court's instructions and by defense counsel's own argument. Second, the State contends that no parole ineligibility instruction was required under *Simmons* because the State never argued Shafer would pose a future danger to society. We now turn to those arguments.

A

"Even if this Court finds *Simmons* was triggered," the State urges, "the defense's closing argument and the judge's charge fulfilled the requirements of *Simmons*." Brief for Respondent 38. To support that contention, the State sets out defense counsel's closing pleas that, if Shafer's life is spared, he will "*die in prison*" after "*spend[ing] his natural life there*." *Id.*, at 39. Next, the State recites passages from the trial judge's instructions reiterating that "life imprisonment means until the death of the defendant." *Id.*, at 40.

The South Carolina Supreme Court, we note, never suggested that counsel's arguments or the trial judge's instructions satisfied *Simmons*. That court simply held *Simmons* inapplicable under the State's new sentencing scheme. 340 S. C., at 298, 531 S. E. 2d, at 528. We do not find the State's position persuasive. Displacement of "the longstanding practice of parole availability" remains a relatively recent development, and "common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." *Simmons*, 512 U. S., at 177–178 (O'Connor, J.). South Carolina's situation is illustrative. Until two years before Shafer's trial, as we earlier noted, the State's law did not categorically preclude parole for capital

defendants sentenced to life imprisonment. See *supra*, at 46–47, n. 3, and 48.

Most plainly contradicting the State's contention, Shafer's jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means. The jurors sought further instruction, asking: "Is there any remote chance for someone convicted of murder to become elig[i]ble for parole?" App. 253; cf. *Simmons*, 512 U. S., at 178 (O'Connor, J.) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison").[6]

The jury's comprehension was hardly aided by the court's final instruction: "Parole eligibility or ineligibility is not for your consideration." App. 240. That instruction did nothing to ensure that the jury was not misled and may well have been taken to mean "that parole *was* available but that the jury, for some unstated reason, should be blind to this fact." *Simmons*, 512 U. S., at 170 (plurality opinion); see 340 S. C., at 310, 531 S. E. 2d, at 534 (Finney, C. J., dissenting) ("[T]he jury's inquiry prompted a misleading response which suggested parole was a possibility."); *State* v. *Kelly*, 343 S. C. 342, 375, 540 S. E. 2d 851, 863–864 (2001) (Pleicones, J., dissenting in part, concurring in part) ("Without the knowledge that, if aggravators are found, a life sentence is not subject to being reduced by parole, or any other method of early release, the jury is likely to speculate unnecessarily on the possibility of early release, and impose a sentence of death

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[6] Animating Justice Thomas' dissent is the conviction that the limited information defense counsel was allowed to convey and the judge's charge "left no room for speculation by the jury." *Post*, at 57. The full record scarcely supports, and we do not share, that conviction. Cf. 340 S. C. 291, 310–311, 531 S. E. 2d 524, 534 (2000) (Finney, C. J., dissenting) ("the jury's inquiry prompted a misleading response" that did not reveal the "simpl[e] truth").

based upon 'fear rather than reason.'" (quoting *Yarbrough* v. *Commonwealth*, 258 Va. 347, 369, 519 S. E. 2d 602, 613 (1999))).

In sum, a life sentence for Shafer would permit no "parole, community supervision, . . . early release program, . . . or any other credits that would reduce the mandatory life imprisonment," S. C. Code Ann. §16–3–20(A) (2000 Cum. Supp.) (set out *supra*, at 42, n. 1); this reality was not conveyed to Shafer's jury by the court's instructions or by the arguments defense counsel was allowed to make.

B

Ultimately, the State maintains that "[t]he prosecution did not argue future dangerousness," so the predicate for a *Simmons* charge is not present here. Brief for Respondent 42. That issue is not ripe for our resolution.

In the trial court, the prosecutor and defense counsel differed on what it takes to place future dangerousness "at issue." The prosecutor suggested that the State must formally *argue* future dangerousness. App. 161. Defense counsel urged that once the prosecutor *introduces evidence* showing future dangerousness, the State cannot avoid a *Simmons* charge by saying the point was not argued or calling the evidence by another name. See App. 161–162.

As earlier recounted, the trial judge determined that future dangerousness was not at issue, but acknowledged, at one point, that the prosecutor had come close to crossing the line. See *supra*, at 41–42, 43. The South Carolina Supreme Court, in order to rule broadly that *Simmons* no longer governs capital sentencing in the State, apparently assumed, *arguendo*, that future dangerousness had been shown at Shafer's sentencing proceeding. See *supra*, at 46–47; cf. *Kelly*, 343 S. C., at 363, 540 S. E. 2d, at 857 (recognizing that future dangerousness is an issue when it is "a logical inference from the evidence" or was "injected into the case through the State's closing argument"). Because the South

Carolina Supreme Court did not home in on the question whether the prosecutor's evidentiary submissions or closing argument in fact placed Shafer's future dangerousness at issue, we leave that question open for the state court's attention and disposition.

* * *

For the reasons stated, the judgment of the South Carolina Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, dissenting.

While I concede that today's judgment is a logical extension of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), I am more attached to the logic of the Constitution, whose Due Process Clause was understood as an embodiment of common-law tradition, rather than as authority for federal courts to promulgate wise national rules of criminal procedure.

As I pointed out in *Simmons*, that common-law tradition does not contain special jury-instruction requirements for capital cases. Today's decision is the second page of the "whole new chapter" of our improvised "'death-is-different' jurisprudence" that *Simmons* began. *Id.*, at 185 (SCALIA, J., dissenting). The third page (or the fourth or fifth) will be the (logical-enough) extension of this novel requirement to cases in which the jury did *not* inquire into the possibility of parole. Providing such information may well be a good idea (though it will sometimes harm rather than help the defendant's case)—and many States have indeed required it. See App. B to Brief for Petitioner. The Constitution, however, does not. I would limit *Simmons* to its facts.

JUSTICE THOMAS, dissenting.

For better or, as I believe, worse, the majority's decision in this case is the logical next step after *Simmons* v. *South*

Carolina, 512 U. S. 154 (1994). Now, whenever future dangerousness is placed at issue and the jury's potential sentencing choice is between life without parole and death, the trial court must instruct the jury on the impossibility of release even if there is an alternative sentence available to the court under which the defendant could be released. However, even accepting that sentencing courts in South Carolina must now permit the jury to learn about the impossibility of parole when life imprisonment is a sentencing possibility, I believe that the court's instructions and the arguments made by counsel in Shafer's case were sufficient to inform the jury of what "life imprisonment" meant for Shafer. I therefore respectfully dissent.

In *Simmons*, a majority of this Court was concerned that the jury in Simmons' trial reasonably could have believed that, if he were sentenced to life, he would be eligible for parole. See *id.*, at 161 (plurality opinion); *id.*, at 177–178 (O'CONNOR, J., concurring in judgment). Therefore, Simmons' defense to future dangerousness—that because he sexually assaulted only elderly women, he would pose no danger to fellow inmates, see *id.*, at 157 (plurality opinion)—would not have been effective. To correct the jury's possible misunderstanding of the availability of parole, Simmons requested several jury instructions, including one that would explain that, if he were sentenced to life imprisonment, "'he actually w[ould] be sentenced to imprisonment in the state penitentiary for the balance of his natural life.'" *Id.*, at 160. The trial court rejected this instruction and instead ambiguously informed the jury that the term life imprisonment is to be understood according to its "'plain and ordinary meaning,'" which did "nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment.'" *Id.*, at 169–170.

In this case, by contrast, the judge repeatedly explained that "life imprisonment means until the death of the defendant." App. 201. The judge defined "life imprisonment" as

"incarceration of the defendant until his death," *id.*, at 209, and informed the jury that, if it chose the punishment of life imprisonment, the verdict form would read " 'We, the jury . . . unanimously recommend that the defendant, Wesley Aaron Shafer, be imprisoned in the state penitentiary for the balance of his natural life.' " *Id.*, at 213–214. Emphasizing this very point, Shafer's counsel argued to the jury that Shafer would never leave prison if he received a life sentence. See *id.*, at 192 ("The question is will the State execute him or will he just die in prison"); *id.*, at 194 ("putting a 19 year old in prison until he is dead" and "you can put him some place until he is dead"); *id.*, at 198 ("When they say give [him] life, he's not going home. . . . I'm just asking for the smallest amount of mercy it takes to make a man, a child spend the rest of his life in prison").

Given these explanations of what life imprisonment means, which left no room for speculation by the jury, I can only infer that the jury's questions regarding parole referred not to Shafer's parole eligibility in the event the jury sentenced Shafer to life, but rather to his parole eligibility in the event it did not sentence him at all. In fact, both of the jury's questions referred only to parole eligibility of someone "convicted of murder," *id.*, at 239–240 (" '[I]s there any remote chance that someone convicted of murder could become eligible for parole' "); *id.*, at 240 (" '[U]nder what conditions would someone convicted for murder be eligible [for parole]' "), rather than parole eligibility of someone *sentenced to life imprisonment*. Under South Carolina law, if the jury does not find an aggravating circumstance, someone convicted of murder could be sentenced to a term of 30 years' imprisonment or greater. See S. C. Code Ann. § 16–3–20(C) (2000 Cum. Supp.). If the jury thought Shafer's release from prison was a possibility in the event the judge sentenced him, they would have been correct. To be sure, under South Carolina's sentencing scheme, the jury did not need to know what sentencing options were available to the judge in the

event the jury did not find an aggravating circumstance. But that is precisely why the trial court's answers were appropriate. It explained what "life" meant for purposes of the *jury*'s sentencing option, and then added that "[p]arole eligibility or ineligibility is not for your consideration." App. 240.

The majority appears to believe that it could develop jury instructions that are more precise than those offered to Shafer's jury. It may well be right. But it is not this Court's role to micromanage state sentencing proceedings or to develop model jury instructions. I would decline to interfere further with matters that the Constitution leaves to the States.

Syllabus

BUFORD *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 99–9073. Argued January 8, 2001—Decided March 20, 2001

The United States Sentencing Guidelines, as relevant here, define a career offender as one with at least two prior felony convictions for violent or drug-related crimes and provide that a sentencing judge must count as a single prior conviction all "related" convictions, advising that they are "related" when, *inter alia*, they were consolidated for sentencing. The Seventh Circuit has held that because two prior convictions might have been consolidated for sentencing, and hence related, even if a sentencing court did not enter a *formal* consolidation order, a court should decide whether such convictions were nonetheless functionally consolidated, meaning that they were factually or logically related and sentencing was joint. Petitioner Buford pleaded guilty to armed bank robbery. At sentencing, the Government conceded that her four prior robbery convictions were related, but did not concede that her prior drug conviction was related to the robberies. The District Court decided that the drug and robbery cases had not been consolidated, either formally or functionally, and the Seventh Circuit affirmed, reviewing the District Court's decision deferentially rather than *de novo*.

Held: Deferential review is appropriate when an appeals court reviews a trial court's Sentencing Guideline determination as to whether an offender's prior convictions were consolidated for sentencing. The relevant federal sentencing statute requires a reviewing court not only to "accept" a district court's "findings of fact" (unless "clearly erroneous"), but also to "give *due deference* to the court's application of the guidelines to the facts." 18 U. S. C. § 3742(e) (emphasis added). The "deference that is due depends on the nature of the question presented." *Koon* v. *United States*, 518 U. S. 81, 98. Although Buford argues that the nature of the question here—applying a Guideline term to undisputed facts—demands no deference at all, the district court is in a better position than the appellate court to decide whether individual circumstances demonstrate functional consolidation. Experience with trials, sentencing, and consolidation procedures will help a district judge draw the proper inferences from the procedural descriptions provided. In addition, factual nuance may closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details. And the decision's fact-bound nature limits the

value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances, state systems, and crimes. Insofar as greater uniformity is necessary, the Sentencing Commission can provide it. Pp. 63–66.

201 F. 3d 937, affirmed.

BREYER, J., delivered the opinion for a unanimous Court.

Dean A. Strang argued the cause for petitioner. With him on the briefs were *Brian P. Mullins* and *Robert A. Kagen.*

Paul R. Q. Wolfson argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, and *Deputy Solicitor General Dreeben.*

JUSTICE BREYER delivered the opinion of the Court.

This case raises a narrow question of sentencing law. What standard of review applies when a court of appeals reviews a trial court's Sentencing Guideline determination as to whether an offender's prior convictions were consolidated, hence "related," for purposes of sentencing? In particular, should the appeals court review the trial court's decision deferentially or *de novo?* We conclude, as did the Court of Appeals, that deferential review is appropriate, and we affirm.

I

A

The trial court decision at issue focused on one aspect of the United States Sentencing Guidelines' treatment of "career offenders," a category of offender subject to particularly severe punishment. The Guidelines define a "career offender" as an offender with "at least two prior felony convictions" for violent or drug-related crimes. United States Sentencing Commission, Guidelines Manual §4B1.1 (Nov. 2000) (USSG). At the same time, they provide that a sentencing judge must count as a single prior felony conviction

all those that are "related" to one another. USSG § 4B1.2(c), and comment., n. 3; § 4A1.2(a)(2). And they advise (in an application note) that prior convictions are "related" to one another when, *inter alia*, they "were consolidated for . . . sentencing." § 4A1.2, comment., n. 3.

The Seventh Circuit has refined this "prior conviction" doctrine yet further. It has held that two prior convictions might have been "consolidated for sentencing," and hence "related," even if the sentencing court did not enter any *formal* order of consolidation. See *United States* v. *Joseph*, 50 F. 3d 401, 404, cert. denied, 516 U. S. 847 (1995). In such an instance, the Circuit has said, a court should decide whether the convictions were nonetheless "*functionally* consolidated," which means that the convictions were "factually or logically related, and sentencing was joint." 201 F. 3d 937, 940 (2000) (emphasis added).

B

This case concerns "functional consolidation." Paula Buford pleaded guilty to armed bank robbery, a crime of violence, in federal court. The federal sentencing judge had to decide whether Buford's five 1992 Wisconsin state-court convictions were "related" to one another, and consequently counted as one single prior conviction, or whether they should count as more than one.

The Government conceded that four of the five prior convictions were "related" to one another. These four involved a series of gas station robberies. All four had been the subject of a single criminal indictment, and Buford had pleaded guilty to all four at the same time in the same court. See USSG § 4A1.2, comment., n. 3 (prior offenses are "related" if "consolidated for trial or sentencing").

The Government did not concede, however, that the fifth conviction, for a drug crime, was "related" to the other four. The drug crime (possession of, with intent to deliver, cocaine) had taken place about the same time as the fourth

robbery, and Buford claimed that the robberies had been motivated by her drug addiction. But the only evidentiary link among the crimes was that the police had discovered the cocaine when searching Buford's house after her arrest for the robberies. Moreover, no formal order of consolidation had been entered. The State had charged the drug offense in a separate indictment and had assigned a different prosecutor to handle the drug case. A different judge had heard Buford plead guilty to the drug charge in a different hearing held on a different date; two different state prosecutors had appeared before the sentencing court, one discussing drugs, the other discussing the robberies; and the sentencing court had entered two separate judgments.

Buford, without denying these facts, nonetheless pointed to other circumstances that, in her view, showed that the drug crime conviction had been "consolidated" with the robbery convictions for sentencing, rendering her drug conviction and robbery convictions "related." She pointed out that the State had sent the four robbery cases for sentencing to the very same judge who had heard and accepted her plea of guilty to the drug charge; that the judge had heard arguments about sentencing in all five cases at the same time in a single proceeding; that the judge had issued sentences for all five crimes at the same time; and that the judge, having imposed three sentences for the five crimes (6 years for the drug crime, 12 years for two robberies, and 15 years for the other two), had ordered all three to run concurrently.

The District Court, placing greater weight on the former circumstances than on the latter, decided that the drug case and the robbery cases had not been consolidated for sentencing, either formally or functionally. Buford appealed. The Court of Appeals found the "functional consolidation" question a close one, and wrote that "the standard of appellate review may be dispositive." 201 F. 3d, at 940. It decided to review the District Court's decision "deferentially" rather

than "*de novo*." *Id.*, at 942. And it affirmed that decision. *Ibid.*

Buford sought certiorari. In light of the different Circuits' different approaches to the problem, we granted the writ. Compare *United States* v. *Irons*, 196 F. 3d 634, 638 (CA6 1999) (relatedness decision reviewed for clear error); *United States* v. *Wiseman*, 172 F. 3d 1196, 1219 (CA10) (same), cert. denied, 528 U. S. 889 (1999); *United States* v. *Mapp*, 170 F. 3d 328, 338 (CA2) (same), cert. denied, 528 U. S. 901 (1999); *United States* v. *Maza*, 93 F. 3d 1390, 1400 (CA8 1996) (same), cert. denied, 519 U. S. 1138 (1997); *United States* v. *Mullens*, 65 F. 3d 1560, 1565 (CA11 1995), cert. denied, 517 U. S. 1112 (1996) (same), with *United States* v. *Garcia*, 962 F. 2d 479, 481 (CA5) (relatedness determination reviewed *de novo*), cert. denied, 506 U. S. 902 (1992); *United States* v. *Davis*, 922 F. 2d 1385, 1388 (CA9 1991) (same).

II

In arguing for *de novo* review, Buford points out that she has not contested any relevant underlying issue of fact. She disagrees only with the District Court's legal conclusion that a legal label—"functional consolidation"—failed to fit the undisputed facts. She concedes, as she must, that this circumstance does not dispose of the standard of review question. That is because the relevant federal sentencing statute requires a reviewing court not only to "accept" a district court's "findings of fact" (unless "clearly erroneous"), but also to "give *due deference* to the district court's application of the guidelines to the facts." 18 U. S. C. § 3742(e) (emphasis added). And that is the kind of determination—application of the Guidelines to the facts—that is at issue here. Hence the question we must answer is what kind of "deference" is "due." And, as we noted in *Koon* v. *United States*, 518 U. S. 81, 98 (1996), the "deference that is due depends on the nature of the question presented."

Buford argues that the nature of the question presented here—applying a Sentencing Guidelines term to undisputed facts—demands no deference at all. That is to say, the deference "due" is no deference; hence the Court of Appeals should have reviewed the trial court's decision *de novo.* Buford points out that, because the underlying facts are not in dispute, witness credibility is not important. She adds that *de novo* appellate review will help clarify and make meaningful the consolidation-related legal principles at issue. And she says that *de novo* review will help avoid inconsistent trial court determinations about consolidation, thereby furthering the Guidelines' effort to bring consistency to sentencing law.

Despite these arguments, we believe that the appellate court was right to review this trial court decision deferentially rather than *de novo.* In *Koon*, we based our selection of an abuse-of-discretion standard of review on the relative institutional advantages enjoyed by the district court in making the type of determination at issue. See *id.*, at 98–99; cf. *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985) (deference may depend on whether "one judicial actor is better positioned than another to decide the issue in question"). We concluded there that the special competence of the district court helped to make deferential review appropriate. And that is true here as well. That is to say, the district court is in a better position than the appellate court to decide whether a particular set of individual circumstances demonstrates "functional consolidation."

That is so because a district judge sees many more "consolidations" than does an appellate judge. As a trial judge, a district judge is likely to be more familiar with trial and sentencing practices in general, including consolidation procedures. And as a sentencing judge who must regularly review and classify defendants' criminal histories, a district judge is more likely to be aware of which procedures the relevant state or federal courts typically follow. Experience with trials, sentencing, and consolidations will help that

judge draw the proper inferences from the procedural descriptions provided.

In addition, factual nuance may closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details. See *Koon* v. *United States*, *supra*, at 98–99 (District Court's detailed understanding of the case before it and experience with other sentencing cases favored deferential review); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 403–404 (1990) (fact-intensive nature of decision whether to impose sanctions under Federal Rule of Civil Procedure 11 made deferential review appropriate); *Pierce* v. *Underwood*, 487 U. S. 552, 560 (1988) (District Court's familiarity with facts of case warranted deferential review of determination whether Government's legal position was "substantially justified"). In a case like this one, for example, under Seventh Circuit doctrine, the District Judge usefully might have considered the factual details of the crimes at issue in order to determine whether factual connections among those crimes, rather than, say, administrative convenience, led Wisconsin to sentence Buford simultaneously and concurrently for the robbery and drug offenses. See *United States* v. *Joseph*, 50 F. 3d, at 404; *United States* v. *Russell*, 2 F. 3d 200, 204 (CA7 1993).

Nor can we place determinative weight upon the heightened uniformity benefits that Buford contends will result from *de novo* review. The legal question at issue is a minor, detailed, interstitial question of sentencing law, buried in a judicial interpretation of an application note to a Sentencing Guideline. That question is not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual guideline, in order to determine their basic intent. Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances. And the

fact-bound nature of the decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances, other state systems, and other crimes. In any event, the Sentencing Commission itself gathers information on the sentences imposed by different courts, it views the sentencing process as a whole, it has developed a broad perspective on sentencing practices throughout the Nation, and it can, by adjusting the Guidelines or the application notes, produce more consistent sentencing results among similarly situated offenders sentenced by different courts. Insofar as greater uniformity is necessary, the Commission can provide it. Cf. *Braxton* v. *United States*, 500 U. S. 344, 347–348 (1991) (Congress intended Sentencing Commission to play primary role in resolving conflicts over interpretation of Guidelines).

III

In light of the fact-bound nature of the legal decision, the comparatively greater expertise of the District Court, and the limited value of uniform court of appeals precedent, we conclude that the Court of Appeals properly reviewed the District Court's "functional consolidation" decision deferentially. The judgment of the Court of Appeals is

Affirmed.

Syllabus

FERGUSON ET AL. *v.* CITY OF CHARLESTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99–936. Argued October 4, 2000—Decided March 21, 2001

In the fall of 1988, staff members at the Charleston public hospital operated by the Medical University of South Carolina (MUSC) became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment. When the incidence of cocaine use among maternity patients remained unchanged despite referrals for counseling and treatment of patients who tested positive for that drug, MUSC staff offered to cooperate with the city in prosecuting mothers whose children tested positive for drugs at birth. Accordingly, a task force made up of MUSC representatives, police, and local officials developed a policy which set forth procedures for identifying and testing pregnant patients suspected of drug use; required that a chain of custody be followed when obtaining and testing patients' urine samples; provided for education and treatment referral for patients testing positive; contained police procedures and criteria for arresting patients who tested positive; and prescribed prosecutions for drug offenses and/or child neglect, depending on the stage of the defendant's pregnancy. Other than the provisions describing the substance abuse treatment to be offered women testing positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns. Petitioners, MUSC obstetrical patients arrested after testing positive for cocaine, filed this suit challenging the policy's validity on, *inter alia*, the theory that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches. Among its actions, the District Court instructed the jury to find for petitioners unless they had consented to such searches. The jury found for respondents, and petitioners appealed, arguing that the evidence was not sufficient to support the jury's consent finding. In affirming without reaching the consent question, the Fourth Circuit held that the searches in question were reasonable as a matter of law under this Court's cases recognizing that "special needs" may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends.

Held: A state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure.

Syllabus

The interest in using the threat of criminal sanctions to deter pregnant women from using cocaine cannot justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant. Pp. 76–86.

(a) Because MUSC is a state hospital, its staff members are government actors subject to the Fourth Amendment's strictures. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 335–337. Moreover, the urine tests at issue were indisputably searches within that Amendment's meaning. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 617. Furthermore, both lower courts viewed the case as one involving MUSC's right to conduct searches without warrants or probable cause, and this Court must assume for purposes of decision that the tests were performed without the patients' informed consent. Pp. 76–77.

(b) Because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to police without the patients' knowledge or consent, this case differs from the four previous cases in which the Court considered whether comparable drug tests fit within the closely guarded category of constitutionally permissible suspicionless searches. See *Chandler* v. *Miller*, 520 U. S. 305, 309; see also *Skinner*, *Treasury Employees* v. *Von Raab*, 489 U. S. 656, and *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646. Those cases employed a balancing test weighing the intrusion on the individual's privacy interest against the "special needs" that supported the program. The invasion of privacy here is far more substantial than in those cases. In previous cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties. Moreover, those cases involved disqualification from eligibility for particular benefits, not the unauthorized dissemination of test results. The critical difference, however, lies in the nature of the "special need" asserted. In each of the prior cases, the "special need" was one divorced from the State's general law enforcement interest. Here, the policy's central and indispensable feature from its inception was the use of law enforcement to coerce patients into substance abuse treatment. Respondents' assertion that their ultimate purpose—namely, protecting the health of both mother and child—is a beneficent one is unavailing. While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal. Given that purpose and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs." The fact that positive test results were turned over to the

police does not merely provide a basis for distinguishing prior "special needs" cases. It also provides an affirmative reason for enforcing the Fourth Amendment's strictures. While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require. Cf. *Miranda* v. *Arizona,* 384 U. S. 436. Pp. 77–86.

186 F. 3d 469, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post,* p. 86. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined as to Part II, *post,* p. 91.

Priscilla J. Smith argued the cause for petitioners. With her on the briefs were *Simon Heller*, *Lynn Paltrow*, *Susan Frietsche*, *David S. Cohen*, *Susan Dunn*, *David Rudovsky*, and *Seth Kreimer.*

Robert H. Hood argued the cause for respondents. With him on the brief were *Barbara Wynne Showers* and *Mary Agnes Hood Craig.**

JUSTICE STEVENS delivered the opinion of the Court.

In this case, we must decide whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Julie E. Sternberg*, *Steven R. Shapiro*, *Sara L. Mandelbaum*, *Catherine Weiss*, *Louise Melling*, *Louis M. Bograd*, *Martha F. Davis*, *Yolanda S. Wu*, and *Roslyn Powell;* for the American Medical Association by *Michael Ile*, *Anne Murphy*, and *Leonard Nelson;* for the American Public Health Association et al. by *Daniel N. Abrahamson* and *David T. Goldberg;* for the NARAL Foundation et al. by *Nancy L. Perkins* and *Jodi Michael;* for the National Coalition for Child Protection Reform et al. by *Carolyn A. Kubitschek;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.

I

In the fall of 1988, staff members at the public hospital operated in the city of Charleston by the Medical University of South Carolina (MUSC) became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment.[1] In response to this perceived increase, as of April 1989, MUSC began to order drug screens to be performed on urine samples from maternity patients who were suspected of using cocaine. If a patient tested positive, she was then referred by MUSC staff to the county substance abuse commission for counseling and treatment. However, despite the referrals, the incidence of cocaine use among the patients at MUSC did not appear to change.

Some four months later, Nurse Shirley Brown, the case manager for the MUSC obstetrics department, heard a news broadcast reporting that the police in Greenville, South Carolina, were arresting pregnant users of cocaine on the theory that such use harmed the fetus and was therefore child abuse.[2] Nurse Brown discussed the story with MUSC's general counsel, Joseph C. Good, Jr., who then contacted

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[1] As several witnesses testified at trial, the problem of "crack babies" was widely perceived in the late 1980's as a national epidemic, prompting considerable concern both in the medical community and among the general populace.

[2] Under South Carolina law, a viable fetus has historically been regarded as a person; in 1995, the South Carolina Supreme Court held that the ingestion of cocaine during the third trimester of pregnancy constitutes criminal child neglect. *Whitner* v. *South Carolina*, 328 S. C. 1, 492 S. E. 2d 777 (1995), cert. denied, 523 U. S. 1145 (1998).

Charleston Solicitor Charles Condon in order to offer MUSC's cooperation in prosecuting mothers whose children tested positive for drugs at birth.[3]

After receiving Good's letter, Solicitor Condon took the first steps in developing the policy at issue in this case. He organized the initial meetings, decided who would participate, and issued the invitations, in which he described his plan to prosecute women who tested positive for cocaine while pregnant. The task force that Condon formed included representatives of MUSC, the police, the County Substance Abuse Commission and the Department of Social Services. Their deliberations led to MUSC's adoption of a 12-page document entitled "POLICY M–7," dealing with the subject of "Management of Drug Abuse During Pregnancy." App. to Pet. for Cert. A–53.

The first three pages of Policy M–7 set forth the procedure to be followed by the hospital staff to "identify/assist pregnant patients suspected of drug abuse." *Id.*, at A–53 to A–56. The first section, entitled the "Identification of Drug Abusers," provided that a patient should be tested for cocaine through a urine drug screen if she met one or more of nine criteria.[4] It also stated that a chain of custody should

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[3] In his letter dated August 23, 1989, Good wrote: "Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter." App. to Pet. for Cert. A–67.

[4] Those criteria were as follows:

"1. No prenatal care

"2. Late prenatal care after 24 weeks gestation

"3. Incomplete prenatal care

"4. Abruptio placentae

"5. Intrauterine fetal death

"6. Preterm labor 'of no obvious cause'

"7. IUGR [intrauterine growth retardation] 'of no obvious cause'

"8. Previously known drug or alcohol abuse

"9. Unexplained congenital anomalies." *Id.*, at A–53 to A–54.

be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings. The policy also provided for education and referral to a substance abuse clinic for patients who tested positive. Most important, it added the threat of law enforcement intervention that "provided the necessary 'leverage' to make the [p]olicy effective." Brief for Respondents 8. That threat was, as respondents candidly acknowledge, essential to the program's success in getting women into treatment and keeping them there.

The threat of law enforcement involvement was set forth in two protocols, the first dealing with the identification of drug use during pregnancy, and the second with identification of drug use after labor. Under the latter protocol, the police were to be notified without delay and the patient promptly arrested. Under the former, after the initial positive drug test, the police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor.[5] In 1990, however, the policy was modified at the behest of the solicitor's office to give the patient who tested positive during labor, like the patient who tested positive during a prenatal care visit, an opportunity to avoid arrest by consenting to substance abuse treatment.

The last six pages of the policy contained forms for the patients to sign, as well as procedures for the police to follow when a patient was arrested. The policy also prescribed in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy. If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18—in this case, the fetus. If she

[5] Despite the conditional description of the first category, when the policy was in its initial stages, a positive test was immediately reported to the police, who then promptly arrested the patient.

delivered "while testing positive for illegal drugs," she was also to be charged with unlawful neglect of a child. App. to Pet. for Cert. A–62. Under the policy, the police were instructed to interrogate the arrestee in order "to ascertain the identity of the subject who provided illegal drugs to the suspect." *Id.*, at A–63. Other than the provisions describing the substance abuse treatment to be offered to women who tested positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns.

II

Petitioners are 10 women who received obstetrical care at MUSC and who were arrested after testing positive for cocaine. Four of them were arrested during the initial implementation of the policy; they were not offered the opportunity to receive drug treatment as an alternative to arrest. The others were arrested after the policy was modified in 1990; they either failed to comply with the terms of the drug treatment program or tested positive for a second time. Respondents include the city of Charleston, law enforcement officials who helped develop and enforce the policy, and representatives of MUSC.

Petitioners' complaint challenged the validity of the policy under various theories, including the claim that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches. Respondents advanced two principal defenses to the constitutional claim: (1) that, as a matter of fact, petitioners had consented to the searches; and (2) that, as a matter of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes. The District Court rejected the second defense because the searches in question "were not done by the medical university for independent purposes. [Instead,] the police came in and there was an agreement reached that the positive

screens would be shared with the police." App. 1248–1249. Accordingly, the District Court submitted the factual defense to the jury with instructions that required a verdict in favor of petitioners unless the jury found consent.[6] The jury found for respondents.

Petitioners appealed, arguing that the evidence was not sufficient to support the jury's consent finding. The Court of Appeals for the Fourth Circuit affirmed, but without reaching the question of consent. 186 F. 3d 469 (1999). Disagreeing with the District Court, the majority of the appellate panel held that the searches were reasonable as a matter of law under our line of cases recognizing that "special needs" may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends.[7]

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[6] The instructions read: "THERE WERE NO SEARCH WARRANTS ISSUED BY A MAGISTRATE OR ANY OTHER PROPER JUDICIAL OFFICER TO PERMIT THESE URINE SCREENS TO BE TAKEN. THERE NOT BEING A WARRANT ISSUED, THEY ARE UNREASONABLE AND IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, UNLESS THE DEFENDANTS HAVE SHOWN BY THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFFS CONSENTED TO THOSE SEARCHES." App. 1314–1315. Under the judge's instructions, in order to find that the plaintiffs had consented to the searches, it was necessary for the jury to find that they had consented to the taking of the samples, to the testing for evidence of cocaine, and to the possible disclosure of the test results to the police. Respondents have not argued, as JUSTICE SCALIA does, that it is permissible for members of the staff of a public hospital to use diagnostic tests "deceivingly" to obtain incriminating evidence from their patients. See *post*, at 94 (dissenting opinion).

[7] The term "special needs" first appeared in Justice Blackmun's opinion concurring in the judgment in *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (1985). In his concurrence, Justice Blackmun agreed with the Court that there are limited exceptions to the probable-cause requirement, in which reasonableness is determined by "a careful balancing of governmental and private interests," but concluded that such a test should only be applied "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ." *Ibid.* This Court subsequently

On the understanding "that MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts,"[8] *id.*, at 477, the majority applied the balancing test used in *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989), and *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995), and concluded that the interest in curtailing the pregnancy complications and medical costs associated with maternal cocaine use outweighed what the majority termed a minimal intrusion on the privacy of the patients. In dissent, Judge Blake concluded that the "special needs" doctrine should not apply and

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adopted the "special needs" terminology in *O'Connor* v. *Ortega*, 480 U. S. 709, 720 (1987) (plurality opinion), and *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987), concluding that, in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when "special needs" other than the normal need for law enforcement provide sufficient justification. See also *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653 (1995).

[8] The majority stated that the District Court had made such a finding. 186 F. 3d, at 477. The text of the relevant finding, made in the context of petitioners' now abandoned Title VI claim, reads as follows: "The policy was applied in all maternity departments at MUSC. Its goal was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child." App. to Pet. for Cert. A–38. That finding, however, must be read in light of this comment by the District Court with respect to the Fourth Amendment claim:

". . . THESE SEARCHES WERE NOT DONE BY THE MEDICAL UNIVERSITY FOR INDEPENDENT PURPOSES. IF THEY HAD BEEN, THEN THEY WOULD NOT IMPLICATE THE FOURTH AMENDMENT. OBVIOUSLY AS I POINT OUT THERE ON PAGE 4, NORMALLY URINE SCREENS AND BLOOD TESTS AND THAT TYPE OF THING CAN BE TAKEN BY HEALTH CARE PROVIDERS WITHOUT HAVING TO WORRY ABOUT THE FOURTH AMENDMENT. THE ONLY REASON THE FOURTH AMENDMENT IS IMPLICATED HERE IS THAT THE POLICE CAME IN AND THERE WAS AN AGREEMENT REACHED THAT THE POSITIVE SCREENS WOULD BE SHARED WITH THE POLICE. AND THEN THE SCREEN IS NOT DONE INDEPENDENT OF POLICE, IT'S DONE IN CONJUNCTION WITH THE POLICE AND THAT IMPLICATES THE FOURTH AMENDMENT." App. 1248–1249.

that the evidence of consent was insufficient to sustain the jury's verdict. 186 F. 3d, at 487–488.

We granted certiorari, 528 U. S. 1187 (2000), to review the appellate court's holding on the "special needs" issue. Because we do not reach the question of the sufficiency of the evidence with respect to consent, we necessarily assume for purposes of our decision—as did the Court of Appeals—that the searches were conducted without the informed consent of the patients. We conclude that the judgment should be reversed and the case remanded for a decision on the consent issue.

III

Because MUSC is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 335–337 (1985). Moreover, the urine tests conducted by those staff members were indisputably searches within the meaning of the Fourth Amendment. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 617 (1989).[9] Neither the District Court nor the Court of Appeals concluded that any of the nine criteria used to identify the women to be searched provided either probable cause to believe that they were using cocaine, or even the basis for a reasonable suspicion of such use. Rather, the District Court and the Court of Appeals viewed the case as one involving MUSC's right

[9] In arguing that the urine tests at issue were not searches, the dissent attempts to disaggregate the taking and testing of the urine sample from the reporting of the results to the police. See *post*, at 92. However, in our special needs cases, we have routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment even though the results were not reported to the police, see, *e. g.*, *Chandler* v. *Miller*, 520 U. S. 305 (1997); *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 617 (1989); *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989), and respondents here do not contend that the tests were not searches. Rather, they argue that the searches were justified by consent and/or by special needs.

to conduct searches without warrants or probable cause.[10] Furthermore, given the posture in which the case comes to us, we must assume for purposes of our decision that the tests were performed without the informed consent of the patients.[11]

Because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients, this case differs from the four previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches." *Chandler* v. *Miller*, 520 U. S. 305, 309 (1997). In three of those cases, we sustained drug tests for railway employees involved in train accidents, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989), for United States Customs Service employees seeking promotion to certain sensitive positions, *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989), and for high school students participating in interscholastic sports, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995). In the fourth case, we struck down such testing for candidates for designated state offices as unreasonable. *Chandler* v. *Miller*, 520 U. S. 305 (1997).

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[10] In a footnote to their brief, respondents do argue that the searches were not entirely suspicionless. Brief for Respondents 23, n. 13. They do not, however, point to any evidence in the record indicating that any of the nine search criteria was more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency. More significantly, their legal argument and the reasoning of the majority panel opinion rest on the premise that the policy would be valid even if the tests were conducted randomly.

[11] The dissent would have us do otherwise and resolve the issue of consent in favor of respondents. Because the Court of Appeals did not discuss this issue, we think it more prudent to allow that court to resolve the legal and factual issues in the first instance, and we express no view on those issues. See, *e. g.*, *Glover* v. *United States*, 531 U. S. 198 (2001); *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999).

In each of those cases, we employed a balancing test that weighed the intrusion on the individual's interest in privacy against the "special needs" that supported the program. As an initial matter, we note that the invasion of privacy in this case is far more substantial than in those cases. In the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.[12] The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties. The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. See Brief for American Medical Association as *Amicus Curiae* 11; Brief for American Public Health Association et al. as *Amici Curiae* 6, 17–19.[13] In none of our prior cases was there any intrusion upon that kind of expectation.[14]

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[12] *Chandler*, 520 U. S., at 312, 318; *Acton*, 515 U. S., at 658; *Skinner*, 489 U. S., at 621, n. 5, 622, n. 6; *Von Raab*, 489 U. S., at 663, 666–667, 672, n. 2.

[13] There are some circumstances in which state hospital employees, like other citizens, may have a duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment, see, *e. g.*, S. C. Code Ann. § 20–7–510 (2000) (physicians and nurses required to report to child welfare agency or law enforcement authority "when in the person's professional capacity the person" receives information that a child has been abused or neglected). While the existence of such laws might lead a patient to expect that members of the hospital staff might turn over evidence acquired in the course of treatment to which the patient had consented, they surely would not lead a patient to anticipate that hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes.

[14] In fact, we have previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from

The critical difference between those four drug-testing cases and this one, however, lies in the nature of the "special need" asserted as justification for the warrantless searches. In each of those earlier cases, the "special need" that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement.[15] This point was em-

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receiving needed medical care. *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977). Cf. Poland, Dombrowski, Ager, & Sokol, Punishing pregnant drug users: enhancing the flight from care, 31 Drug and Alcohol Dependence 199–203 (1993).

[15] As The Chief Justice recently noted: "The 'special needs' doctrine, which has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing." *Indianapolis* v. *Edmond*, 531 U. S. 32, 54 (2000) (dissenting opinion); see also nn. 16–17, *infra*. In *T. L. O.*, we made a point of distinguishing searches "carried out by school authorities acting alone and on their own authority" from those conducted "in conjunction with or at the behest of law enforcement agencies." 469 U. S., at 341, n. 7.

The dissent, however, relying on *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), argues that the special needs doctrine "is ordinarily employe[d], precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective." *Post*, at 100. Viewed in the context of our special needs case law and even viewed in isolation, *Griffin* does not support the proposition for which the dissent invokes it. In other special needs cases, we have tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement. See *Skinner*, 489 U. S., at 620–621; *Von Raab*, 489 U. S., at 665–666; *Acton*, 515 U. S., at 658. Moreover, *after* our decision in *Griffin*, we reserved the question whether "routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program." *Skinner*, 489 U. S., at 621, n. 5. In *Griffin* itself, this Court noted that "[a]lthough a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen." 483 U. S., at 876. Finally, we agree with petitioners

phasized both in the majority opinions sustaining the programs in the first three cases,[16] as well as in the dissent in the *Chandler* case.[17] In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the

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that *Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large. *Id.*, at 874–875.

[16] In *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989), this Court noted that "[t]he FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" *Id.*, at 620–621 (quoting 49 CFR § 219.1(a) (1987)). Similarly, in *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989), we concluded that it was "clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent." *Id.*, at 665–666. In the same vein, in *Acton*, 515 U. S., at 658, we relied in part on the fact that "the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function" in finding the searches reasonable.

[17] "Today's opinion speaks of a 'closely guarded' class of permissible suspicionless searches which must be justified by a 'special need.' But this term, as used in *Skinner* and *Von Raab* and on which the Court now relies, was used in a quite different sense than it is used by the Court today. In *Skinner* and *Von Raab* it was used to describe a basis for a search apart from the regular needs of law enforcement, *Skinner*, [489 U. S.], at 620; *Von Raab*, [489 U. S.], at 669. The 'special needs' inquiry as delineated there has not required especially great 'importan[ce],' [520 U. S.], at 318, unless one considers 'the supervision of probationers,' or the 'operation of a government office,' *Skinner*, *supra*, at 620, to be especially 'important.' Under our precedents, if there was a proper governmental purpose other than law enforcement, there was a 'special need,' and the Fourth Amendment then required the familiar balancing between that interest and the individual's privacy interest." *Chandler* v. *Miller*, 520 U. S., at 325 (REHNQUIST, C. J., dissenting).

course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here. See, *e. g.*, Council on Ethical and Judicial Affairs, American Medical Association, Policy-Finder, Current Opinions E–5.05 (2000) (requiring reporting where "a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat"); Ark. Code Ann. § 12–12–602 (1999) (requiring reporting of intentionally inflicted knife or gunshot wounds); Ariz. Rev. Stat. Ann. § 13–3620 (Supp. 2000) (requiring "any . . . person having responsibility for the care or treatment of children" to report suspected abuse or neglect to a peace officer or child protection agency).[18]

Respondents argue in essence that their ultimate purpose—namely, protecting the health of both mother and child—is a beneficent one. In *Chandler*, however, we did not simply accept the State's invocation of a "special need." Instead, we carried out a "close review" of the scheme at issue before concluding that the need in question was not "special," as that term has been defined in our cases. 520 U. S., at 322. In this case, a review of the M–7 policy plainly reveals that the purpose actually served by the MUSC searches "is ultimately indistinguishable from the general interest in crime control." *Indianapolis* v. *Edmond*, 531 U. S. 32, 44 (2000).

In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose. See, *e. g.*, *id.*, at 45–47. In this case, as

[18] Our emphasis on this distinction should make it clear that, contrary to the hyperbole in the dissent, we do not view these reporting requirements as "clearly bad." See *post*, at 95–96, n. 3. Those requirements are simply not in issue here.

Judge Blake put it in her dissent below, "it . . . is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers . . . ." 186 F. 3d, at 484. Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Nowhere, however, does the document discuss different courses of medical treatment for either mother or infant, aside from treatment for the mother's addiction.

Moreover, throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy. Police and prosecutors decided who would receive the reports of positive drug screens and what information would be included with those reports. App. 78–80, 145–146, 1058–1060. Law enforcement officials also helped determine the procedures to be followed when performing the screens.[19] *Id.*, at 1052–1053. See also *id.*, at 26–27, 945. In the course of the policy's administration, they had access to Nurse Brown's medical files on the women who tested positive, routinely attended the substance abuse team's meetings, and regularly received copies of team documents discussing the women's progress. *Id.*, at 122–124, 609–610. Police took pains to coordinate the timing and circumstances of the arrests with MUSC staff, and, in particular, Nurse Brown. *Id.*, at 1057–1058.

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment

[19] Accordingly, the police organized a meeting with the staff of the police and hospital laboratory staffs, as well as Nurse Brown, in which the police went over the concept of a chain of custody system with the MUSC staff. App. 1052–1053.

and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes*[20] in order to reach that goal.[21] The threat of law enforcement

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[20] We italicize those words lest our reasoning be misunderstood. See *post*, at 86–88 (KENNEDY, J., concurring in judgment). In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes. Our essential point is the same as JUSTICE KENNEDY's—the extensive entanglement of law enforcement cannot be justified by reference to legitimate needs.

According to the dissent, the fact that MUSC performed tests prior to the development of Policy M–7 should immunize any subsequent testing policy despite the presence of a law enforcement purpose and extensive law enforcement involvement. See *post*, at 98–100. To say that any therapeutic purpose did not disappear is simply to miss the point. What matters is that under the new policy developed by the solicitor's office and MUSC, law enforcement involvement was the means by which that therapeutic purpose was to be met. Policy M–7 was, at its core, predicated on the use of law enforcement. The extensive involvement of law enforcement and the threat of prosecution were, as respondents admitted, essential to the program's success.

[21] Accordingly, this case differs from *New York* v. *Burger*, 482 U. S. 691 (1987), in which the Court upheld a scheme in which police officers were used to carry out administrative inspections of vehicle dismantling businesses. That case involved an industry in which the expectation of privacy in commercial premises was "particularly attenuated" given the extent to which the industry in question was closely regulated. *Id.*, at 700. More important for our purposes, the Court relied on the "plain administrative purposes" of the scheme to reject the contention that the statute was in fact "designed to gather evidence to enable convictions under the penal laws . . . ." *Id.*, at 715. The discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search. In contrast, in this case, the policy was specifically designed to gather evidence of violations of penal laws.

This case also differs from the handful of seizure cases in which we have applied a balancing test to determine Fourth Amendment reasonableness. See, *e. g.*, *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 455 (1990); *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976). First, those cases involved roadblock seizures, rather than "the intrusive search of the body or the home." See *Indianapolis* v. *Edmond*, 531 U. S., at 54–55 (REHNQUIST, C. J., dissenting); *Martinez-Fuerte*, 428 U. S., at 561 ("[W]e deal

may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.[22] Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."[23]

The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the "special needs" balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. While state hospital employees, like other citizens, may have a duty to provide the police with evidence

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neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection"). Second, the Court explicitly distinguished the cases dealing with checkpoints from those dealing with "special needs." *Sitz*, 496 U. S., at 450.

[22] Thus, under respondents' approach, any search to generate evidence for use by the police in enforcing general criminal laws would be justified by reference to the broad social benefits that those laws might bring about (or, put another way, the social harms that they might prevent).

[23] It is especially difficult to argue that the program here was designed simply to save lives. *Amici* claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health. See Brief for American Medical Association as *Amicus Curiae* 6–22; Brief for American Public Health Association et al. as *Amici Curiae* 17–21; Brief for NARAL Foundation et al. as *Amici Curiae* 18–19.

of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.[24] Cf. *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

As respondents have repeatedly insisted, their motive was benign rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy. The stark

[24] In fact, some MUSC staff made this distinction themselves. See Pl. Exh. No. 14, Hulsey, 11–17–89, Coke Committee, 1–2 ("The use of medically indicated tests for substance abuse, obtained in conventional manners, must be distinguished from mandatory screening and collection of evidence using such methods as chain of custody, etc. . . . The question is raised as to whether pediatricians should function as law enforcement officials. While the reporting of criminal activity to appropriate authorities may be required and/or ethically just, the active pursuit of evidence to be used against individuals presenting for medical care may not be proper").

The dissent, however, mischaracterizes our opinion as holding that "material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain." *Post*, at 95. But, as we have noted elsewhere, given the posture of the case, we must assume for purposes of decision that the patients did *not* consent to the searches, and we leave the question of consent for the Court of Appeals to determine. See n. 11, *supra*.

The dissent further argues that our holding "leaves law enforcement officials entirely in the dark as to when they can use incriminating evidence obtained from 'trusted' sources." See *post*, at 95. With all due respect, we disagree. We do not address a case in which doctors independently complied with reporting requirements. Rather, as we point out above, in this case, medical personnel used the criteria set out in n. 4, *supra*, to collect evidence for law enforcement purposes, and law enforcement officers were extensively involved in the initiation, design, and implementation of the program. In such circumstances, the Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches applies in the absence of consent. We decline to accept the dissent's invitation to make a foray into dicta and address other situations not before us.

and unique fact that characterizes this case is that Policy M–7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions. While respondents are correct that drug abuse both was and is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Indianapolis* v. *Edmond*, 531 U. S., at 42–43. The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy. See, *e. g.*, *Chandler*, 520 U. S., at 308; *Skinner*, 489 U. S., at 619.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

I agree that the search procedure in issue cannot be sustained under the Fourth Amendment. My reasons for this conclusion differ somewhat from those set forth by the Court, however, leading to this separate opinion.

I

The Court does not dispute that the search policy at some level serves special needs, beyond those of ordinary law enforcement, such as the need to protect the health of mother and child when a pregnant mother uses cocaine. Instead, the majority characterizes these special needs as the "ultimate goal[s]" of the policy, as distinguished from the policy's "immediate purpose," the collection of evidence of drug use, which, the Court reasons, is the appropriate inquiry for the special needs analysis. *Ante*, at 81–84.

The majority views its distinction between the ultimate goal and immediate purpose of the policy as critical to its

analysis. *Ante,* at 83–84. The distinction the Court makes, however, lacks foundation in our special needs cases. All of our special needs cases have turned upon what the majority terms the policy's ultimate goal. For example, in *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989), had we employed the majority's distinction, we would have identified as the relevant need the collection of evidence of drug and alcohol use by railway employees. Instead, we identified the relevant need as "[t]he Government's interest in regulating the conduct of railroad employees to ensure [railroad] safety." *Id.,* at 620. In *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989), the majority's distinction should have compelled us to isolate the relevant need as the gathering of evidence of drug abuse by would-be drug interdiction officers. Instead, the special needs the Court identified were the necessities "to deter drug use among those eligible for promotion to sensitive positions within the [United States Customs] Service and to prevent the promotion of drug users to those positions." *Id.*, at 666. In *Vernonia School Dist. 47J* v. *Acton,* 515 U. S. 646 (1995), the majority's distinction would have required us to identify the immediate purpose of gathering evidence of drug use by student-athletes as the relevant "need" for purposes of the special needs analysis. Instead, we sustained the policy as furthering what today's majority would have termed the policy's ultimate goal: "[d]eterring drug use by our Nation's schoolchildren," and particularly by student-athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Id.*, at 661–662.

It is unsurprising that in our prior cases we have concentrated on what the majority terms a policy's ultimate goal, rather than its proximate purpose. By very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence. The circumstance that a particular search, like all searches, is designed to collect evidence

of some sort reveals nothing about the need it serves. Put a different way, although procuring evidence is the immediate result of a successful search, until today that procurement has not been identified as the special need which justifies the search.

II

While the majority's reasoning seems incorrect in the respects just discussed, I agree with the Court that the search policy cannot be sustained. As the majority demonstrates and well explains, there was substantial law enforcement involvement in the policy from its inception. None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives. The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes. Most of those tested for drug use under the policy at issue here were not brought into direct contact with law enforcement. This does not change the fact, however, that, as a systemic matter, law enforcement was a part of the implementation of the search policy in each of its applications. Every individual who tested positive was given a letter explaining the policy not from the hospital but from the solicitor's office. Everyone who tested positive was told a second positive test or failure to undergo substance abuse treatment would result in arrest and prosecution. As the Court holds, the hospital acted, in some respects, as an institutional arm of law enforcement for purposes of the policy. Under these circumstances, while the policy may well have served legitimate needs unrelated to law enforcement, it had

as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale.

In my view, it is necessary and prudent to be explicit in explaining the limitations of today's decision. The beginning point ought to be to acknowledge the legitimacy of the State's interest in fetal life and of the grave risk to the life and health of the fetus, and later the child, caused by cocaine ingestion. Infants whose mothers abuse cocaine during pregnancy are born with a wide variety of physical and neurological abnormalities. See Chiriboga, Brust, Bateman, & Hauser, Dose-Response Effect of Fetal Cocaine Exposure on Newborn Neurologic Function, 103 Pediatrics 79 (1999) (finding that, compared with unexposed infants, cocaine-exposed infants experienced higher rates of intrauterine growth retardation, smaller head circumference, global hypertonia, coarse tremor, and extensor leg posture). Prenatal exposure to cocaine can also result in developmental problems which persist long after birth. See Arendt, Angelopoulos, Salvator, & Singer, Motor Development of Cocaine-exposed Children at Age Two Years, 103 Pediatrics 86 (1999) (concluding that, at two years of age, children who were exposed to cocaine in utero exhibited significantly less fine and gross motor development than those not so exposed); Chasnoff et al., Prenatal Exposure to Cocaine and Other Drugs: Outcome at Four to Six Years, 846 Annals of the New York Academy of Sciences 314, 319–320 (J. Harvey and B. Kosofsky eds. 1998) (finding that 4- to 6-year-olds who were exposed to cocaine in utero exhibit higher instances of depression, anxiety, social, thought, and attention problems, and delinquent and aggressive behaviors than their unexposed counterparts). There can be no doubt that a mother's ingesting this drug can cause tragic injury to a fetus and a child. There should be no doubt that South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him

or her lifelong damage and suffering. The State, by taking special measures to give rehabilitation and training to expectant mothers with this tragic addiction or weakness, acts well within its powers and its civic obligations.

The holding of the Court, furthermore, does not call into question the validity of mandatory reporting laws such as child abuse laws which require teachers to report evidence of child abuse to the proper authorities, even if arrest and prosecution is the likely result. That in turn highlights the real difficulty. As this case comes to us, and as reputable sources confirm, see K. Farkas, Training Health Care and Human Services Personnel in Perinatal Substance Abuse, in Drug & Alcohol Abuse Reviews, Substance Abuse During Pregnancy and Childhood 13, 27–28 (R. Watson ed. 1995); U. S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, Pregnant, Substance-Using Women 48 (1993), we must accept the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child. If prosecuting authorities then adopt legitimate procedures to discover this information and prosecution follows, that ought not to invalidate the testing. One of the ironies of the case, then, may be that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system. We must, however, take the case as it comes to us; and the use of handcuffs, arrests, prosecutions, and police assistance in designing and implementing the testing and rehabilitation policy cannot be sustained under our previous cases concerning mandatory testing.

III

An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse con-

sequences (*e. g.*, dismissal from employment or disqualification from playing on a high school sports team) will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word. See *Skinner*, 489 U. S., at 615; *Von Raab*, 489 U. S., at 660–661; *Acton*, 515 U. S., at 650–651. The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program.

Here, on the other hand, the question of consent, even with the special connotation used in the special needs cases, has yet to be decided. Indeed, the Court finds it necessary to take the unreal step of assuming there was no voluntary consent at all. Thus, we have erected a strange world for deciding the case.

My discussion has endeavored to address the permissibility of a law enforcement purpose in this artificial context. The role played by consent might have affected our assessment of the issues. My concurrence in the judgment, furthermore, should not be interpreted as having considered or resolved the important questions raised by JUSTICE SCALIA with reference to whether limits might be imposed on the use of the evidence if in fact it were obtained with the patient's consent and in the context of the special needs program. Had we the prerogative to discuss the role played by consent, the case might have been quite a different one. All are in agreement, of course, that the Court of Appeals will address these issues in further proceedings on remand.

With these remarks, I concur in the judgment.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join as to Part II, dissenting.

There is always an unappealing aspect to the use of doctors and nurses, ministers of mercy, to obtain incriminating evidence against the supposed objects of their ministration—although here, it is correctly pointed out, the doctors and

nurses were ministering not just to the mothers but also to the children whom their cooperation with the police was meant to protect. But whatever may be the correct social judgment concerning the desirability of what occurred here, that is not the issue in the present case. The Constitution does not resolve all difficult social questions, but leaves the vast majority of them to resolution by debate and the democratic process—which would produce a decision by the citizens of Charleston, through their elected representatives, to forbid or permit the police action at issue here. The question before us is a narrower one: whether, whatever the desirability of this police conduct, it violates the Fourth Amendment's prohibition of unreasonable searches and seizures. In my view, it plainly does not.

I

The first step in Fourth Amendment analysis is to identify the search or seizure at issue. What petitioners, the Court, and to a lesser extent the concurrence really object to is not the urine testing, but the hospital's reporting of positive drug-test results to police. But the latter is obviously not a search. At most it may be a "derivative use of the product of a past unlawful search," which, of course, "work[s] no new Fourth Amendment wrong" and "presents a question, not of rights, but of remedies." *United States* v. *Calandra*, 414 U. S. 338, 354 (1974). There is only one act that could conceivably be regarded as a search of petitioners in the present case: the *taking* of the urine sample. I suppose the *testing* of that urine for traces of unlawful drugs could be considered a search of sorts, but the Fourth Amendment protects only against searches of citizens' "persons, houses, papers, and effects"; and it is entirely unrealistic to regard urine as one of the "effects" (*i. e.*, part of the property) of the person who has passed and abandoned it. Cf. *California* v. *Greenwood*, 486 U. S. 35 (1988) (garbage left at curb is not property protected by the Fourth Amendment). Some would argue,

I suppose, that testing of the urine is prohibited by some generalized privacy right "emanating" from the "penumbras" of the Constitution (a question that is not before us); but it is not even arguable that the testing of urine that has been lawfully obtained is a Fourth Amendment search. (I may add that, even if it were, the factors legitimizing the taking of the sample, which I discuss below, would likewise legitimize the testing of it.)

It is rudimentary Fourth Amendment law that a search which has been consented to is not unreasonable. There is no contention in the present case that the urine samples were extracted forcibly. The only conceivable bases for saying that they were obtained without consent are the contentions (1) that the consent was coerced by the patients' need for medical treatment, (2) that the consent was uninformed because the patients were not told that the tests would include testing for drugs, and (3) that the consent was uninformed because the patients were not told that the results of the tests would be provided to the police.[1] (When the court below said that it was reserving the factual issue of consent, see 186 F. 3d 469, 476 (CA4 1999), it was referring at most to these three—and perhaps just to the last two.)

[1] The Court asserts that it is improper to "disaggregate the taking and testing of the urine sample from the reporting of the results to the police," because "in our special needs cases, we have routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment." *Ante*, at 76, n. 9. But in all of those cases, the urine was obtained involuntarily. See *Chandler* v. *Miller*, 520 U. S. 305 (1997); *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989); *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989). Where the taking of the urine sample is unconsented (and thus a Fourth Amendment search), the subsequent testing and reporting of the results to the police are obviously part of (or infected by) the same search; but where, as here, the taking of the sample was not a Fourth Amendment search, it is necessary to consider separately whether the testing and reporting were.

Under our established Fourth Amendment law, the last two contentions would not suffice, even without reference to the special-needs doctrine. The Court's analogizing of this case to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and its claim that "standards of knowing waiver" apply, *ante*, at 85, are flatly contradicted by our jurisprudence, which shows that using lawfully (but deceivingly) obtained material for purposes other than those represented, and giving that material or information derived from it to the police, is not unconstitutional. In *Hoffa* v. *United States*, 385 U. S. 293 (1966), "[t]he argument [was] that [the informant's] failure to disclose his role as a government informant vitiated the consent that the petitioner gave" for the agent's access to evidence of criminal wrongdoing, *id.*, at 300. We rejected that argument, because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.*, at 302. Because the defendant had voluntarily provided access to the evidence, there was no reasonable expectation of privacy to invade. Abuse of trust is surely a sneaky and ungentlemanly thing, and perhaps there should be (as there are) laws against such conduct by the government. See, *e. g.*, 50 U. S. C. § 403–7 (1994 ed., Supp. IV) (prohibiting the "Intelligence Community['s]" use of journalists as agents). That, however, is immaterial for Fourth Amendment purposes, for "*however strongly* a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities." *United States* v. *White*, 401 U. S. 745, 749 (1971) (emphasis added). The *Hoffa* line of cases, I may note, does not distinguish between operations meant to catch a criminal in the act, and those meant only to gather evidence of prior wrongdoing. See, *e. g.*, *United States* v. *Miller*, 425 U. S. 435, 440–443 (1976); cf. *Illinois* v. *Perkins*, 496 U. S. 292, 298 (1990) (relying on *Hoffa* in holding the

Miranda rule did not require suppression of an inmate confession given an agent posing as a fellow prisoner).

Until today, we have *never* held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain.[2] Without so much as discussing the point, the Court today opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate. Today's holding would be remarkable enough if the confidential relationship violated by the police conduct were at least one protected by state law. It would be surprising to learn, for example, that in a State which recognizes a spousal evidentiary privilege the police cannot use evidence obtained from a cooperating husband or wife. But today's holding goes even beyond that, since there does not exist any physician-patient privilege in South Carolina. See, *e. g.*, *Peagler* v. *Atlantic Coast R. R. Co.*, 232 S. C. 274, 101 S. E. 2d 821 (1958). Since the Court declines even to discuss the issue, it leaves law enforcement officials entirely in the dark as to when they can use incriminating evidence obtained from "trusted" sources.[3] Presumably the

[2] *Hoffa* did say that the Fourth Amendment can be violated by "guileful as well as by forcible intrusions into a constitutionally protected area." 385 U. S., at 301. The case it cited for that proposition, however, shows what it meant: *Gouled* v. *United States*, 255 U. S. 298 (1921), found a Fourth Amendment violation where a Government agent who had obtained access to the defendant's office on pretext of a social visit carried away private papers. "Guile" (rather than force) had been used to *go beyond the scope of the consented access to evidence.* Whereas the search in *Gouled* was invalidated, the search was approved in *Lewis* v. *United States*, 385 U. S. 206 (1966), where an equally guileful agent stayed within the bounds of the access to defendant's home, carrying away only a package of drugs that had been voluntarily provided.

[3] The Court contends that its opinion does not leave law enforcement officials in the dark as to when they can use incriminating evidence from trusted sources, since it "do[es] not address a case in which doctors independently complied with reporting requirements," *ante*, at 85, n. 24. I find it hard to understand how not addressing that point fails to leave

lines will be drawn in the case-by-case development of a whole new branch of Fourth Amendment jurisprudence, taking yet another social judgment (which confidential relationships ought not be invaded by the police) out of democratic control, and confiding it to the uncontrolled judgment of this Court—uncontrolled because there is no common-law precedent to guide it. I would adhere to our established law, which says that information obtained through violation of a relationship of trust is obtained consensually, and is hence not a search.[4]

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it enshrouded in darkness—unless the Court means that such reporting requirements are clearly bad. (If voluntary betrayal of a trust in mere *cooperation* with the police constitutes a Fourth Amendment search, surely betrayal of a trust *at the direction* of the legislature must be.) But in any event, reporting requirements are an infinitesimal part of the problem. What about a doctor's—or a spouse's—voluntary provision of information to the police, without the compulsion of a statute?

[4] The Court contends that I am "mischaracteriz[ing]" its opinion, since the Court is merely "assum[ing] for purposes of decision that the patients did *not* consent to the searches, and [leaves] the question of consent for the Court of Appeals to determine." *Ibid.* That is not responsive. The "question of consent" that the Court leaves open is whether the patients consented, not merely to the taking of the urine samples, but to the drug testing in particular, and to the provision of the results to the police. Consent to the taking of the samples alone—or even to the taking of the samples *plus* the drug testing—does not suffice. The Court's contention that the question of the sufficiency of that more limited consent is not before us because respondents did not raise it, see *ante*, at 74, n. 6, is simply mistaken. Part II of respondents' brief, entitled "The Petitioners consented to the searches," argues that "Petitioners . . . freely and voluntarily . . . provided the urine samples"; that "each of the Petitioners signed a consent to treatment form which authorized the MUSC medical staff to conduct all necessary tests of those urine samples—including drug tests"; and that "[t]here is no precedent in this Court's Fourth Amendment search and seizure jurisprudence which imposes any . . . requirement that the searching agency inform the consenting party that the results of the search will be turned over to law enforcement." Brief for Respondents 38–39. The brief specifically *takes issue* with the District Court's charge to the jury—which the Court chooses to accept as an unexaminable "given," see *ante*, at 74, n. 6—that "the Respondents were required to

There remains to be considered the first possible basis for invalidating this search, which is that the patients were coerced to produce their urine samples by their necessitous circumstances, to wit, their need for medical treatment of their pregnancy. If that was coercion, it was not coercion applied by the government—and if such nongovernmental coercion sufficed, the police would never be permitted to use the ballistic evidence obtained from treatment of a patient with a bullet wound. And the Fourth Amendment would invalidate those many state laws that require physicians to report gunshot wounds,[5] evidence of spousal abuse,[6] and (like the South Carolina law relevant here, see S. C. Code Ann. §20–7–510 (2000)) evidence of child abuse.[7]

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show that the Petitioners consented to MUSC disclosing the information to law enforcement." Brief for Respondents 39.

In sum, I think it clear that the Court's disposition requires the holding that violation of a relationship of trust constitutes a search. The opinion itself implies that in its description of the issue left for the Court of Appeals on remand, see *ante*, at 77, n. 11: whether "the tests were performed without the *informed* consent of the patients," *ante*, at 77 (emphasis added)—informed, that is, that the urine would be tested for drugs and that the results would be given to the police. I am happy, of course, to accept the Court's illogical assurance that it intends no such holding, and urge the Court of Appeals on remand to do the same.

[5] See, *e. g.*, Cal. Penal Code Ann. §11160 (West Supp. 2001); N. Y. Penal Law §265.25 (McKinney 2000); S. C. Code Ann. §16–3–1072 (Supp. 2000).

[6] See, *e. g.*, Cal. Penal Code Ann. §11160 (West Supp. 2001); Colo. Rev. Stat. §12–36–135 (2000).

[7] The Court contends that I "would have us . . . resolve the issue of consent in favor of respondents," whereas the Court's opinion "more prudent[ly] allow[s] [the Court of Appeals] to resolve the legal and factual issues in the first instance, and . . . express[es] no view on those issues." *Ante*, at 77, n. 11. That is not entirely so. The Court does not resolve the factual issue whether there was consent to the drug testing and to providing the results to the police; and neither do I. But the Court *does* resolve the legal issue whether *that* consent was necessary, see *ante*, at 77, 84–85, and n. 24; and so do I. Since the Court concludes it was necessary, the factual inquiry is left for the Fourth Circuit on remand. Since I conclude it was not necessary (and since no one contends that the taking

II

I think it clear, therefore, that there is no basis for saying that obtaining of the urine sample was unconstitutional. The special-needs doctrine is thus quite irrelevant, since it operates only to validate searches and seizures that are otherwise unlawful. In the ensuing discussion, however, I shall assume (contrary to legal precedent) that the taking of the urine sample was (either because of the patients' necessitous circumstances, or because of failure to disclose that the urine would be tested for drugs, or because of failure to disclose that the results of the test would be given to the police) coerced. Indeed, I shall even assume (contrary to common sense) that the testing of the urine constituted an unconsented search of the patients' effects. On those assumptions, the special-needs doctrine *would* become relevant; and, properly applied, would validate what was done here.

The conclusion of the Court that the special-needs doctrine is inapplicable rests upon its contention that respondents "undert[ook] to obtain [drug] evidence from their patients" not for any medical purpose, but "*for the specific purpose of incriminating those patients.*" *Ante*, at 85 (emphasis in original). In other words, the purported medical rationale was merely a pretext; there was no special need. See *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 621, n. 5 (1989). This contention contradicts the District Court's finding of fact that the goal of the testing policy "was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child." App. to Pet. for Cert. A–38.[8] This finding is binding upon us unless clearly erro-

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of the urine sample was unconsented), there is on my analysis no factual consent issue remaining.

[8] The Court believes that this finding "must be read in light of" the District Court's comment that "'these searches were not done by the medical university for independent purposes. . . . [T]he police came in and there was an agreement reached that the positive screens would be shared with the police. And then the screen is not done independent of police,

neous, see Fed. Rule Civ. Proc. 52(a). Not only do I find it supportable; I think any other finding would have to be overturned.

The cocaine tests started in April 1989, *neither at police suggestion nor with police involvement.* Expectant mothers who tested positive were referred by hospital staff for substance-abuse treatment, *ante*, at 70 (opinion of the Court)—an obvious health benefit to both mother and child. See App. 43 (testimony that a single use of cocaine can cause fetal damage). And, since "[i]nfants whose mothers abuse cocaine during pregnancy are born with a wide variety of physical and neurological abnormalities," *ante*, at 89 (KENNEDY, J., concurring in judgment), which require medical attention, see Brief in Opposition A76–A77, the tests were of additional medical benefit in predicting needed postnatal treatment for the child. Thus, in their origin—before the police were in any way involved—the tests had an immediate, not merely an "ultimate," *ante*, at 82 (opinion of the Court), purpose of improving maternal and infant health. Several months after the testing had been initiated, a nurse discovered that local police were arresting pregnant users of cocaine for child abuse, the hospital's general counsel wrote the county solicitor to ask "what, if anything, our Medical Center needs to do to assist you in this matter," App. 499 (South Carolina law requires child abuse to be reported, see S. C. Code Ann. §20–7–510), the police suggested ways to avoid tainting evidence, and the hospital and police in conjunction used the testing program as a means of securing what the Court calls the "ultimate" health benefit of coercing drug-abusing mothers into drug treatment. See *ante*, at 70–73, 82. Why would there be any reason to believe that, once

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it's done in conjunction with the police and that implicates the Fourth Amendment.'" *Ante*, at 75, n. 8, quoting App. 1247–1249. But all this shows is that the explicit finding of medical purpose was not a finding of *exclusive* medical purpose. As discussed later in text, the special-needs doctrine contains no such exclusivity requirement.

this policy of using the drug tests for their "ultimate" health benefits had been adopted, use of them for their original, *immediate*, benefits somehow disappeared, and testing somehow became in its entirety nothing more than a "pretext" for obtaining grounds for arrest? On the face of it, this is incredible. The only evidence of the exclusively arrest-related purpose of the testing adduced by the Court is that the police-cooperation policy *itself* does not describe how to care for cocaine-exposed infants. See *ante*, at 73, 82. But *of course* it does not, since that policy, adopted months after the cocaine testing was initiated, had as its only health object the "ultimate" goal of inducing drug treatment through threat of arrest. Does the Court really believe (or even *hope*) that, once invalidation of the program challenged here has been decreed, drug testing will cease?

In sum, there can be no basis for the Court's purported ability to "distinguis[h] this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that . . . is subject to reporting requirements," *ante*, at 80–81, unless it is this: That the *addition* of a law-enforcement-related purpose *to* a legitimate medical purpose destroys applicability of the "special-needs" doctrine. But that is quite impossible, since the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective. Thus, in *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), a probation officer received a tip from a detective that petitioner, a felon on probation, possessed a firearm. Accompanied by police, he conducted a warrantless search of petitioner's home. The weapon was found and used as evidence in the probationer's trial for unlawful possession of a firearm. See *id.*, at 870–872. Affirming denial of a motion to suppress, we concluded that the "special need" of assuring compliance with terms of release

justified a warrantless search of petitioner's home. Notably, we observed that a probation officer is not

> "the police officer who normally conducts searches against the ordinary citizen. He is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer . . . . In such a setting, we think it reasonable to dispense with the warrant requirement." *Id.*, at 876–877.

Like the probation officer, the doctors here do not "ordinarily conduc[t] searches against the ordinary citizen," and they are "supposed to have in mind the welfare of the [mother and child]." That they have in mind in addition the provision of evidence to the police should make no difference. The Court suggests that if police involvement in this case was in some way incidental and after-the-fact, that would make a difference in the outcome. See *ante*, at 80–84. But in *Griffin*, even more than here, police were involved in the search from the very beginning; indeed, the initial tip about the gun came from a detective. Under the factors relied upon by the Court, the use of evidence approved in *Griffin* would have been permitted only if the parole officer had been untrained in chain-of-custody procedures, had not known of the possibility a gun was present, and had been unaccompanied by police when he simply happened upon the weapon. Why any or all of these is constitutionally significant is baffling.

Petitioners seek to distinguish *Griffin* by observing that probationers enjoy a lesser expectation of privacy than does the general public. That is irrelevant to the point I make here, which is that the presence of a law enforcement purpose does not render the special-needs doctrine inapplicable. In any event, I doubt whether Griffin's reasonable expectation of privacy in his home was any less than petitioners' reasonable expectation of privacy in their urine taken,

or in the urine tests performed, in a hospital—especially in a State such as South Carolina, which recognizes no physician-patient testimonial privilege and requires the physician's duty of confidentiality to yield to public policy, see *McCormick* v. *England*, 328 S. C. 627, 633, 640–642, 494 S. E. 2d 431, 434, 438–439 (App. 1997); and which requires medical conditions that indicate a violation of the law to be reported to authorities, see, *e. g.*, S. C. Code Ann. § 20–7–510 (2000) (child abuse). Cf. *Whalen* v. *Roe*, 429 U. S. 589, 597–598 (1977) (privacy interest does not forbid government to require hospitals to provide, for law enforcement purposes, names of patients receiving prescriptions of frequently abused drugs).

The concurrence makes essentially the same basic error as the Court, though it puts the point somewhat differently: "The special needs cases we have decided," it says, "do not sustain the active use of law enforcement . . . as an integral part of a program which seeks to achieve legitimate, civil objectives." *Ante*, at 88. *Griffin* shows that is not true. Indeed, *Griffin* shows that there is not even any truth in the more limited proposition that our cases do not support application of the special-needs exception where the "legitimate, civil objectives" are sought only *through* the use of law enforcement means. (Surely the parole officer in *Griffin* was using threat of reincarceration to assure compliance with parole.) But even if this latter proposition *were* true, it would invalidate what occurred here only if the drug testing sought exclusively the "ultimate" health benefits achieved by coercing the mothers into drug treatment through threat of prosecution. But in fact the drug testing sought, independently of law enforcement involvement, the "immediate" health benefits of identifying drug-impaired mother and child for necessary medical treatment. The concurrence concedes that if the testing is conducted for medical reasons, the fact that "prosecuting authorities *then* adopt legitimate procedures to discover this information and prosecution follows

. . . ought not to invalidate the testing." *Ante*, at 90 (emphasis added). But here the police involvement in each case did *take place after* the testing was conducted for independent reasons. Surely the concurrence cannot mean that no police-suggested procedures (such as preserving the chain of custody of the urine sample) can be applied until *after* the testing; or that the police-suggested procedures must have been *designed* after the testing. The facts in *Griffin* (and common sense) show that this cannot be so. It seems to me that the only real distinction between what the concurrence must reasonably be thought to be approving, and what we have here, is that here the police took the lesser step of initially *threatening* prosecution rather than bringing it.

* * *

As I indicated at the outset, it is not the function of this Court—at least not in Fourth Amendment cases—to weigh petitioners' privacy interest against the State's interest in meeting the crisis of "crack babies" that developed in the late 1980's. I cannot refrain from observing, however, that the outcome of a wise weighing of those interests is by no means clear. The initial goal of the doctors and nurses who conducted cocaine testing in this case was to refer pregnant drug addicts to treatment centers, and to prepare for necessary treatment of their possibly affected children. When the doctors and nurses agreed to the program providing test results to the police, they did so because (in addition to the fact that child abuse was required by law to be reported) they wanted to use the sanction of arrest as a strong incentive for their addicted patients to undertake drug-addiction treatment. And the police themselves used it for that benign purpose, as is shown by the fact that only 30 of 253 women testing positive for cocaine were ever arrested, and only 2 of those prosecuted. See App. 1125–1126. It would not be unreasonable to conclude that today's judgment, authorizing the assessment of damages against the county

solicitor and individual doctors and nurses who participated in the program, proves once again that no good deed goes unpunished.

But as far as the Fourth Amendment is concerned: There was no unconsented search in this case. And if there was, it would have been validated by the special-needs doctrine. For these reasons, I respectfully dissent.

Syllabus

CIRCUIT CITY STORES, INC. *v.* ADAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–1379. Argued November 6, 2000—Decided March 21, 2001

A provision in respondent's application for work at petitioner electronics retailer required all employment disputes to be settled by arbitration. After he was hired, respondent filed a state-law employment discrimination action against petitioner, which then sued in federal court to enjoin the state-court action and to compel arbitration pursuant to the Federal Arbitration Act (FAA). The District Court entered the requested order. The Ninth Circuit reversed, interpreting § 1 of the FAA—which excludes from that Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—to exempt all employment contracts from the FAA's reach.

Held: The § 1 exemption is confined to transportation workers. Pp. 111–124.

(a) The FAA's coverage provision, § 2, compels judicial enforcement of arbitration agreements "in any . . . contract evidencing a transaction involving commerce." In *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, the Court interpreted § 2's "involving commerce" phrase as implementing Congress' intent "to exercise [its] commerce power to the full." *Id.*, at 277. Pp. 111–113.

(b) The Court rejects respondent's contention that the word "transaction" in § 2 extends only to commercial contracts, and that therefore an employment contract is not a "contract evidencing a transaction involving interstate commerce" at all. If that were true, the separate § 1 exemption that is here at issue would be pointless. See, *e. g.*, *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 562. Accordingly, any argument that arbitration agreements in employment contracts are not covered by the FAA must be premised on the language of the § 1 exclusion itself. Pp. 113–114.

(c) The statutory text forecloses the construction that § 1 excludes all employment contracts from the FAA. Respondent relies on *Allied-Bruce*'s expansive reading of "involving commerce" to contend that § 1's "engaged in . . . commerce" language should have a like reach, exempting from the FAA all employment contracts falling within Congress' commerce power. This reading of § 1 runs into the insurmountable tex-

tual obstacle that, unlike § 2's "involving commerce" language, the § 1 words "any other class of workers engaged in . . . commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." The wording thus calls for application of the maxim *ejusdem generis*, under which the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should be controlled and defined by reference to those terms. See, *e. g., Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 129. Application of *ejusdem generis* is also in full accord with other sound considerations bearing upon the proper interpretation of the clause. In prior cases, the Court has read "engaged in commerce" as a term of art, indicating a limited assertion of federal jurisdiction. See, *e. g., United States* v. *American Building Maintenance Industries*, 422 U. S. 271, 279–280. The Court is not persuaded by the assertion that its § 1 interpretation should be guided by the fact that, when Congress adopted the FAA, the phrase "engaged in commerce" came close to expressing the outer limits of its Commerce Clause power as then understood, see, *e. g., The Employers' Liability Cases*, 207 U. S. 463, 498. This fact alone does not provide any basis to adopt, "by judicial decision, rather than amendatory legislation," *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 202, an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used. While it is possible that Congress might have chosen a different jurisdictional formulation had it known that the Court later would embrace a less restrictive reading of the Commerce Clause, § 1's text precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts. The statutory context in which the "engaged in commerce" language is found, *i. e.*, in a residual provision, and the FAA's purpose of overcoming judicial hostility to arbitration further compel that the § 1 exclusion be afforded a narrow construction. The better reading of § 1, in accord with the prevailing view in the Courts of Appeals, is that § 1 exempts from the FAA only employment contracts of transportation workers. Pp. 114–119.

(d) As the Court's conclusion is directed by § 1's text, the rather sparse legislative history of the exclusion provision need not be assessed. The Court rejects respondent's argument that the Court's holding attributes an irrational intent to Congress by excluding from the FAA's coverage those employment contracts that most involve interstate commerce, *i. e.*, those of transportation workers, while including employment contracts having a lesser connection to commerce. It is a permissible inference that the former contracts were excluded because Congress had already enacted, or soon would enact, statutes governing

transportation workers' employment relationships and did not wish to unsettle established or developing statutory dispute resolution schemes covering those workers. As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," it would be rational for Congress to ensure that workers in general would be covered by the FAA, while reserving for itself more specific legislation for transportation workers. Pp. 119–121.

(e) *Amici* argue that, under the Court's reading, the FAA in effect pre-empts state employment laws restricting the use of arbitration agreements. That criticism is not properly directed at today's holding, but at *Southland Corp.* v. *Keating*, 465 U. S. 1, holding that Congress intended the FAA to apply in state courts, and to pre-empt state anti-arbitration laws to the contrary. The Court explicitly declined to overrule *Southland* in *Allied-Bruce*, *supra*, at 272, and Congress has not moved to overturn *Southland* in response to *Allied-Bruce*. Nor is *Southland* directly implicated in this case, which concerns the application of the FAA in a federal, rather than in a state, court. The Court should not chip away at *Southland* by indirection. Furthermore, there are real benefits to arbitration in the employment context, including avoidance of litigation costs compounded by difficult choice-of-law questions and by the necessity of bifurcating the proceedings where state law precludes arbitration of certain types of employment claims but not others. Adoption of respondent's position would call into doubt the efficacy of many employers' alternative dispute resolution procedures, in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it. *Allied-Bruce*, *supra*, at 275. Pp. 121–124.

194 F. 3d 1070, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, and in which SOUTER, J., joined as to Parts II and III, *post*, p. 124. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 133.

David E. Nagle argued the cause for petitioner. With him on the briefs were *W. Stephen Cannon*, *Pamela G. Parsons*, *Walter E. Dellinger*, *Samuel Estreicher*, and *Rex Darrell Berry*.

Counsel

Michael Rubin argued the cause for respondent. With him on the brief were *Scott A. Kronland*, *Cliff Palefsky*, and *Steven L. Robinson.**

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*Briefs of *amici curiae* urging reversal were filed for the American Arbitration Association by *Florence M. Peterson*, *Jay W. Waks*, and *James H. Carter;* for the Chamber of Commerce of the United States of America by *Lawrence Z. Lorber*, *Lawrence R. Sandak*, *Stephen A. Bokat*, and *Robin S. Conrad;* for the Council for Employment Law Equity by *Garry G. Mathiason;* for Credit Suisse First Boston by *Stephen J. Marzen*, *Meredith Kolsky Lewis*, and *Joseph T. McLaughlin;* for the Employers Group by *Daniel H. Bromberg*, *Richard H. Sayler*, and *William J. Emanuel;* for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman*, *Daniel V. Yager*, and *Heather L. MacDougall;* for the Securities Industry Association by *Michael Delikat*, *Stuart J. Kaswell*, and *George Kramer;* for the Society for Human Resource Management by *David E. Block* and *Christine L. Wilson;* and for the Texas Employment Law Council by *W. Carl Jordan* and *Robert L. Ivey.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Waxman*, *Deputy Solicitor General Underwood*, *James A. Feldman*, *Henry L. Solano*, *Philip B. Sklover*, and *Robert J. Gregory;* for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *Louis Verdugo, Jr.*, Assistant Attorney General, *Catherine Z. Ysrael*, Supervising Deputy Attorney General, and *Thomas P. Reilly*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.*, of New Jersey, *Eliot Spitzer* of New York, *Heidi Heitkamp* of North Dakota, *D. Michael Fisher* of Pennsylvania, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, by *William A. Reich;* for AARP by *Thomas W. Osborne*, *Laurie A. McCann*, *Sally P. Dunaway*, and *Melvin Radowitz;* for the Association of Trial Lawyers of America by *Jeffrey Robert White*, *Eric Schnapper*, and *Frederick M. Baron;* for Law Professors by *Robert Belton*, *James J. Brudney*, *David S. Schwartz*, *Nathan P. Feinsinger*, *James E. Jones, Jr.*, *Cynthia L. Estlund*, *Michael*

JUSTICE KENNEDY delivered the opinion of the Court.

Section 1 of the Federal Arbitration Act (FAA or Act) excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. § 1. All but one of the Courts of Appeals which have addressed the issue interpret this provision as exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA's coverage. A different interpretation has been adopted by the Court of Appeals for the Ninth Circuit, which construes the exemption so that all contracts of employment are beyond the FAA's reach, whether or not the worker is engaged in transportation. It applied that rule to the instant case. We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.

I

In October 1995, respondent Saint Clair Adams applied for a job at petitioner Circuit City Stores, Inc., a national retailer of consumer electronics. Adams signed an employment application which included the following provision:

> "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or

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H. Gottesman, *Jeffrey W. Stempel*, *Katherine Van Wezel*, and *Clyde W. Summers;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Paul W. Mollica*, *Daniel F. Kolb*, *John Payton*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Richard T. Seymour*, *Teresa A. Ferrante*, *Elaine R. Jones*, *Theodore M. Shaw*, *Norman J. Chachkin*, *Charles Stephen Ralston*, *Dennis C. Hayes*, *Antonia Hernandez*, *Judith L. Lichtman*, *Donna R. Lenhoff*, *Marcia D. Greenberger*, *Julie Goldscheid*, and *Yolanda S. Wu;* for the National Academy of Arbitrators by *David E. Feller* and *John Kagel;* and for the National Employment Lawyers Association by *James M. True III* and *Paula A. Brantner.*

Lewis Maltby filed a brief for the National Workrights Institute as *amicus curiae.*

> relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort." App. 13 (emphasis in original).

Adams was hired as a sales counselor in Circuit City's store in Santa Rosa, California.

Two years later, Adams filed an employment discrimination lawsuit against Circuit City in state court, asserting claims under California's Fair Employment and Housing Act, Cal. Govt. Code Ann. § 12900 *et seq.* (West 1992 and Supp. 1997), and other claims based on general tort theories under California law. Circuit City filed suit in the United States District Court for the Northern District of California, seeking to enjoin the state-court action and to compel arbitration of respondent's claims pursuant to the FAA, 9 U. S. C. §§ 1–16. The District Court entered the requested order. Respondent, the court concluded, was obligated by the arbitration agreement to submit his claims against the employer to binding arbitration. An appeal followed.

While respondent's appeal was pending in the Court of Appeals for the Ninth Circuit, the court ruled on the key issue in an unrelated case. The court held the FAA does not apply to contracts of employment. See *Craft* v. *Campbell Soup Co.*, 177 F. 3d 1083 (1999). In the instant case, following the rule announced in *Craft*, the Court of Appeals held the arbitration agreement between Adams and Circuit City was contained in a "contract of employment," and so was not subject to the FAA. 194 F. 3d 1070 (1999). Circuit City petitioned this Court, noting that the Ninth Circuit's

conclusion that all employment contracts are excluded from the FAA conflicts with every other Court of Appeals to have addressed the question. See, *e. g.*, *McWilliams* v. *Logicon, Inc.*, 143 F. 3d 573, 575–576 (CA10 1998); *O'Neil* v. *Hilton Head Hospital*, 115 F. 3d 272, 274 (CA4 1997); *Pryner* v. *Tractor Supply Co.*, 109 F. 3d 354, 358 (CA7 1997); *Cole* v. *Burns Int'l Security Servs.*, 105 F. 3d 1465, 1470–1472 (CADC 1997); *Rojas* v. *TK Communications, Inc.*, 87 F. 3d 745, 747–748 (CA5 1996); *Asplundh Tree Co.* v. *Bates*, 71 F. 3d 592, 596–601 (CA6 1995); *Erving* v. *Virginia Squires Basketball Club*, 468 F. 2d 1064, 1069 (CA2 1972); *Dickstein* v. *DuPont*, 443 F. 2d 783, 785 (CA1 1971); *Tenney Engineering, Inc.* v. *United Elec. & Machine Workers of Am.*, 207 F. 2d 450 (CA3 1953). We granted certiorari to resolve the issue. 529 U. S. 1129 (2000).

II

A

Congress enacted the FAA in 1925. As the Court has explained, the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice. See, *e. g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 270–271 (1995); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 24 (1991). To give effect to this purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements. The FAA's coverage provision, § 2, provides that

> "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

We had occasion in *Allied-Bruce*, *supra*, at 273–277, to consider the significance of Congress' use of the words "involving commerce" in § 2. The analysis began with a reaffirmation of earlier decisions concluding that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty, see *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 405 (1967), and that the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration, see *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984). Relying upon these background principles and upon the evident reach of the words "involving commerce," the Court interpreted § 2 as implementing Congress' intent "to exercise [its] commerce power to the full." *Allied-Bruce*, *supra*, at 277.

The instant case, of course, involves not the basic coverage authorization under § 2 of the Act, but the exemption from coverage under § 1. The exemption clause provides the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. § 1. Most Courts of Appeals conclude the exclusion provision is limited to transportation workers, defined, for instance, as those workers "'actually engaged in the movement of goods in interstate commerce.'" *Cole*, *supra*, at 1471. As we stated at the outset, the Court of Appeals for the Ninth Circuit takes a different view and interprets the § 1 exception to exclude all contracts of employment from the reach of the FAA. This comprehensive exemption had been advocated by *amici curiae* in *Gilmer*, where we addressed the question whether a registered securities representative's employment discrimination claim under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, could be submitted to arbitration pursuant to an agreement in his securities registration application.

Concluding that the application was not a "contract of employment" at all, we found it unnecessary to reach the meaning of § 1. See *Gilmer, supra,* at 25, n. 2. There is no such dispute in this case; while Circuit City argued in its petition for certiorari that the employment application signed by Adams was not a "contract of employment," we declined to grant certiorari on this point. So the issue reserved in *Gilmer* is presented here.

B

Respondent, at the outset, contends that we need not address the meaning of the § 1 exclusion provision to decide the case in his favor. In his view, an employment contract is not a "contract evidencing a transaction involving interstate commerce" at all, since the word "transaction" in § 2 extends only to commercial contracts. See *Craft,* 177 F. 3d, at 1085 (concluding that § 2 covers only "commercial deal[s] or merchant's sale[s]"). This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous. If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce" would be pointless. See, *e. g., Pennsylvania Dept. of Public Welfare* v. *Davenport,* 495 U. S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). The proffered interpretation of "evidencing a transaction involving commerce," furthermore, would be inconsistent with *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U. S. 20 (1991), where we held that § 2 required the arbitration of an age discrimination claim based on an agreement in a securities registration application, a dispute that did not arise from a "commercial deal or merchant's sale." Nor could respondent's construction of § 2 be reconciled with the expansive reading of those words adopted in *Allied-Bruce,* 513 U. S., at 277, 279–280. If, then,

there is an argument to be made that arbitration agreements in employment contracts are not covered by the Act, it must be premised on the language of the § 1 exclusion provision itself.

Respondent, endorsing the reasoning of the Court of Appeals for the Ninth Circuit that the provision excludes all employment contracts, relies on the asserted breadth of the words "contracts of employment of . . . any other class of workers engaged in . . . commerce." Referring to our construction of § 2's coverage provision in *Allied-Bruce*—concluding that the words "involving commerce" evidence the congressional intent to regulate to the full extent of its commerce power—respondent contends § 1's interpretation should have a like reach, thus exempting all employment contracts. The two provisions, it is argued, are coterminous; under this view the "involving commerce" provision brings within the FAA's scope all contracts within the Congress' commerce power, and the "engaged in . . . commerce" language in § 1 in turn exempts from the FAA all employment contracts falling within that authority.

This reading of § 1, however, runs into an immediate and, in our view, insurmountable textual obstacle. Unlike the "involving commerce" language in § 2, the words "any other class of workers engaged in . . . commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in . . . commerce" residual clause. The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to

embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991); see also *Norfolk & Western R. Co.* v. *Train Dispatchers,* 499 U. S. 117, 129 (1991). Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent fails to produce these results.

Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction. The application of the rule *ejusdem generis* in this case, however, is in full accord with other sound considerations bearing upon the proper interpretation of the clause. For even if the term "engaged in commerce" stood alone in § 1, we would not construe the provision to exclude all contracts of employment from the FAA. Congress uses different modifiers to the word "commerce" in the design and enactment of its statutes. The phrase "affecting commerce" indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause. See, *e. g.*, *Allied-Bruce,* 513 U. S., at 277. The "involving commerce" phrase, the operative words for the reach of the basic coverage provision in § 2, was at issue in *Allied-Bruce.* That particular phrase had not been interpreted before by this Court. Considering the usual meaning of the word "involving," and the pro-arbitration purposes of the FAA, *Allied-Bruce* held the "word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Ibid.* Unlike those phrases, however, the general words "in commerce" and the specific phrase "engaged in commerce" are understood to have a more limited reach. In *Allied-Bruce* itself the Court said the words "in commerce" are "often-found words of art" that we have not read as expressing

congressional intent to regulate to the outer limits of authority under the Commerce Clause. *Id.*, at 273; see also *United States* v. *American Building Maintenance Industries*, 422 U. S. 271, 279–280 (1975) (phrase "engaged in commerce" is "a term of art, indicating a limited assertion of federal jurisdiction"); *Jones* v. *United States*, 529 U. S. 848, 855 (2000) (phrase "used in commerce" "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce").

It is argued that we should assess the meaning of the phrase "engaged in commerce" in a different manner here, because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by our decisions. See *United States* v. *Lopez*, 514 U. S. 549, 556 (1995) (noting that Supreme Court decisions beginning in 1937 "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause"). When the FAA was enacted in 1925, respondent reasons, the phrase "engaged in commerce" was not a term of art indicating a limited assertion of congressional jurisdiction; to the contrary, it is said, the formulation came close to expressing the outer limits of Congress' power as then understood. See, *e. g.*, *The Employers' Liability Cases*, 207 U. S. 463, 498 (1908) (holding unconstitutional jurisdictional provision in Federal Employers Liability Act (FELA) covering the employees of "every common carrier engaged in trade or commerce"); *Second Employers' Liability Cases*, 223 U. S. 1, 48–49 (1912); but cf. *Illinois Central R. Co.* v. *Behrens*, 233 U. S. 473 (1914) (noting in dicta that the amended FELA's application to common carriers "while engaging in commerce" did not reach all employment relationships within Congress' commerce power). Were this mode of interpretation to prevail, we would take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the statute means now.

A variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation. The Court has declined in past cases to afford significance, in construing the meaning of the statutory jurisdictional provisions "in commerce" and "engaged in commerce," to the circumstance that the statute predated shifts in the Court's Commerce Clause cases. In *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), the Court rejected the contention that the phrase "in commerce" in § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. § 45, a provision enacted by Congress in 1914, should be read in as expansive a manner as "affecting commerce." See *Bunte Bros.*, *supra*, at 350–351. We entertained a similar argument in a pair of cases decided in the 1974 Term concerning the meaning of the phrase "engaged in commerce" in § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18, another 1914 congressional enactment. See *American Building Maintenance*, *supra*, at 277–283; *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–202 (1974). We held that the phrase "engaged in commerce" in § 7 "means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." *American Building Maintenance*, *supra*, at 283; cf. *Gulf Oil*, *supra*, at 202 (expressing doubt as to whether an "argument from the history and practical purposes of the Clayton Act" could justify "radical expansion of the Clayton Act's scope beyond that which the statutory language defines").

The Court's reluctance to accept contentions that Congress used the words "in commerce" or "engaged in commerce" to regulate to the full extent of its commerce power rests on sound foundation, as it affords objective and consistent significance to the meaning of the words Congress uses when it defines the reach of a statute. To say that the statutory words "engaged in commerce" are subject to variable interpretations depending upon the date of adoption, even a date

before the phrase became a term of art, ignores the reason why the formulation became a term of art in the first place: The plain meaning of the words "engaged in commerce" is narrower than the more open-ended formulations "affecting commerce" and "involving commerce." See, *e. g.*, *Gulf Oil*, *supra*, at 195 (phrase "engaged in commerce" "appears to denote only persons or activities within the flow of interstate commerce"). It would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment.

In rejecting the contention that the meaning of the phrase "engaged in commerce" in § 1 of the FAA should be given a broader construction than justified by its evident language simply because it was enacted in 1925 rather than 1938, we do not mean to suggest that statutory jurisdictional formulations "necessarily have a uniform meaning whenever used by Congress." *American Building Maintenance Industries*, *supra*, at 277. As the Court has noted: "The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula." *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 520 (1942). We must, of course, construe the "engaged in commerce" language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose. These considerations, however, further compel that the § 1 exclusion provision be afforded a narrow construction. As discussed above, the location of the phrase "any other class of workers engaged in . . . commerce" in a residual provision, after specific categories of workers have been enumerated, undermines any attempt to give the provision a sweeping, open-ended construction. And the fact that the provision is contained in a statute that "seeks broadly to overcome judicial hostility to arbitration agreements," *Allied-Bruce*, 513 U. S., at 272–273, which the Court concluded in *Allied-Bruce* coun-

seled in favor of an expansive reading of § 2, gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage.

In sum, the text of the FAA forecloses the construction of § 1 followed by the Court of Appeals in the case under review, a construction which would exclude all employment contracts from the FAA. While the historical arguments respecting Congress' understanding of its power in 1925 are not insubstantial, this fact alone does not give us basis to adopt, "by judicial decision rather than amendatory legislation," *Gulf Oil*, *supra*, at 202, an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used. While it is of course possible to speculate that Congress might have chosen a different jurisdictional formulation had it known that the Court would soon embrace a less restrictive reading of the Commerce Clause, the text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts. Section 1 exempts from the FAA only contracts of employment of transportation workers.

C

As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision. See *Ratzlaf* v. *United States*, 510 U. S. 135, 147–148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear"). We do note, however, that the legislative record on the § 1 exemption is quite sparse. Respondent points to no language in either Committee Report addressing the meaning of the provision, nor to any mention of the § 1 exclusion during debate on the FAA on the floor of the House or Senate. Instead, respondent places greatest reliance upon testimony before a Senate subcommittee hearing suggesting that the exception may have been added in response to the objections of the president of the International Seamen's Union of America. See Hearing on

S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. Cf. *Kelly* v. *Robinson*, 479 U. S. 36, 51, n. 13 (1986) ("[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements"). We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.

Nor can we accept respondent's argument that our holding attributes an irrational intent to Congress. "Under petitioner's reading of § 1," he contends, "those employment contracts *most* involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 . . . are *excluded* from [the] Act's coverage; while those employment contracts having a *less* direct and less certain connection to interstate commerce . . . would come *within* the Act's affirmative coverage and would not be excluded." Brief for Respondent 38 (emphases in original).

We see no paradox in the congressional decision to exempt the workers over whom the commerce power was most apparent. To the contrary, it is a permissible inference that the employment contracts of the classes of workers in § 1 were excluded from the FAA precisely because of Congress' undoubted authority to govern the employment relationships

at issue by the enactment of statutes specific to them. By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§ 300–316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U. S. C. § 651 (repealed). It is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.

As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation. See *Pryner* v. *Tractor Supply Co.*, 109 F. 3d, at 358 (Posner, C. J.). Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, see 49 Stat. 1189, 45 U. S. C. §§ 181–188.

III

Various *amici*, including the attorneys general of 21 States, object that the reading of the § 1 exclusion provision adopted today intrudes upon the policies of the separate States. They point out that, by requiring arbitration agreements in most employment contracts to be covered by the

FAA, the statute in effect pre-empts those state employment laws which restrict or limit the ability of employees and employers to enter into arbitration agreements. It is argued that States should be permitted, pursuant to their traditional role in regulating employment relationships, to prohibit employees like respondent from contracting away their right to pursue state-law discrimination claims in court.

It is not our holding today which is the proper target of this criticism. The line of argument is relevant instead to the Court's decision in *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984), holding that Congress intended the FAA to apply in state courts, and to pre-empt state antiarbitration laws to the contrary. See *id.*, at 16.

The question of *Southland*'s continuing vitality was given explicit consideration in *Allied-Bruce*, and the Court declined to overrule it. 513 U. S., at 272; see also *id.*, at 282 (O'Connor, J., concurring). The decision, furthermore, is not directly implicated in this case, which concerns the application of the FAA in a federal, rather than in a state, court. The Court should not chip away at *Southland* by indirection, especially by the adoption of the variable statutory interpretation theory advanced by the respondent in the instant case. Not all of the Justices who join today's holding agreed with *Allied-Bruce*, see 513 U. S., at 284 (Scalia, J., dissenting); *id.*, at 285 (Thomas, J., dissenting), but it would be incongruous to adopt, as we did in *Allied-Bruce*, a conventional reading of the FAA's coverage in § 2 in order to implement pro-arbitration policies and an unconventional reading of the reach of § 1 in order to undo the same coverage. In *Allied-Bruce* the Court noted that Congress had not moved to overturn *Southland*, see 513 U. S., at 272; and we now note that it has not done so in response to *Allied-Bruce* itself.

Furthermore, for parties to employment contracts not involving the specific exempted categories set forth in § 1, it is true here, just as it was for the parties to the contract at issue in *Allied-Bruce*, that there are real benefits to the

enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. See *Gilmer*, 500 U. S., at 30–32. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, cf. *Egelhoff* v. *Egelhoff*, *post*, at 149 (noting possible "choice-of-law problems" presented by state laws affecting administration of Employee Retirement Income Security Act of 1974 plans), and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, *supra*, at 275. The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" 500 U. S., at 26 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985)). *Gilmer*, of course, involved a federal

statute, while the argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins as to Parts II and III, dissenting.

JUSTICE SOUTER has cogently explained why the Court's parsimonious construction of § 1 of the Federal Arbitration Act (FAA or Act) is not consistent with its expansive reading of § 2. I join his dissent, but believe that the Court's heavy reliance on the views expressed by the Courts of Appeals during the past decade makes it appropriate to comment on three earlier chapters in the history of this venerable statute.

I

Section 2 of the FAA makes enforceable written agreements to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U. S. C. § 2. If we were writing on a clean slate, there would be good reason to conclude that neither the phrase "maritime transaction" nor the phrase "contract evidencing a transaction involving commerce" was intended to encompass employment contracts.[1]

[1] Doing so, in any event, is not precluded by our decision in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995). While we held that § 2 of

The history of the Act, which is extensive and well documented, makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements, which were commonly used in the maritime context. The original bill was drafted by the Committee on Commerce, Trade, and Commercial Law of the American Bar Association (ABA) upon consideration of "the further extension of the principle of *commercial* arbitration." Report of the Forty-third Annual Meeting of the ABA, 45 A. B. A. Rep. 75 (1920) (emphasis added). As drafted, the bill was understood by Members of Congress to "simply provid[e] for one thing, and that is to give an opportunity to enforce an agreement in *commercial* contracts and *admiralty* contracts." 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham) (emphasis added).[2] It is no surprise, then, that when the legislation

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the FAA evinces Congress' intent to exercise its full Commerce Clause power, *id.*, at 277, the case did not involve a contract of employment, nor did it consider whether such contracts fall within either category of § 2's coverage provision, however broadly construed, in light of the legislative history detailed *infra* this page and 126–127.

[2] Consistent with this understanding, Rep. Mills, who introduced the original bill in the House, explained that it "provides that where there are *commercial* contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract." 65 Cong. Rec., at 11080 (emphasis added). And before the Senate, the chairman of the New York Chamber of Commerce, one of the many business organizations that requested introduction of the bill, testified that it was needed to "enable *business men* to settle their disputes expeditiously and economically, and will reduce the congestion in the Federal and State courts." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923) (Hearing) (emphasis added). See also *id.*, at 14 (letter of H. Hoover, Secretary of Commerce) ("I have been, as you may know, very strongly impressed with the urgent need of a Federal *commercial* arbitration act. The American Bar Association has now joined hands with the business men of this country to the same effect and unanimously approved" the bill drafted by the ABA committee and introduced in both Houses of Congress (emphasis added)).

was first introduced in 1922,[3] it did not mention employment contracts, but did contain a rather precise definition of the term "maritime transactions" that underscored the commercial character of the proposed bill.[4] Indeed, neither the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.

Nevertheless, the original bill was opposed by representatives of organized labor, most notably the president of the International Seamen's Union of America,[5] because of their

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[3] S. 4214, 67th Cong., 4th Sess. (1922) (S. 4214); H. R. 13522, 67th Cong., 4th Sess. (1922) (H. R. 13522). See 64 Cong. Rec. 732, 797 (1922).

[4] "[M]aritime transactions" was defined as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, seamen's wages, collisions, or any other matters in foreign or interstate commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." S. 4214, § 1; H. R. 13522, § 1. Although there was no illustrative definition of "contract evidencing a transaction involving commerce," the draft defined "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." S. 4214, § 1; H. R. 13522, § 1. Considered together, these definitions embrace maritime and nonmaritime commercial transactions, and with one possible exception do not remotely suggest coverage of employment contracts. That exception, "seamen's wages," was eliminated by the time the bill was reintroduced in the next session of Congress, when the exclusions in § 1 were added. See Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 2 (1924) (Joint Hearings); see also *infra*, at 127. These definitions were enacted as amended and remain essentially the same today.

[5] He stated:

"[T]his bill provides for reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such

concern that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements.[6] In response to those objections, the chairman of the ABA committee that drafted the legislation emphasized at a Senate Judiciary Subcommittee hearing that "[i]t is not intended that this shall be an act referring to labor disputes, at all," but he also observed that "if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.'" Hearing 9. Similarly, another supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Id.*, at 14. The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to § 1,[7] and the amendment eliminated organized labor's opposition to the proposed law.[8]

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contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the *seaman*, and the hunger of the wife and children of the *railroad man* will surely tempt them to sign, and so with *sundry other workers in 'Interstate and Foreign Commerce.'*" Proceedings of the Twenty-sixth Annual Convention of the International Seamen's Union of America 203–204 (1923) (emphasis added).

[6] See Hearing 9. See also *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 466–467, n. 2 (1957) (Frankfurter, J., dissenting).

[7] See Joint Hearings 2.

[8] Indeed, in a postenactment comment on the amendment, the Executive Council of the American Federation of Labor reported:

"Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that 'nothing

That amendment is what the Court construes today. History amply supports the proposition that it was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts. It is particularly ironic, therefore, that the amendment has provided the Court with its sole justification for refusing to give the text of § 2 a natural reading. Playing ostrich to the substantial history behind the amendment, see *ante*, at 119 ("[W]e need not assess the legislative history of the exclusion provision"), the Court reasons in a vacuum that "[i]f all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption" in § 1 "would be pointless," *ante*, at 113. But contrary to the Court's suggestion, it is not "pointless" to adopt a clarifying amendment in order to eliminate opposition to a bill. Moreover, the majority's reasoning is squarely contradicted by the Court's approach in *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 200, 201, n. 3 (1956), where the Court concluded that an employment contract did not "evidence 'a transaction involving commerce' within the meaning of § 2 of the Act," and therefore did not "reach the further question whether in any event petitioner would be included in 'any other class of workers' within the exceptions of § 1 of the Act."

The irony of the Court's reading of § 2 to include contracts of employment is compounded by its cramped interpretation of the exclusion inserted into § 1. As proposed and enacted, the exclusion fully responded to the concerns of the Seamen's Union and other labor organizations that § 2 might encom-

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herein contained shall apply to contracts of employment of seamen, railroad employes or any other class of workers engaged in foreign or interstate commerce.' This exempted labor from the provisions of the law, although its sponsors denied there was any intention to include labor disputes." Proceedings of the Forty-fifth Annual Convention of the American Federation of Labor 52 (1925).

pass employment contracts by expressly exempting the labor agreements not only of "seamen" and "railroad employees," but also of "*any other class of workers* engaged in foreign or interstate commerce." 9 U. S. C. § 1 (emphasis added). Today, however, the Court fulfills the original—and originally unfounded—fears of organized labor by essentially rewriting the text of § 1 to exclude the employment contracts *solely* of "seamen, railroad employees, or any other class of *[transportation]* workers engaged in foreign or interstate commerce." See *ante*, at 119. In contrast, whether one views the legislation before or after the amendment to § 1, it is clear that it was not intended to apply to employment contracts at all.

II

A quarter century after the FAA was passed, many Courts of Appeals were presented with the question whether collective-bargaining agreements were "contracts of employment" for purposes of § 1's exclusion. The courts split over that question, with at least the Third, Fourth, and Fifth Circuits answering in the affirmative,[9] and the First and Sixth Circuits answering in the negative.[10] Most of these cases neither involved employees engaged in transportation nor turned on whether the workers were so occupied. Indeed, the general assumption seemed to be, as the Sixth Circuit stated early on, that § 1 "was deliberately worded by the Congress to exclude from the [FAA] all contracts of employ-

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[9] *Lincoln Mills of Ala.* v. *Textile Workers*, 230 F. 2d 81, 86 (CA5 1956), rev'd on other grounds, 353 U. S. 448 (1957); *Electrical Workers* v. *Miller Metal Products, Inc.*, 215 F. 2d 221, 224 (CA4 1954); *Electric R. and Motor Coach Employees* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310, 313 (CA3 1951). Apparently, two other Circuits shared this view. See *Mercury Oil Refining Co.* v. *Oil Workers*, 187 F. 2d 980, 983 (CA10 1951); *Shirley-Herman Co.* v. *Hod Carriers*, 182 F. 2d 806, 809 (CA2 1950).

[10] *Electrical Workers* v. *General Elec. Co.*, 233 F. 2d 85, 100 (CA1 1956), aff'd on other grounds, 353 U. S. 547 (1957); *Hoover Motor Express Co., Inc.* v. *Teamsters*, 217 F. 2d 49, 53 (CA6 1954).

ment of workers engaged in interstate commerce." *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876, 882 (1944).

The contrary view that the Court endorses today—namely, that only employees engaged in interstate transportation are excluded by § 1—was not expressed until 1954, by the Third Circuit in *Tenney Engineering, Inc.* v. *Electrical Workers*, 207 F. 2d 450, 452 (1953). And that decision, significantly, was rejected shortly thereafter by the Fourth Circuit. See *Electrical Workers* v. *Miller Metal Products, Inc.*, 215 F. 2d 221, 224 (1954). The conflict among the Circuits that persisted in the 1950's thus suggests that it may be inappropriate to attach as much weight to recent Court of Appeals opinions as the Court does in this case. See *ante*, at 109, 110–111, 112.

Even more important than the 1950's conflict, however, is the way in which this Court tried to resolve the debate. In *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448 (1957), the Court granted certiorari to consider the union's claim that, in a suit brought under § 301 of the Labor Management Relations Act, 1947 (LMRA), a federal court may enforce the arbitration clause in a collective-bargaining agreement. The union argued that such authority was implicitly granted by § 301 and explicitly granted by § 2 of the FAA. In support of the latter argument, the union asked the Court to rule either that a collective-bargaining agreement is not a "contrac[t] of employment" within the meaning of the exclusion in § 1, or that the exclusion is limited to transportation workers.[11] The Court did not accept either argument, but held that § 301 itself provided the authority to compel arbitration. The fact that the Court relied on § 301 of the LMRA, a statutory provision that does not mention arbitration, rather than the FAA, a statute that expressly authorizes the enforcement of arbitration agreements, strongly implies that the Court had concluded that the FAA simply did

[11] See Brief for Petitioner in *Textile Workers* v. *Lincoln Mills of Ala.*, O. T. 1956, No. 211, pp. 53–59.

not apply because § 1 exempts labor contracts. That was how Justice Frankfurter, who of course was present during the deliberations on the case, explained the disposition of the FAA issues. See 353 U. S., at 466–468 (dissenting opinion).[12]

Even if Justice Frankfurter's description of the majority's rejection of the applicability of the FAA does not suffice to establish *Textile Workers* as precedent for the meaning of § 1, his opinion unquestionably reveals his own interpretation of the Act. Moreover, given that Justice Marshall and I have also subscribed to that reading of § 1,[13] and that three more Members of this Court do so in dissenting from today's decision, it follows that more Justices have endorsed that view than the one the Court now adopts. That fact, of course, does not control the disposition of this case, but it does seem to me that it is entitled to at least as much respect as the number of Court of Appeals decisions to which the Court repeatedly refers.

III

Times have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendu-

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[12] In Justice Frankfurter's words,

"Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for 'contracts of employment,' were available, the Court would hardly spin such power out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S., at 466 (dissenting opinion).

[13] See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 36, 38–41 (1991) (dissenting opinion).

lum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.[14] The strength of that policy preference has been echoed in the recent Court of Appeals opinions on which the Court relies.[15] In a sense, therefore, the Court is standing on its own shoulders when it points to those cases as the basis for its narrow construction of the exclusion in § 1. There is little doubt that the Court's interpretation of the Act has given it a scope far beyond the expectations of the Congress that enacted it. See, *e. g.*, *Southland Corp.* v. *Keating*, 465 U. S. 1, 17–21 (1984) (STEVENS, J., concurring in part and dissenting in part); *id.*, at 21–36 (O'CONNOR, J., dissenting).

It is not necessarily wrong for the Court to put its own imprint on a statute. But when its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority. As the history of the legislation indicates, the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the Act, which it feared would require courts to enforce unfair employment contracts. That same concern, as JUSTICE SOUTER points out, see *post*, at 138, n. 2, underlay Congress' exemption of contracts of

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[14] See, *e. g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1 (1983); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967).

[15] See, *e. g.*, *O'Neil* v. *Hilton Head Hosp.*, 115 F. 3d 272, 274 (CA4 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption. Thus, those courts have limited the section 1 exemption to seamen, railroad workers, and other workers actually involved in the interstate transportation of goods").

employment from mandatory arbitration. When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.

This case illustrates the wisdom of an observation made by Justice Aharon Barak of the Supreme Court of Israel. He has perceptively noted that the "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" has more discretion than the judge "who will seek guidance from every reliable source." Judicial Discretion 62 (Y. Kaufmann transl. 1989). A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.

I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Section 2 of the Federal Arbitration Act (FAA or Act) provides for the enforceability of a written arbitration clause in "any maritime transaction or a contract evidencing a transaction involving commerce," 9 U. S. C. §2, while §1 exempts from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Whatever the understanding of Congress's implied admiralty power may have been when the Act was passed in 1925, the commerce power was then thought to be far narrower than we have subsequently come to see it. As a consequence, there are two quite different ways of reading the scope of the Act's provisions. One way would be to say, for example, that the coverage provision extends only to those contracts "involving commerce" that were understood to be covered in 1925; the other would be to read it as exercising Congress's commerce jurisdiction in its modern conception in the same way it was

thought to implement the more limited view of the Commerce Clause in 1925. The first possibility would result in a statutory ambit frozen in time, behooving Congress to amend the statute whenever it desired to expand arbitration clause enforcement beyond its scope in 1925; the second would produce an elastic reach, based on an understanding that Congress used language intended to go as far as Congress could go, whatever that might be over time.

In *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995), we decided that the elastic understanding of § 2 was the more sensible way to give effect to what Congress intended when it legislated to cover contracts "involving commerce," a phrase that we found an apt way of providing that coverage would extend to the outer constitutional limits under the Commerce Clause. The question here is whether a similarly general phrase in the § 1 exemption, referring to contracts of "any . . . class of workers engaged in foreign or interstate commerce," should receive a correspondingly evolutionary reading, so as to expand the exemption for employment contracts to keep pace with the enhanced reach of the general enforceability provision. If it is tempting to answer yes, on the principle that what is sauce for the goose is sauce for the gander, it is sobering to realize that the Courts of Appeals have, albeit with some fits and starts as noted by JUSTICE STEVENS, *ante*, at 129–130 (dissenting opinion),[1] overwhelmingly rejected the evolutionary reading of § 1 accepted by the Court of Appeals in this case. See *ante*, at 110–111 (opinion of the Court) (citing cases). A ma-

[1] Compare, *e. g.*, *Asplundh Tree Expert Co.* v. *Bates*, 71 F. 3d 592, 600–601 (CA6 1995) (construing exclusion narrowly), with *Willis* v. *Dean Witter Reynolds*, 948 F. 2d 305, 311–312 (CA6 1991) (concluding, in dicta, that contracts of employment are generally excluded), and *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876, 882 (CA6 1944) ("[T]he Arbitration Act excluded employment contracts"). See also *Craft* v. *Campbell Soup Co.*, 177 F. 3d 1083, 1086, n. 6 (CA9 1999) (noting intracircuit inconsistency).

jority of this Court now puts its *imprimatur* on the majority view among the Courts of Appeals.

The number of courts arrayed against reading the § 1 exemption in a way that would allow it to grow parallel to the expanding § 2 coverage reflects the fact that this minority view faces two hurdles, each textually based and apparent from the face of the Act. First, the language of coverage (a contract evidencing a transaction "involving commerce") is different from the language of the exemption (a contract of a worker "engaged in . . . commerce"). Second, the "engaged in . . . commerce" catchall phrase in the exemption is placed in the text following more specific exemptions for employment contracts of "seamen" and "railroad employees." The placement possibly indicates that workers who are excused from arbitrating by virtue of the catchall exclusion must resemble seamen and railroad workers, perhaps by being employees who actually handle and move goods as they are shipped interstate or internationally.

Neither hurdle turns out to be a bar, however. The first objection is at best inconclusive and weaker than the grounds to reject it; the second is even more certainly inapposite, for reasons the Court itself has stated but misunderstood.

I

Is Congress further from a plenary exercise of the commerce power when it deals with contracts of workers "engaged in . . . commerce" than with contracts detailing transactions "involving commerce?" The answer is an easy yes, insofar as the former are only the class of labor contracts, while the latter are not so limited. But that is not the point. The question is whether Congress used language indicating that it meant to cover as many contracts as the Commerce Clause allows it to reach within each class of contracts addressed. In *Allied-Bruce* we examined the 1925 context and held that "involving commerce" showed just such a plenary intention, even though at the time we decided that case

we had long understood "affecting commerce" to be the quintessential expression of an intended plenary exercise of commerce power. 513 U. S., at 273–274; see also *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

Again looking to the context of the time, I reach the same conclusion about the phrase "engaged in commerce" as a description of employment contracts exempted from the Act. When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce. Compare *The Employers' Liability Cases*, 207 U. S. 463, 496, 498 (1908) (suggesting that regulation of the employment relations of railroad employees "actually engaged in an operation of interstate commerce" is permissible under the Commerce Clause but that regulation of a railroad company's clerical force is not), with *Hammer* v. *Dagenhart*, 247 U. S. 251, 271–276 (1918) (invalidating statute that had the "necessary effect" of "regulat[ing] the hours of labor of children in factories and mines within the States"). Thus, by using "engaged in" for the exclusion, Congress showed an intent to exclude to the limit of its power to cover employment contracts in the first place, and it did so just as clearly as its use of "involving commerce" showed its intent to legislate to the hilt over commercial contracts at a more general level. That conclusion is in fact borne out by the statement of the then-Secretary of Commerce, Herbert Hoover, who suggested to Congress that the § 1 exclusion language should be adopted "[i]f objection appears to the inclusion of workers' contracts in the law's scheme." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 14 (1923) (hereinafter Hearing on S. 4213 et al.).

The Court cites *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), *United States* v. *American Building Maintenance Industries*, 422 U. S. 271 (1975), and *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186 (1974), for the proposition that "engaged in" has acquired a more restricted meaning as a term of art, immune to tampering now. *Ante*, at 117–118. But none of the cited cases dealt with the question here, whether exemption language is to be read as petrified when coverage language is read to grow. Nor do the cases support the Court's unwillingness to look beyond the four corners of the statute to determine whether the words in question necessarily "'have a uniform meaning whenever used by Congress,'" *ante*, at 118 (quoting *American Building Maintenance*, *supra*, at 277). Compare *ante*, at 119 ("[W]e need not assess the legislative history of the exclusion provision"), with, *e. g.*, *American Building Maintenance*, *supra*, at 279–283 (examining legislative history and agency enforcement of the Clayton Act before resolving meaning of "engaged in commerce").

The Court has no good reason, therefore, to reject a reading of "engaged in" as an expression of intent to legislate to the full extent of the commerce power over employment contracts. The statute is accordingly entitled to a coherent reading as a whole, see, *e. g.*, *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991), by treating the exemption for employment contracts as keeping pace with the expanded understanding of the commerce power generally.

II

The second hurdle is cleared more easily still, and the Court has shown how. Like some Courts of Appeals before it, the majority today finds great significance in the fact that the generally phrased exemption for the employment contracts of workers "engaged in commerce" does not stand alone, but occurs at the end of a sequence of more specific

exemptions: for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Like those other courts, this Court sees the sequence as an occasion to apply the interpretive maxim of *ejusdem generis*, that is, when specific terms are followed by a general one, the latter is meant to cover only examples of the same sort as the preceding specifics. Here, the same sort is thought to be contracts of transportation workers, or employees of transporters, the very carriers of commerce. And that, of course, excludes respondent Adams from benefit of the exemption, for he is employed by a retail seller.

Like many interpretive canons, however, *ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside. *E. g., Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 129 (1991).[2] There are good reasons here. As Adams argued, it is imputing something very odd to the working of the congressional brain to say that Congress took care to bar application of the Act to the class of employment contracts it most obviously had authority to legislate about in 1925, contracts of workers employed by carriers and handlers of commerce, while covering only employees "engaged" in less obvious ways, over whose coverage litigation might be anticipated with uncertain results. It would seem to have made more sense either to cover all coverable employment contracts or to exclude them all. In fact, exclusion might well have been in order based on concern that arbitration could prove expensive or unfavorable to em-

[2] What is more, the Court has repeatedly explained that the canon is triggered only by uncertain statutory text, *e. g.*, *Garcia* v. *United States*, 469 U. S. 70, 74–75 (1984); *Gooch* v. *United States*, 297 U. S. 124, 128 (1936), and that it can be overcome by, *inter alia*, contrary legislative history, *e. g., Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 44, n. 5 (1983). The Court today turns this practice upside down, using *ejusdem generis* to establish that the text is so clear that legislative history is irrelevant. *Ante*, at 119.

ployees, many of whom lack the bargaining power to resist an arbitration clause if their prospective employers insist on one.[3] And excluding all employment contracts from the Act's enforcement of mandatory arbitration clauses is consistent with Secretary Hoover's suggestion that the exemption language would respond to any "objection . . . to the inclusion of workers' contracts."

The Court tries to deflect the anomaly of excluding only carrier contracts by suggesting that Congress used the reference to seamen and rail workers to indicate the class of employees whose employment relations it had already legislated about and would be most likely to legislate about in the future. *Ante*, at 120–121. This explanation, however, does nothing to eliminate the anomaly. On the contrary, the explanation tells us why Congress might have referred specifically to the sea and rail workers; but, if so, it also indicates that Congress almost certainly intended the catchall phrase to be just as broad as its terms, without any interpretive squeeze in the name of *ejusdem generis*.

The very fact, as the Court points out, that Congress already had spoken on the subjects of sailors and rail workers and had tailored the legislation to the particular circumstances of the sea and rail carriers may well have been reason for mentioning them specifically. But making the specific references was in that case an act of special care to make sure that the FAA not be construed to modify the existing legislation so exactly aimed; that was no reason at all to limit the general FAA exclusion from applying to employment

[3] Senator Walsh expressed this concern during a subcommittee hearing on the FAA:

"'The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.'" Hearing on S. 4213 et al., at 9.

contracts that had not been targeted with special legislation. Congress did not need to worry especially about the FAA's effect on legislation that did not exist and was not contemplated. As to workers uncovered by any specific legislation, Congress could write on a clean slate, and what it wrote was a general exclusion for employment contracts within Congress's power to regulate. The Court has understood this point before, holding that the existence of a special reason for emphasizing specific examples of a statutory class can negate any inference that an otherwise unqualified general phrase was meant to apply only to matters *ejusdem generis.*[4] On the Court's own reading of the history, then, the explanation for the catchall is not *ejusdem generis;* instead, the explanation for the specifics is *ex abundanti cautela*, abundance of caution, see *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 646 (1990).

Nothing stands in the way of construing the coverage and exclusion clauses together, consistently and coherently. I respectfully dissent.

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[4] In *Watt* v. *Western Nuclear, Inc.*, *supra,* at 44, n. 5, the Court concluded that the *ejusdem generis* canon did not apply to the words "coal and other minerals" where "[t]here were special reasons for expressly addressing coal that negate any inference that the phrase 'and other minerals' was meant to reserve only substances *ejusdem generis,*" namely that Congress wanted "to make clear that coal was reserved even though existing law treated it differently from other minerals."

Syllabus

EGELHOFF *v.* EGELHOFF, A MINOR, BY AND THROUGH HER NATURAL PARENT, BREINER, ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 99–1529. Argued November 8, 2000—Decided March 21, 2001

While David A. Egelhoff was married to petitioner, he designated her as the beneficiary of a life insurance policy and pension plan provided by his employer and governed by the Employee Retirement Income Security Act of 1974 (ERISA). Shortly after petitioner and Mr. Egelhoff divorced, Mr. Egelhoff died intestate. Respondents, Mr. Egelhoff's children by a previous marriage, filed separate suits against petitioner in state court to recover the insurance proceeds and pension plan benefits. They relied on a Washington statute that provides that the designation of a spouse as the beneficiary of a nonprobate asset—defined to include a life insurance policy or employee benefit plan—is revoked automatically upon divorce. Respondents argued that in the absence of a qualified named beneficiary, the proceeds would pass to them as Mr. Egelhoff's statutory heirs under state law. The trial courts concluded that both the insurance policy and the pension plan should be administered in accordance with ERISA, and granted petitioner summary judgment in both cases. The Washington Court of Appeals consolidated the cases and reversed, concluding that the statute was not pre-empted by ERISA. The State Supreme Court affirmed, holding that the statute, although applicable to employee benefit plans, does not "refe[r] to" or have a "connection with" an ERISA plan that would compel pre-emption under that statute.

Held: The state statute has a connection with ERISA plans and is therefore expressly pre-empted. Pp. 146–152.

(a) ERISA's pre-emption section, 29 U. S. C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. A state law relates to an ERISA plan "if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 97. To determine whether there is a forbidden connection, the Court looks both to ERISA's objectives as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the state law's effect on ERISA plans. *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325. Applying this framework, the state statute has an impermissible connection with ERISA plans, as it binds plan administrators to a

particular choice of rules for determining beneficiary status. Administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern, running counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D). The state statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration. Administrators cannot make payments simply by identifying the beneficiary specified in the plan documents, but must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. The burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer, the plan participant, and the participant's former spouse live in different States. Although the Washington statute provides protection for administrators who have no actual knowledge of a divorce, they still face the risk that a court might later find that they did have such knowledge. If they instead decide to await the results of litigation among putative beneficiaries before paying benefits, they will simply transfer to the beneficiaries the costs of delay and uncertainty. Requiring administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of minimizing their administrative and financial burdens. Differing state regulations affecting an ERISA plan's system for processing claims and paying benefits impose precisely the burden that ERISA pre-emption was intended to avoid. *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 10. Pp. 146–150.

(b) Respondents' reasons why ordinary ERISA pre-emption analysis should not apply here—that the state statute allows employers to opt out; that it involves areas of traditional state regulation; and that if ERISA pre-empts this statute, it also must pre-empt the various state statutes providing that a murdering heir is not entitled to receive property as a result of the killing—are rejected. Pp. 150–152.

139 Wash. 2d 557, 989 P. 2d 80, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 152. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 153.

William J. Kilberg argued the cause for petitioner. With him on the briefs were *Thomas G. Hungar* and *Henry Haas.*

Barbara McDowell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, *Henry L. Solano*, *Nathaniel I. Spiller*, and *Elizabeth Hopkins.*

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Erik S. Jaffe* and *Michael W. Jordan.**

JUSTICE THOMAS delivered the opinion of the Court.

A Washington statute provides that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. We are asked to decide whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, 29 U. S. C. § 1001 *et seq.*, preempts that statute to the extent it applies to ERISA plans. We hold that it does.

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*Briefs of *amici curiae* urging reversal were filed for the AARP by *Mary Ellen Signorille* and *Melvin Radowitz;* for the Boeing Co. et al. by *Bruce D. Corker*, *Kurt E. Lisnenmayer*, *Paul J. Ehlenbach*, *Loretta B. Kepler*, *Stephen A. Bokat*, and *Jan Amundson;* for the National Coordinating Committee for Multiemployer Plans by *Denise M. Clark* and *Mark C. Nielsen;* and for the Western Conference of Teamsters Pension Trust Fund by *Robert S. Unger*, *Russell J. Reid*, and *Michael R. McCarthy.*

Briefs of *amici curiae* urging affirmance were filed for the State of Washington et al. by *Christine O. Gregoire*, Attorney General of Washington, *Jay D. Geck*, Assistant Attorney General, and *William Berggren Collins*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *Thomas F. Reilly* of Massachusetts, *Joseph P. Mazurek* of Montana, *W. A. Drew Edmondson* of Oklahoma, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley.*

I

Petitioner Donna Rae Egelhoff was married to David A. Egelhoff. Mr. Egelhoff was employed by the Boeing Company, which provided him with a life insurance policy and a pension plan. Both plans were governed by ERISA, and Mr. Egelhoff designated his wife as the beneficiary under both. In April 1994, the Egelhoffs divorced. Just over two months later, Mr. Egelhoff died intestate following an automobile accident. At that time, Mrs. Egelhoff remained the listed beneficiary under both the life insurance policy and the pension plan. The life insurance proceeds, totaling $46,000, were paid to her.

Respondents Samantha and David Egelhoff, Mr. Egelhoff's children by a previous marriage, are his statutory heirs under state law. They sued petitioner in Washington state court to recover the life insurance proceeds. Respondents relied on a Washington statute that provides:

> "If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity." Wash. Rev. Code § 11.07.010(2)(a) (1994).

That statute applies to "all nonprobate assets, wherever situated, held at the time of entry by a superior court of this state of a decree of dissolution of marriage or a declaration of invalidity." § 11.07.010(1). It defines "nonprobate asset" to include "a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account." § 11.07.010(5)(a).

Respondents argued that they were entitled to the life insurance proceeds because the Washington statute disqualified Mrs. Egelhoff as a beneficiary, and in the absence of a qualified named beneficiary, the proceeds would pass to them as Mr. Egelhoff's heirs. In a separate action, respondents also sued to recover the pension plan benefits. Respondents again argued that the Washington statute disqualified Mrs. Egelhoff as a beneficiary and they were thus entitled to the benefits under the plan.

The trial courts, concluding that both the insurance policy and the pension plan "should be administered in accordance" with ERISA, granted summary judgment to petitioner in both cases. App. to Pet. for Cert. 46a, 48a. The Washington Court of Appeals consolidated the cases and reversed. *In re Estate of Egelhoff*, 93 Wash. App. 314, 968 P. 2d 924 (1998). It concluded that the Washington statute was not pre-empted by ERISA. *Id.*, at 317, 968 P. 2d, at 925. Applying the statute, it held that respondents were entitled to the proceeds of both the insurance policy and the pension plan. *Ibid.*

The Supreme Court of Washington affirmed. 139 Wash. 2d 557, 989 P. 2d 80 (1999). It held that the state statute, although applicable to "employee benefit plan[s]," does not "refe[r] to" ERISA plans to an extent that would require pre-emption, because it "does not apply immediately and exclusively to an ERISA plan, nor is the existence of such a plan essential to operation of the statute." *Id.*, at 574, 989 P. 2d, at 89. It also held that the statute lacks a "connection with" an ERISA plan that would compel pre-emption. *Id.*, at 576, 989 P. 2d, at 90. It emphasized that the statute "does not alter the nature of the plan itself, the administrator's fiduciary duties, or the requirements for plan administration." *Id.*, at 575, 989 P. 2d, at 90. Nor, the court concluded, does the statute conflict with any specific provision of ERISA, including the antialienation provision, 29 U. S. C. § 1056(d)(1), because it "does not operate to divert benefit

plan proceeds from distribution under terms of the plan documents," but merely alters "the underlying circumstances to which the distribution scheme of [the] plan must be applied." 139 Wash. 2d, at 578, 989 P. 2d, at 91.

Courts have disagreed about whether statutes like that of Washington are pre-empted by ERISA. Compare, *e. g.*, *Manning* v. *Hayes*, 212 F. 3d 866 (CA5 2000) (finding pre-emption), cert. pending, No. 00–265,* and *Metropolitan Life Ins. Co.* v. *Hanslip*, 939 F. 2d 904 (CA10 1991) (same), with, *e. g.*, *Emard* v. *Hughes Aircraft Co.*, 153 F. 3d 949 (CA9 1998) (finding no pre-emption), and 139 Wash. 2d, at 557, 989 P. 2d, at 80 (same). To resolve the conflict, we granted certiorari. 530 U. S. 1242 (2000).

II

Petitioner argues that the Washington statute falls within the terms of ERISA's express pre-emption provision and that it is pre-empted by ERISA under traditional principles of conflict pre-emption. Because we conclude that the statute is expressly pre-empted by ERISA, we address only the first argument.

ERISA's pre-emption section, 29 U. S. C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. We have observed repeatedly that this broadly worded provision is "clearly expansive." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995); see, *e. g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384 (1992) (listing cases in which we have described ERISA pre-emption in broad terms). But at the same time, we have recognized that the term "relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Travelers*, *supra*, at 655.

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*[Reporter's Note: See *post*, p. 941.]

We have held that a state law relates to an ERISA plan "if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 97 (1983). Petitioner focuses on the "connection with" part of this inquiry. Acknowledging that "connection with" is scarcely more restrictive than "relate to," we have cautioned against an "uncritical literalism" that would make pre-emption turn on "infinite connections." *Travelers*, *supra*, at 656. Instead, "to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325 (1997), quoting *Travelers*, *supra*, at 656 (citation omitted).

Applying this framework, petitioner argues that the Washington statute has an impermissible connection with ERISA plans. We agree. The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." § 1002(8).[1] In other words, unlike generally applica-

[1] One can of course escape the conflict between the plan documents (which require making payments to the named beneficiary) and the statute (which requires making payments to someone else) by calling the statute an "invalidation" of the designation of the named beneficiary, and by ob-

ble laws regulating "areas where ERISA has nothing to say," *Dillingham*, 519 U. S., at 330, which we have upheld notwithstanding their incidental effect on ERISA plans, see, *e. g.*, *ibid.*, this statute governs the payment of benefits, a central matter of plan administration.

The Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration. One of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 9 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different States.

The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents.[2] Instead they must familiarize themselves with

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serving that the plan documents are silent on whether "invalidation" is to occur upon divorce. The dissent employs just such an approach. See *post*, at 155–156 (opinion of BREYER, J.). Reading a clear statement as an ambiguous metastatement enables one to avoid all kinds of conflicts between seemingly contradictory texts. Suppose, for example, that the statute required that all pension benefits be paid to the Governor of Washington. That seems inconsistent with the plan documents (and with ERISA), but the inconsistency disappears if one calls the statute an "invalidation" of the principal and alternate beneficiary designations. After all, neither the plan nor ERISA actually *says* that beneficiaries *cannot* be invalidated in favor of the Governor. This approach exploits the logical inability of any text to contain a complete set of instructions for its own interpretation. It has the vice—or perhaps the virtue, depending upon one's point of view—of draining all language of its meaning.

[2] Respondents argue that in this case, the disposition dictated by the Washington statute is consistent with that specified in the plan documents. Because Mr. Egelhoff designated "Donna R. Egelhoff wife" as the beneficiary of the life insurance policy, they contend that once the Egelhoffs divorced, "there was no such person as 'Donna R. Egelhoff *wife*'; the designated person had definitionally ceased to exist." Brief for Respondents 44 (emphasis in original); see also *post*, at 155 (BREYER, J., dissenting). In effect, respondents ask us to infer that what Mr. Egelhoff meant when

state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.

To be sure, the Washington statute protects administrators from liability for making payments to the named beneficiary unless they have "actual knowledge of the dissolution or other invalidation of marriage," Wash. Rev. Code § 11.07.010(3)(a) (1994), and it permits administrators to refuse to make payments until any dispute among putative beneficiaries is resolved, § 11.07.010(3)(b). But if administrators do pay benefits, they will face the risk that a court might later find that they had "actual knowledge" of a divorce. If they instead decide to await the results of litigation before paying benefits, they will simply transfer to the beneficiaries the costs of delay and uncertainty.[3] Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the

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he filled out the form was not "Donna R. Egelhoff, who is my wife," but rather "a new legal person—'Donna as spouse,'" Brief for Respondents 44. They do not mention, however, that below the "Beneficiary" line on the form, the printed text reads, "First Name [space] Middle Initial [space] Last Name [space] Relationship." See Appendix to opinion of BREYER, J., *post*. Rather than impute to Mr. Egelhoff the unnatural (and indeed absurd) literalism suggested by respondents, we conclude that he simply provided all of the information requested by the form. The happenstance that "Relationship" was on the same line as the beneficiary's name does not, we think, evince an intent to designate "a new legal person."

[3] The dissent observes that the Washington statute permits a plan administrator to avoid resolving the dispute himself and to let courts or parties settle the matter. See *post*, at 158. This observation only presents an example of how the costs of delay and uncertainty can be passed on to beneficiaries, thereby thwarting ERISA's objective of efficient plan administration. Cf. *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 9 (1987).

congressional goal of "minimiz[ing] the administrative and financial burden[s]" on plan administrators—burdens ultimately borne by the beneficiaries. *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 142 (1990).

We recognize that all state laws create some potential for a lack of uniformity. But differing state regulations affecting an ERISA plan's "system for processing claims and paying benefits" impose "precisely the burden that ERISA pre-emption was intended to avoid." *Fort Halifax*, *supra*, at 10. And as we have noted, the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents. We conclude that the Washington statute has a "connection with" ERISA plans and is therefore pre-empted.

III

Respondents suggest several reasons why ordinary ERISA pre-emption analysis should not apply here. First, they observe that the Washington statute allows employers to opt out. According to respondents, the statute neither regulates plan administration nor impairs uniformity because it does not apply when "[t]he instrument governing disposition of the nonprobate asset expressly provides otherwise." Wash. Rev. Code § 11.07.010(2)(b)(i) (1994). We do not believe that the statute is saved from pre-emption simply because it is, at least in a broad sense, a default rule.

Even though the Washington statute's cancellation of private choice may itself be trumped by specific language in the plan documents, the statute does "dictate the choice[s] facing ERISA plans" with respect to matters of plan administration. *Dillingham*, *supra*, at 334. Plan administrators must either follow Washington's beneficiary designation scheme or alter the terms of their plan so as to indicate that they will not follow it. The statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it. Of course, simple noncom-

pliance with the statute is not one of the options available to plan administrators. Their only choice is one of timing, *i. e.*, whether to bear the burden of compliance *ex post*, by paying benefits as the statute dictates (and in contravention of the plan documents), or *ex ante*, by amending the plan.[4]

Respondents emphasize that the opt-out provision makes compliance with the statute less burdensome than if it were mandatory. That is true enough, but the burden that remains is hardly trivial. It is not enough for plan administrators to opt out of this particular statute. Instead, they must maintain a familiarity with the laws of all 50 States so that they can update their plans as necessary to satisfy the opt-out requirements of other, similar statutes. They also must be attentive to changes in the interpretations of those statutes by state courts. This "tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction" is exactly the burden ERISA seeks to eliminate. *Ingersoll-Rand*, *supra*, at 142.

Second, respondents emphasize that the Washington statute involves both family law and probate law, areas of traditional state regulation. There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law. See, *e. g.*, *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979). But that presumption can be overcome where, as here, Congress has made clear its desire for pre-emption. Accordingly, we have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans. See, *e. g.*, *Boggs* v. *Boggs*, 520

[4] Contrary to the dissent's suggestion that the resolution of this case depends on one's view of federalism, see *post*, at 160–161, we are called upon merely to interpret ERISA. And under the text of ERISA, the fiduciary "shall" administer the plan "in accordance with the documents and instruments governing the plan," 29 U. S. C. § 1104(a)(1)(D). The Washington statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.

U. S. 833 (1997) (holding that ERISA pre-empts a state community property law permitting the testamentary transfer of an interest in a spouse's pension plan benefits).

Finally, respondents argue that if ERISA pre-empts this statute, then it also must pre-empt the various state statutes providing that a murdering heir is not entitled to receive property as a result of the killing. See, *e. g.*, Cal. Prob. Code Ann. §§ 250–259 (West 1991 and Supp. 2000); 755 Ill. Comp. Stat., ch. 755, § 5/2–6 (1999). In the ERISA context, these "slayer" statutes could revoke the beneficiary status of someone who murdered a plan participant. Those statutes are not before us, so we do not decide the issue. We note, however, that the principle underlying the statutes—which have been adopted by nearly every State—is well established in the law and has a long historical pedigree predating ERISA. See, *e. g.*, *Riggs* v. *Palmer*, 115 N. Y. 506, 22 N. E. 188 (1889). And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.

* * *

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE GINSBURG joins, concurring.

I join the opinion of the Court, since I believe that the "relate to" pre-emptive provision of the Employee Retirement Income Security Act of 1974 (ERISA) is assuredly triggered by a state law that contradicts ERISA. As the Court notes, "the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Ante*, at 150. I remain unsure (as I think the lower courts and everyone else will be) as to what else triggers the "relate to" pro-

vision, which—if it is interpreted to be anything other than a reference to our established jurisprudence concerning conflict and field pre-emption—has no discernible content that would not pick up every ripple in the pond, producing a result "that no sensible person could have intended." *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 336 (1997) (SCALIA, J., concurring). I persist in the view that we can bring some coherence to this area, and can give the statute both a plausible and precise content, only by interpreting the "relate to" clause as a reference to our ordinary pre-emption jurisprudence. See *ibid.*

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

Like JUSTICE SCALIA, I believe that we should apply normal conflict pre-emption and field pre-emption principles where, as here, a state statute covers ERISA and non-ERISA documents alike. *Ante* this page (concurring opinion). Our more recent ERISA cases are consistent with this approach. See *De Buono* v. *NYSA–ILA Medical and Clinical Services Fund*, 520 U. S. 806, 812–813 (1997) (rejecting literal interpretation of ERISA's pre-emption clause); *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 334 (1997) (narrowly interpreting the clause); *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 656 (1995) ("go[ing] beyond the unhelpful text [of the clause] and the frustrating difficulty of defining its key term, and look[ing] instead to the objectives of the ERISA statute as a guide"). See also *Boggs* v. *Boggs*, 520 U. S. 833, 841 (1997) (relying on conflict pre-emption principles instead of ERISA's pre-emption clause). And I fear that our failure to endorse this "new approach" explicitly, *Dillingham*, *supra*, at 336 (SCALIA, J., concurring), will continue to produce an "avalanche of litigation," *De Buono*, *supra*, at 809, n. 1, as

courts struggle to interpret a clause that lacks any "discernible content," *ante*, at 153 (SCALIA, J., concurring), threatening results that Congress could not have intended.

I do not agree with JUSTICE SCALIA or with the majority, however, that there is any plausible pre-emption principle that leads to a conclusion that ERISA pre-empts the statute at issue here. No one could claim that ERISA pre-empts the entire *field* of state law governing inheritance—though such matters "relate to" ERISA broadly speaking. See *Travelers*, *supra*, at 655. Neither is there any direct conflict between the Washington statute and ERISA, for the one nowhere directly contradicts the other. Cf. *ante*, at 150 (claiming a "direc[t] conflic[t]" between ERISA and the Washington statute). But cf. *ante*, at 146 (relying upon the "relate to" language in ERISA's pre-emption clause).

The Court correctly points out that ERISA requires a fiduciary to make payments to a beneficiary "in accordance with the documents and instruments governing the plan." 29 U. S. C. § 1104(a)(1)(D). But nothing in the Washington statute requires the contrary. Rather, the state statute simply sets forth a default rule for interpreting documentary silence. The statute specifies that a nonprobate asset will pass at A's death "as if" A's "former spouse" had died first—*unless the "instrument governing disposition of the nonprobate asset expressly provides otherwise.*" Wash. Rev. Code § 11.07.010(2)(b)(i) (1994) (emphasis added). This state-law rule is a rule of interpretation, and it is designed to carry out, not to conflict with, the employee's likely intention as revealed in the plan documents.

There is no direct conflict or contradiction between the Washington statute and the terms of the plan documents here at issue. David Egelhoff's investment plan provides that when a "beneficiary designation" is "invalid," the "benefits will be paid" to a "surviving spouse," or "[i]f there is no surviving spouse," to the "children in equal shares." App. 40. The life insurance plan is silent about what occurs when

a beneficiary designation is invalid. The Washington statute fills in these gaps, *i. e.*, matters about which the documents themselves say nothing. Thus, the Washington statute specifies that a beneficiary designation—here "Donna R. Egelhoff wife" in the pension plan—is invalid where there is no longer any such person as Donna R. Egelhoff, wife. See Appendix, *infra.* And the statute adds that in such instance the funds would be paid to the children, who themselves are potential pension plan beneficiaries.

The Court's "direct conflict" conclusion rests upon its claim that "administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents." *Ante,* at 147. But the Court cannot mean "identified *anywhere* in the plan documents," for the Egelhoff children were "identified" as recipients in the pension plan documents should the initial designation to "Donna R. Egelhoff wife" become invalid. And whether that initial designation became invalid upon divorce is a matter about which the plan documents are silent.

To refer to state law to determine whether a given name makes a designation that is, or has become, invalid makes sense where background property or inheritance law is at issue, say, for example, where a written name is potentially ambiguous, where it is set forth near, but not in, the correct space, where it refers to a missing person perhaps presumed dead, where the name was written at a time the employee was incompetent, or where the name refers to an individual or entity disqualified by other law, say, the rule against perpetuities or rules prohibiting a murderer from benefiting from his crime. Why would Congress want the courts to create an ERISA-related federal property law to deal with such problems? Regardless, to refer to background state law in such circumstances does not *directly* conflict with any explicit ERISA provision, for no provision of ERISA forbids reading an instrument or document in light of state property law principles. In any event, in this case the plan docu-

ments *explicitly* foresee that a beneficiary designation may become "invalid," but they do not specify the invalidating circumstances. *Supra*, at 154–155. To refer to state property law to fill in that blank cannot possibly create any direct conflict with the plan documents.

The majority simply denies that there is any blank to fill in and suggests that the plan documents require the plan to pay the designated beneficiary under all circumstances. See *ante*, at 147–148, n. 1. But there is nonetheless an open question, namely, whether a designation that (here explicitly) refers to a wife remains valid after divorce. The question is genuine and important (unlike the imaginary example in the majority's footnote). The plan documents themselves do not answer the question any more than they describe what is to occur in a host of other special circumstances (*e. g.*, mental incompetence, intoxication, ambiguous names, etc.). To determine whether ERISA permits state law to answer such questions requires a careful examination of the particular state law in light of ERISA's basic policies. See *ante*, at 147; *infra* this page and 157–159. We should not short circuit that necessary inquiry simply by announcing a "direct conflict" where none exists.

The Court also complains that the Washington statute restricts the plan's choices to "two." *Ante*, at 150. But it is difficult to take this complaint seriously. After all, the two choices that Washington gives the plan are (1) to comply with Washington's rule or (2) not to comply with Washington's rule. What other choices could there be? A state statute that asks a plan to choose whether it intends to comply is not a statute that directly conflicts with a plan. Quite obviously, it is possible, not "'impossible,'" to comply with both the Washington statute and federal law. *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 873 (2000).

The more serious pre-emption question is whether this state statute "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-

gress.'" *Ibid.* (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). In answering that question, we must remember that petitioner has to overcome a strong presumption *against* pre-emption. That is because the Washington statute governs family property law—a "fiel[d] of traditional state regulation," where courts will not find federal pre-emption unless such was the "'clear and manifest purpose of Congress,'" *Travelers*, 514 U. S., at 655 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)), or the state statute does "'major damage' to 'clear and substantial' federal interests," *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979) (quoting *United States* v. *Yazell*, 382 U. S. 341, 352 (1966)). No one can seriously argue that Congress has *clearly* resolved the question before us. And the only damage to federal interests that the Court identifies consists of the added administrative burden the state statute imposes upon ERISA plan administrators.

The Court claims that the Washington statute "interferes with nationally uniform plan administration" by requiring administrators to "familiarize themselves with state statutes." *Ante*, at 148–149. But administrators have to familiarize themselves with state law in any event when they answer such routine legal questions as whether amounts due are subject to garnishment, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 838 (1988), who is a "spouse," who qualifies as a "child," or when an employee is legally dead. And were that "familiarizing burden" somehow overwhelming, the plan could easily avoid it by resolving the divorce revocation issue in the plan documents themselves, stating expressly that state law does not apply. The "burden" thus reduces to a one-time requirement that would fall primarily upon the few who draft model ERISA documents, not upon the many who administer them. So meager a burden cannot justify pre-empting a state law that enjoys a presumption against pre-emption.

The Court also fears that administrators would have to make difficult choice-of-law determinations when parties live in different States. *Ante*, at 148–149. Whether this problem is or is not "major" in practice, the Washington statute resolves it by expressly setting forth procedures whereby the parties or the courts, *not* the plan administrator, are responsible for resolving it. See §§ 11.07.010(3)(b)(i)–(ii) (stating that a plan may "without liability, refuse to pay or transfer a nonprobate asset" until "[a]ll beneficiaries and other interested persons claiming an interest have consented in writing to the payment or transfer" or "[t]he payment or transfer is authorized or directed by a court of proper jurisdiction"); § 11.07.010(3)(c) (plan may condition payment on provision of security by recipient to indemnify plan for costs); § 11.07.010(2)(b)(i) (plan may avoid default rule by expressing its intent in the plan documents).

The Court has previously made clear that the fact that state law "impose[s] some burde[n] on the administration of ERISA plans" does not necessarily require pre-emption. *De Buono*, 520 U. S., at 815; *Mackey*, *supra*, at 831 (upholding state garnishment law notwithstanding claim that "benefit plans subjected to garnishment will incur substantial administrative burdens"). Precisely, what is it about this statute's requirement that distinguishes it from the "'myriad state laws'" that impose some kind of burden on ERISA plans? *De Buono*, *supra*, at 815 (quoting *Travelers*, *supra*, at 668).

Indeed, if one looks beyond administrative burden, one finds that Washington's statute poses no obstacle, but furthers ERISA's ultimate objective—developing a fair system for protecting employee benefits. Cf. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 720 (1984). The Washington statute transfers an employee's pension assets at death to those individuals whom the worker would likely have wanted to receive them. As many jurisdictions have concluded, divorced workers more often prefer that a child, rather than a divorced spouse, receive

those assets. Of course, an employee can secure this result by changing a beneficiary form; but doing so requires awareness, understanding, and time. That is why Washington and many other jurisdictions have created a statutory assumption that divorce works a revocation of a designation in favor of an ex-spouse. That assumption is embodied in the Uniform Probate Code; it is consistent with human experience; and those with expertise in the matter have concluded that it "more often" serves the cause of "[j]ustice." Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1135 (1984).

In forbidding Washington to apply that assumption here, the Court permits a divorced wife, who *already* acquired, during the divorce proceeding, her fair share of the couple's community property, to receive in addition the benefits that the divorce court awarded to her former husband. To be more specific, Donna Egelhoff already received a business, an IRA account, and stock; David received, among other things, 100% of his pension benefits. App. 31–34. David did not change the beneficiary designation in the pension plan or life insurance plan during the 6-month period between his divorce and his death. As a result, Donna will now receive a windfall of approximately $80,000 at the expense of David's children. The State of Washington enacted a statute to prevent precisely this kind of unfair result. But the Court, relying on an inconsequential administrative burden, concludes that Congress required it.

Finally, the logic of the Court's decision does not stop at divorce revocation laws. The Washington statute is virtually indistinguishable from other traditional state-law rules, for example, rules using presumptions to transfer assets in the case of simultaneous deaths, and rules that prohibit a husband who kills a wife from receiving benefits as a result of the wrongful death. It is particularly difficult to believe that Congress wanted to pre-empt the latter kind of statute. But how do these statutes differ from the one before us?

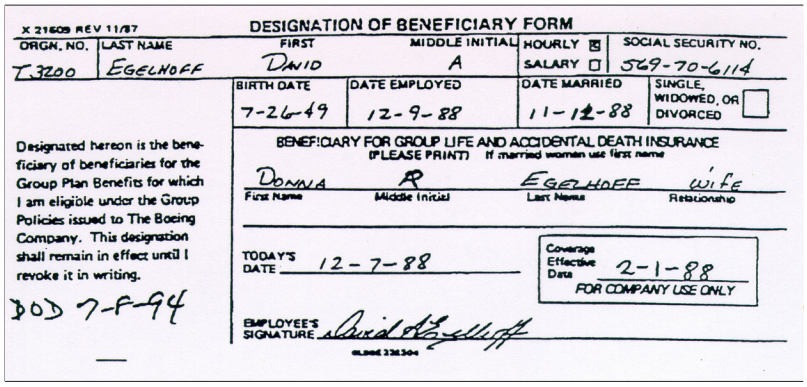
Slayer statutes—like this statute—"gover[n] the payment of benefits, a central matter of plan administration." *Ante*, at 148. And contrary to the Court's suggestion, *ante*, at 152, slayer statutes vary from State to State in their details just like divorce revocation statutes. Compare Ariz. Rev. Stat. Ann. § 14–2803(F) (1995) (requiring proof, in a civil proceeding, under preponderance of the evidence standard); Haw. Rev. Stat. § 560:2–803(g) (1999) (same), with Ga. Code Ann. § 53–1–5(d) (Supp. 1996) (requiring proof under clear and convincing evidence standard); Me. Rev. Stat. Ann., Tit. 18–A, § 2–803(e) (1998) (same); and Ala. Code § 43–8–253(e) (1991) (treating judgment of conviction as conclusive when it becomes final); Me. Rev. Stat. Ann., Tit. 18–A, § 2–803(e) (1998) (same), with Ariz. Rev. Stat. Ann. § 14–2803(F) (1995) (treating judgment of conviction as conclusive only after "all right to appeal has been exhausted"); Haw. Rev. Stat. § 560:2–803(g) (1999) (same). Indeed, the "slayer" conflict would seem more serious, not less serious, than the conflict before us, for few, if any, slayer statutes permit plans to opt out of the state property law rule.

"ERISA pre-emption analysis," the Court has said, must "respect" the "separate spher[e]" of state "authority." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 19 (1987) (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 522 (1981)) (internal quotation marks omitted). In so stating, the Court has recognized the practical importance of preserving local independence, at retail, *i. e.*, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy. Indeed, in today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, *United States* v. *Morrison*, 529 U. S. 598 (2000), or to protect a State's treasury from a private damages action, *Board of Trustees of Univ. of Ala.* v.

Garrett, 531 U. S. 356 (2001), but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law, *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 427 (1999) (BREYER, J., concurring in part and dissenting in part).

In this case, "field pre-emption" is not at issue. There is no "direct" conflict between state and federal statutes. The state statute poses no significant obstacle to the accomplishment of any federal objective. Any effort to squeeze some additional pre-emptive force from ERISA's words (*i. e.*, "relate to") is inconsistent with the Court's recent case law. And the state statute before us is one regarding family property—a "fiel[d] of traditional state regulation," where the interpretive presumption against pre-emption is particularly strong. *Travelers*, 514 U. S., at 655. For these reasons, I disagree with the Court's conclusion. And, consequently, I dissent.

APPENDIX TO OPINION OF BREYER, J.



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DESIGNATION OF BENEFICIARY FORM

ORGN. NO.	LAST NAME	FIRST	MIDDLE INITIAL	HOURLY ☒ / SALARY ☐	SOCIAL SECURITY NO.
T3200	EGELHOFF	DAVID	A		569-70-6114

BIRTH DATE	DATE EMPLOYED	DATE MARRIED	SINGLE, WIDOWED, OR DIVORCED
7-26-49	12-9-88	11-12-88	☐

Designated hereon is the beneficiary of beneficiaries for the Group Plan Benefits for which I am eligible under the Group Policies issued to The Boeing Company. This designation shall remain in effect until I revoke it in writing.

DOD 7-F-94

BENEFICIARY FOR GROUP LIFE AND ACCIDENTAL DEATH INSURANCE (PLEASE PRINT) If married woman use first name

First Name	Middle Initial	Last Name	Relationship
DONNA	R	EGELHOFF	WIFE

TODAY'S DATE 12-7-88

Coverage Effective Date 2-1-88 FOR COMPANY USE ONLY

EMPLOYEE'S SIGNATURE David A Egelhoff

Syllabus

TEXAS *v.* COBB

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 99–1702. Argued January 16, 2001—Decided April 2, 2001

While under arrest for an unrelated offense, respondent confessed to a home burglary, but denied knowledge of a woman and child's disappearance from the home. He was indicted for the burglary, and counsel was appointed to represent him. He later confessed to his father that he had killed the woman and child, and his father then contacted the police. While in custody, respondent waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and confessed to the murders. He was convicted of capital murder and sentenced to death. On appeal to the Texas Court of Criminal Appeals, he argued, *inter alia*, that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel, which he claimed attached when counsel was appointed in the burglary case. The court reversed and remanded, holding that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged.

Held: Because the Sixth Amendment right to counsel is "offense specific," it does not necessarily extend to offenses that are "factually related" to those that have actually been charged. Pp. 167–174.

(a) In *McNeil* v. *Wisconsin*, 501 U. S. 171, 176, this Court held that a defendant's statements regarding offenses for which he has not been charged are admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. Although some lower courts have read into *McNeil*'s offense-specific definition an exception for crimes that are "factually related" to a charged offense, and have interpreted *Brewer* v. *Williams*, 430 U. S. 387, and *Maine* v. *Moulton*, 474 U. S. 159, to support this view, this Court declines to do so. *Brewer* did not address the question at issue here. And to the extent *Moulton* spoke to the matter at all, it expressly referred to the offense-specific nature of the Sixth Amendment right to counsel. In predicting that the offense-specific rule will prove disastrous to suspects' constitutional rights and will permit the police almost total license to conduct unwanted and uncounseled interrogations, respondent fails to appreciate two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. See *Miranda*, *supra*, at 479. Here, police scrupulously

Syllabus

followed *Miranda*'s dictates when questioning respondent. Second, the Constitution does not negate society's interest in the police's ability to talk to witnesses and suspects, even those who have been charged with other offenses. See *McNeil*, *supra*, at 181. Pp. 167–172.

(b) Although the Sixth Amendment right to counsel clearly attaches only to charged offenses, this Court has recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging document. The test to determine whether there are two different offenses or only one is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U. S. 299, 304. The *Blockburger* test has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." See, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 164–166. There is no constitutional difference between "offense" in the double jeopardy and right-to-counsel contexts. Accordingly, when the Sixth Amendment right to counsel attaches, it encompasses offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test. Pp. 172–174.

(c) At the time respondent confessed to the murders, he had been indicted for burglary but had not been charged in the murders. As defined by Texas law, these crimes are not the same offense under *Blockburger*. Thus, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and his confession was therefore admissible. P. 174.

Reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 174. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 177.

Gregory S. Coleman, Solicitor General of Texas, argued the cause for petitioner. With him on the briefs were *John Cornyn*, Attorney General, *Andy Taylor*, First Assistant Attorney General, and *S. Kyle Duncan*, Assistant Solicitor General.

Lisa Schiavo Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney Gen-*

eral Robinson, Deputy Solicitor General Dreeben, and *Deborah Watson.*

Roy E. Greenwood, by appointment of the Court, 531 U. S. 807, argued the cause for respondent. With him on the brief were *David A. Schulman* and *Lee Haidusek.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Texas Court of Criminal Appeals held that a criminal defendant's Sixth Amendment right to counsel attaches not only to the offense with which he is charged, but to other offenses "closely related factually" to the charged offense. We hold that our decision in *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), meant what it said, and that the Sixth Amendment right is "offense specific."

In December 1993, Lindsey Owings reported to the Walker County, Texas, Sheriff's Office that the home he

*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery,* Attorney General of Ohio, *Edward B. Foley,* State Solicitor, *David M. Gormley,* Associate Solicitor, and *Elise W. Porter* and *Norman E. Plate,* Assistant Solicitors, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *John M. Bailey* of Connecticut, *Robert A. Butterworth* of Florida, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *Michael C. Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Mark L. Earley* of Virginia, and *Gay Woodhouse* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the National Association of Police Organizations et al. by *Patrick F. Philbin* and *Stephen R. McSpadden.*

Sheri Lynn Johnson and *Jeffrey J. Pokorak* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

Stephen G. Tipps and *Jennifer L. Walker Elrod* filed a brief for the Texas District & County Attorneys Association et al. as *amici curiae.*

shared with his wife, Margaret, and their 16-month-old daughter, Kori Rae, had been burglarized. He also informed police that his wife and daughter were missing. Respondent Raymond Levi Cobb lived across the street from the Owings. Acting on an anonymous tip that respondent was involved in the burglary, Walker County investigators questioned him about the events. He denied involvement. In July 1994, while under arrest for an unrelated offense, respondent was again questioned about the incident. Respondent then gave a written statement confessing to the burglary, but he denied knowledge relating to the disappearances. Respondent was subsequently indicted for the burglary, and Hal Ridley was appointed in August 1994 to represent respondent on that charge.

Shortly after Ridley's appointment, investigators asked and received his permission to question respondent about the disappearances. Respondent continued to deny involvement. Investigators repeated this process in September 1995, again with Ridley's permission and again with the same result.

In November 1995, respondent, free on bond in the burglary case, was living with his father in Odessa, Texas. At that time, respondent's father contacted the Walker County Sheriff's Office to report that respondent had confessed to him that he killed Margaret Owings in the course of the burglary. Walker County investigators directed respondent's father to the Odessa police station, where he gave a statement. Odessa police then faxed the statement to Walker County, where investigators secured a warrant for respondent's arrest and faxed it back to Odessa. Shortly thereafter, Odessa police took respondent into custody and administered warnings pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Respondent waived these rights.

After a short time, respondent confessed to murdering both Margaret and Kori Rae. Respondent explained that when Margaret confronted him as he was attempting to re-

move the Owings' stereo, he stabbed her in the stomach with a knife he was carrying. Respondent told police that he dragged her body to a wooded area a few hundred yards from the house. Respondent then stated:

> "'I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then.'" App. to Pet. for Cert. A–9 to A–10.

Respondent later led police to the location where he had buried the victims' bodies.

Respondent was convicted of capital murder for murdering more than one person in the course of a single criminal transaction. See Tex. Penal Code Ann. § 19.03(a)(7)(A) (1994). He was sentenced to death. On appeal to the Court of Criminal Appeals of Texas, respondent argued, *inter alia*, that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. Relying on *Michigan* v. *Jackson*, 475 U. S. 625 (1986), respondent contended that his right to counsel had attached when Ridley was appointed in the burglary case and that Odessa police were therefore required to secure Ridley's permission before proceeding with the interrogation.

The Court of Criminal Appeals reversed respondent's conviction by a divided vote and remanded for a new trial. The court held that "once the right to counsel attaches to

the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." 2000 WL 275644, *3 (2000) (citations omitted). Finding the capital murder charge to be "factually interwoven with the burglary," the court concluded that respondent's Sixth Amendment right to counsel had attached on the capital murder charge even though respondent had not yet been charged with that offense. *Id.*, at *4. The court further found that respondent had asserted that right by accepting Ridley's appointment in the burglary case. See *ibid.* Accordingly, it deemed the confession inadmissible and found that its introduction had not been harmless error. See *id.*, at *4–*5. Three judges dissented, finding *Michigan* v. *Jackson* to be distinguishable and concluding that respondent had made a valid unilateral waiver of his right to counsel before confessing. See 2000 WL, at *5–*13 (opinion of McCormick, P. J.).

The State sought review in this Court, and we granted certiorari to consider first whether the Sixth Amendment right to counsel extends to crimes that are "factually related" to those that have actually been charged, and second whether respondent made a valid unilateral waiver of that right in this case. 530 U. S. 1260 (2000). Because we answer the first question in the negative, we do not reach the second.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *McNeil* v. *Wisconsin,* 501 U. S. 171 (1991), we explained when this right arises:

> "The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, in-

> formation, or arraignment." *Id.*, at 175 (citations and internal quotation marks omitted).

Accordingly, we held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. See *id.*, at 176.

Some state courts and Federal Courts of Appeals, however, have read into *McNeil*'s offense-specific definition an exception for crimes that are "factually related" to a charged offense.[1] Several of these courts have interpreted *Brewer* v. *Williams*, 430 U. S. 387 (1977), and *Maine* v. *Moulton*, 474 U. S. 159 (1985)—both of which were decided well before *McNeil*—to support this view, which respondent now invites us to approve. We decline to do so.

In *Brewer*, a suspect in the abduction and murder of a 10-year-old girl had fled from the scene of the crime in Des Moines, Iowa, some 160 miles east to Davenport, Iowa, where he surrendered to police. An arrest warrant was issued in Des Moines on a charge of abduction, and the suspect was arraigned on that warrant before a Davenport judge. Des Moines police traveled to Davenport, took the man into custody, and began the drive back to Des Moines. Along the way, one of the officers persuaded the suspect to lead police to the victim's body. The suspect ultimately was convicted of the girl's murder. This Court upheld the federal habeas court's conclusion that police had violated the suspect's Sixth Amendment right to counsel. We held that the officer's comments to the suspect constituted in-

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[1] See, *e. g.*, *United States* v. *Covarrubias*, 179 F. 3d 1219, 1223–1224 (CA9 1999); *United States* v. *Melgar*, 139 F. 3d 1005, 1013 (CA4 1998); *United States* v. *Doherty*, 126 F. 3d 769, 776 (CA6 1997); *United States* v. *Arnold*, 106 F. 3d 37, 41 (CA3 1997); *United States* v. *Williams*, 993 F. 2d 451, 457 (CA5 1993); *Commonwealth* v. *Rainwater*, 425 Mass. 540, 556, 681 N. E. 2d 1218, 1229 (1997); *In re Pack*, 420 Pa. Super. 347, 354–356, 616 A. 2d 1006, 1010–1011 (1992).

terrogation and that the suspect had not validly waived his right to counsel by responding to the officer. See 430 U. S., at 405–406.

Respondent suggests that *Brewer* implicitly held that the right to counsel attached to the factually related murder when the suspect was arraigned on the abduction charge. See Brief for Respondent 4. The Court's opinion, however, simply did not address the significance of the fact that the suspect had been arraigned only on the abduction charge, nor did the parties in any way argue this question. Constitutional rights are not defined by inferences from opinions which did not address the question at issue. Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

Moulton is similarly unhelpful to respondent. That case involved two individuals indicted for a series of thefts, one of whom had secretly agreed to cooperate with the police investigation of his codefendant, Moulton. At the suggestion of police, the informant recorded several telephone calls and one face-to-face conversation he had with Moulton during which the two discussed their criminal exploits and possible alibis. In the course of those conversations, Moulton made various incriminating statements regarding both the thefts for which he had been charged and additional crimes. In a superseding indictment, Moulton was charged with the original crimes as well as burglary, arson, and three additional thefts. At trial, the State introduced portions of the recorded face-to-face conversation, and Moulton ultimately was convicted of three of the originally charged thefts plus one count of burglary. Moulton appealed his convictions to the Supreme Judicial Court of Maine, arguing that introduction of the recorded conversation violated

his Sixth Amendment right to counsel. That court agreed, holding:

> "'Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired.'" 474 U. S., at 168 (quoting *State* v. *Moulton*, 481 A. 2d 155, 161 (1984)).

We affirmed.

Respondent contends that, in affirming reversal of both the theft and burglary charges, the *Moulton* Court must have concluded that Moulton's Sixth Amendment right to counsel attached to the burglary charge. See Brief for Respondent 13–14; see also Brief for the National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 22–23. But the *Moulton* Court did not address the question now before us, and to the extent *Moulton* spoke to the matter at all, it expressly referred to the offense-specific nature of the Sixth Amendment right to counsel:

> "The police have an interest in the thorough investigation of crimes for which *formal charges* have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and *formally charged* with having committed another crime obviously seek to discover evidence useful at a trial of either crime. In seeking evidence pertaining to *pending charges*, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. . . . On the other hand, to exclude

> evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 U. S., at 179–180 (emphasis added; footnote omitted).

See also *id.*, at 168 ("[T]he purpose of their meeting was to discuss the *pending charges*"); *id.*, at 177 ("[T]he police knew . . . that Moulton and [the informant] were meeting for the express purpose of discussing the *pending charges* . . ." (emphasis added)). Thus, respondent's reliance on *Moulton* is misplaced and, in light of the language employed there and subsequently in *McNeil*, puzzling.

Respondent predicts that the offense-specific rule will prove "disastrous" to suspects' constitutional rights and will "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations." Brief for Respondent 8–9. Besides offering no evidence that such a parade of horribles has occurred in those jurisdictions that have not enlarged upon *McNeil*, he fails to appreciate the significance of two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. See *Miranda* v. *Arizona*, 384 U. S., at 479; *Dickerson* v. *United States*, 530 U. S. 428, 435 (2000) (quoting *Miranda*). In the present case, police scrupulously followed *Miranda*'s dictates when questioning respondent.[2] Second, it is critical to recognize that the Con-

[2] Curiously, while predicting disastrous consequences for the core values underlying the Sixth Amendment, see *post*, at 179–183 (opinion of BREYER, J.), the dissenters give short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson*) in protecting a defendant's right to consult with counsel before talking to police. Even though the Sixth Amendment right to counsel has not attached to uncharged offenses,

stitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

> "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil*, 501 U. S., at 181 (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)).

See also *Moulton*, *supra*, at 180 ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities").

Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recog-

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defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights. Thus, in all but the rarest of cases, the Court's decision today will have no impact whatsoever upon a defendant's ability to protect his Sixth Amendment right.

It is also worth noting that, contrary to the dissent's suggestion, see *post*, at 177–178, 179, there is no "background principle" of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present. The dissent would expand the Sixth Amendment right to the assistance of counsel in a criminal prosecution into a rule which "'exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship.'" *Post*, at 181 (quoting ABA Ann. Model Rule of Profesional Conduct 4.2 (4th ed. 1999)). Every profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions. The Sixth Amendment right to counsel is personal to the defendant and specific to the offense.

nized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In *Blockburger* v. *United States*, 284 U. S. 299 (1932), we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." See, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 164–166 (1977). We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.[3]

While simultaneously conceding that its own test "lacks the precision for which police officers may hope," *post*, at 186, the dissent suggests that adopting *Blockburger*'s definition of "offense" will prove difficult to administer. But it is the dissent's vague iterations of the "'closely related to'" or "'inextricably intertwined with'" test, *post*, at 186, that would defy simple application. The dissent seems to presuppose that officers will possess complete knowledge of the circumstances surrounding an incident, such that the officers will be able to tailor their investigation to avoid addressing factually related offenses. Such an assumption, however, ignores the reality that police often are not yet aware of the

[3] In this sense, we could just as easily describe the Sixth Amendment as "prosecution specific," insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*, could not be the subject of a later prosecution. And, indeed, the text of the Sixth Amendment confines its scope to "all criminal *prosecutions*."

exact sequence and scope of events they are investigating—indeed, that is why police must investigate in the first place. Deterred by the possibility of violating the Sixth Amendment, police likely would refrain from questioning certain defendants altogether.

It remains only to apply these principles to the facts at hand. At the time he confessed to Odessa police, respondent had been indicted for burglary of the Owings residence, but he had not been charged in the murders of Margaret and Kori Rae. As defined by Texas law, burglary and capital murder are not the same offense under *Blockburger*. Compare Tex. Penal Code Ann. § 30.02(a) (1994) (requiring entry into or continued concealment in a habitation or building) with § 19.03(a)(7)(A) (requiring murder of more than one person during a single criminal transaction). Accordingly, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and respondent's confession was therefore admissible.

The judgment of the Court of Criminal Appeals of Texas is reversed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

The Court's opinion is altogether sufficient to explain why the decision of the Texas Court of Criminal Appeals should be reversed for failure to recognize the offense-specific nature of the Sixth Amendment right to counsel. It seems advisable, however, to observe that the Court has reached its conclusion without the necessity to reaffirm or give approval to the decision in *Michigan* v. *Jackson*, 475 U. S. 625 (1986). This course is wise, in my view, for the underlying theory of *Jackson* seems questionable.

As the facts of the instant case well illustrate, it is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free

choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* rule, and the related preventative rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), serve to protect a suspect's voluntary choice not to speak outside his lawyer's presence. The parallel rule announced in *Jackson*, however, supersedes the suspect's voluntary choice to speak with investigators. After *Jackson* had been decided, the Court made the following observation with respect to *Edwards:*

> "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny—not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused 'knowingly and intelligently' pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial." *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988).

There is little justification for not applying the same course of reasoning with equal force to the court-made preventative rule announced in *Jackson;* for *Jackson*, after all, was a wholesale importation of the *Edwards* rule into the Sixth Amendment.

In the instant case, Cobb at no time indicated to law enforcement authorities that he elected to remain silent about the double murder. By all indications, he made the voluntary choice to give his own account. Indeed, even now Cobb does not assert that he had no wish to speak at the time he confessed. While the *Edwards* rule operates to preserve the free choice of a suspect to remain silent, if *Jackson* were to apply it would override that choice.

There is further reason to doubt the wisdom of the *Jackson* holding. Neither *Miranda* nor *Edwards* enforces the

Fifth Amendment right unless the suspect makes a clear and unambiguous assertion of the right to the presence of counsel during custodial interrogation. *Davis* v. *United States*, 512 U. S. 452, 459 (1994). Where a required *Miranda* warning has been given, a suspect's later confession, made outside counsel's presence, is suppressed to protect the Fifth Amendment right of silence only if a reasonable officer should have been certain that the suspect expressed the unequivocal election of the right.

The Sixth Amendment right to counsel attaches quite without reference to the suspect's choice to speak with investigators after a *Miranda* warning. It is the commencement of a formal prosecution, indicated by the initiation of adversary judicial proceedings, that marks the beginning of the Sixth Amendment right. See *ante*, at 167–168 (quoting *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991)). These events may be quite independent of the suspect's election to remain silent, the interest which the *Edwards* rule serves to protect with respect to *Miranda* and the Fifth Amendment, and it thus makes little sense for a protective rule to attach absent such an election by the suspect. We ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent.

Even if *Jackson* is to remain good law, its protections should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*. Cobb made no such assertion here, yet JUSTICE BREYER's dissent rests upon the assumption that the *Jackson* rule should operate to exclude the confession no matter. There would be little justification for this extension of a rule that, even in a more limited application, rests on a doubtful rationale.

JUSTICE BREYER defends *Jackson* by arguing that, once a suspect has accepted counsel at the commencement of ad-

versarial proceedings, he should not be forced to confront the police during interrogation without the assistance of counsel. See *post*, at 179–181. But the acceptance of counsel at an arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*.

With these further remarks, I join in full the opinion of the Court.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This case focuses upon the meaning of a single word, "offense," when it arises in the context of the Sixth Amendment. Several basic background principles define that context.

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963); *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932).

Second, the right attaches when adversary proceedings, triggered by the government's formal accusation of a crime, begin. See *Brewer* v. *Williams*, 430 U. S. 387, 401 (1977); *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972); *Massiah* v. *United States*, 377 U. S. 201, 206 (1964).

Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights. See *Michigan* v. *Jackson*, 475 U. S. 625, 633, 636 (1986) (waiver

of right to presence of counsel is assumed invalid unless accused initiates communication); *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985) (Sixth Amendment gives defendant right "to rely on counsel as a 'medium' between him and the State"). Cf. ABA Model Rule of Professional Conduct 4.2 (2001) (lawyer is generally prohibited from communicating with a person known to be represented by counsel "about the subject of the representation" without counsel's "consent"); Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283, 284, and n. 5 (1988) (version of Model Rule 4.2 or its predecessor has been adopted by all 50 States).

Fourth, the particular aspect of the right here at issue—the rule that the police ordinarily must communicate with the defendant through counsel—has important limits. In particular, recognizing the need for law enforcement officials to investigate "new or additional crimes" not the subject of current proceedings, *Maine* v. *Moulton*, *supra*, at 179, this Court has made clear that the right to counsel does not attach to any and every crime that an accused may commit or have committed, see *McNeil* v. *Wisconsin*, 501 U. S. 171, 175–176 (1991). The right "cannot be invoked once for all future prosecutions," and it does not forbid "interrogation unrelated to the charge." *Id.*, at 175, 178. In a word, as this Court previously noted, the right is "offense specific." *Id.*, at 175.

This case focuses upon the last-mentioned principle, in particular upon the meaning of the words "offense specific." These words appear in this Court's Sixth Amendment case law, not in the Sixth Amendment's text. See U. S. Const., Amdt. 6 (guaranteeing right to counsel "[i]n all criminal prosecutions"). The definition of these words is not self-evident. Sometimes the term "offense" may refer to words that are written in a criminal statute; sometimes it may refer generally to a course of conduct in the world, aspects of which constitute the elements of one or more crimes; and

sometimes it may refer, narrowly and technically, just to the conceptually severable aspects of the latter. This case requires us to determine whether an "offense"—for Sixth Amendment purposes—includes factually related aspects of a single course of conduct other than those few acts that make up the essential elements of the crime charged.

We should answer this question in light of the Sixth Amendment's basic objectives as set forth in this Court's case law. At the very least, we should answer it in a way that does not undermine those objectives. But the Court today decides that "offense" means the crime set forth within "the four corners of a charging instrument," along with other crimes that "would be considered the same offense" under the test established by *Blockburger* v. *United States*, 284 U. S. 299 (1932). *Ante*, at 173. In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.

For one thing, the majority's rule, while leaving the Fifth Amendment's protections in place, threatens to diminish severely the additional protection that, under this Court's rulings, the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them through that counsel. See, *e. g.*, *Michigan* v. *Jackson*, *supra*, at 632 (Sixth Amendment prevents police from questioning represented defendant through informants even when Fifth Amendment would not); *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980) (Fifth Amendment right, unlike Sixth, applies only in custodial interrogation).

JUSTICE KENNEDY, JUSTICE SCALIA, and JUSTICE THOMAS, if not the majority, apparently believe these protections constitutionally unimportant, for, in their view, "the underlying theory of *Jackson* seems questionable." *Ante*, at 174 (KENNEDY, J., concurring). Both the majority and

concurring opinions suggest that a suspect's ability to invoke his Fifth Amendment right and "refuse any police questioning" offers that suspect adequate constitutional protection. *Ante*, at 172, n. 2 (majority opinion); see also *ante*, at 175–176 (KENNEDY, J., concurring). But that is not so.

Jackson focuses upon a suspect—perhaps a frightened or uneducated suspect—who, hesitant to rely upon his own unaided judgment in his dealings with the police, has invoked his constitutional right to legal assistance in such matters. See *Michigan* v. *Jackson*, 475 U. S., at 634, n. 7 (" 'The simple fact that [a] defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly' ") (quoting *People* v. *Bladel*, 421 Mich. 39, 63–64, 365 N. W. 2d 56, 67 (1984)). *Jackson* says that, once such a request has been made, the police may not simply throw that suspect—who does not trust his own unaided judgment—back upon his own devices by requiring him to rely for protection upon that same unaided judgment that he previously rejected as inadequate. In a word, the police may not force a suspect who has asked for legal counsel to make a critical legal choice without the legal assistance that he has requested and that the Constitution guarantees. See *McNeil* v. *Wisconsin*, *supra*, at 177–178 ("The purpose of the Sixth Amendment counsel guarantee . . . is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary' ") (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)). The Constitution does not take away with one hand what it gives with the other. See *Gideon* v. *Wainwright*, 372 U. S., at 344 (Sixth Amendment means that a person charged with a crime need not "face his accusers without a lawyer to assist him"); *Michigan* v. *Jackson*, *supra*, at 633, 635 (presuming "that the defendant requests the lawyer's services at every critical stage of the prosecution" even if the defendant fails to invoke his Fifth Amendment rights at the time of interrogation); cf. *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981) (when

accused has expressed desire to deal with police through counsel, police may not reinitiate interrogation until counsel has been made available); ABA Ann. Model Rule of Professional Conduct 4.2, p. 398, comment. (4th ed. 1999) ("Rule 4.2 . . . exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship").

For these reasons, the Sixth Amendment right at issue is independent of the Fifth Amendment's protections; and the importance of this Sixth Amendment right has been repeatedly recognized in our cases. See, *e. g.*, *Michigan* v. *Jackson*, *supra*, at 636 ("We conclude that the assertion [of the right to counsel] is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment").

JUSTICE KENNEDY primarily relies upon *Patterson* v. *Illinois*, 487 U. S. 285 (1988), in support of his conclusion that *Jackson* is not good law. He quotes *Patterson*'s statement that the Constitution does " 'not ba[r] an accused from making an *initial* election as to whether' " to speak with the police without counsel's assistance. *Ante*, at 175 (quoting *Patterson* v. *Illinois*, *supra*, at 291).

This statement, however, cannot justify the overruling of *Jackson*. That is because, in *Patterson* itself, this Court noted, "as a matter of some significance," that, at the time he was interrogated, *the defendant had neither retained nor accepted the appointment of counsel*. 487 U. S., at 290, n. 3. We characterized our holding in *Jackson* as having depended upon "the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police," 487 U. S., at 291 (quoting *Michigan* v. *Jackson*, *supra*, at 631), and explained that, "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect," 487 U. S., at 290, n. 3 (citing *Maine* v. *Moulton*, 474 U. S., at 176).

JUSTICE KENNEDY also criticizes *Jackson* on the ground that it prevents a suspect "from . . . making th[e] choice" to "give . . . a forthright account of the events that occurred." *Ante*, at 177. But that is not so. A suspect may initiate communication with the police, thereby avoiding the risk that the police induced him to make, unaided, the kind of critical legal decision best made with the help of counsel, whom he has requested.

Unlike JUSTICE KENNEDY, the majority does not call *Jackson* itself into question. But the majority would undermine that case by significantly diminishing the Sixth Amendment protections that the case provides. That is because criminal codes are lengthy and highly detailed, often proliferating "overlapping and related statutory offenses" to the point where prosecutors can easily "spin out a startlingly numerous series of offenses from a single . . . criminal transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 445, n. 10 (1970). Thus, an armed robber who reaches across a store counter, grabs the cashier, and demands "your money or your life," may through that single instance of conduct have committed several "offenses," in the majority's sense of the term, including armed robbery, assault, battery, trespass, use of a firearm to commit a felony, and perhaps possession of a firearm by a felon, as well. A person who is using and selling drugs on a single occasion might be guilty of possessing various drugs, conspiring to sell drugs, being under the influence of illegal drugs, possessing drug paraphernalia, possessing a gun in relation to the drug sale, and, depending upon circumstances, violating various gun laws as well. A protester blocking an entrance to a federal building might also be trespassing, failing to disperse, unlawfully assembling, and obstructing Government administration all at one and the same time.

The majority's rule permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking questions about any other related crime not actually charged in

the indictment. Thus, the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockburger*'s definition it counts as the "same crime"), all *without notifying counsel.* Indeed, the majority's rule would permit law enforcement officials to question anyone charged with any crime in any one of the examples just given about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sense—what common sense—does such a rule make? What is left of the "communicate through counsel" rule? The majority's approach is inconsistent with any common understanding of the scope of counsel's representation. It will undermine the lawyer's role as "'medium'" between the defendant and the government. *Maine* v. *Moulton*, *supra*, at 176. And it will, on a random basis, remove a significant portion of the protection that this Court has found inherent in the Sixth Amendment.

In fact, under the rule today announced by the majority, two of the seminal cases in our Sixth Amendment jurisprudence would have come out differently. In *Maine* v. *Moulton,* which the majority points out "expressly referred to the offense-specific nature of the Sixth Amendment right to counsel," *ante,* at 170, we treated burglary and theft as the same offense for Sixth Amendment purposes. Despite the opinion's clear statement that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses," 474 U. S., at 180, n. 16, the Court affirmed the lower court's reversal of both burglary and theft charges even though, at the time that the incriminating statements at issue were made, Moulton had been charged only with theft by receiving, *id.*, at 162, 167, 180. Under the majority's rule, in contrast, because theft by re-

ceiving and burglary each required proof of a fact that the other did not, only Moulton's theft convictions should have been overturned. Compare Me. Rev. Stat. Ann., Tit. 17–A, § 359 (1981) (theft) (requiring knowing receipt, retention, or disposal of stolen property with the intent to deprive the owner thereof), with § 401 (burglary) (requiring entry of a structure without permission and with the intent to commit a crime).

In *Brewer* v. *Williams*, the effect of the majority's rule would have been even more dramatic. Because first-degree murder and child abduction each required proof of a fact not required by the other, and because at the time of the impermissible interrogation Williams had been charged only with abduction of a child, Williams' murder conviction should have remained undisturbed. See 430 U. S., at 390, 393–395, 406. Compare Iowa Code § 690.2 (1950 and Supp. 1978) (first-degree murder) (requiring a killing) with Iowa Code § 706.2 (1950) (repealed 1978) (child-stealing) (requiring proof that a child under 16 was taken with the intent to conceal the child from his or her parent or guardian). This is not to suggest that this Court has previously addressed and decided the question presented by this case. Rather, it is to point out that the Court's conception of the Sixth Amendment right at the time that *Moulton* and *Brewer* were decided naturally presumed that it extended to factually related but uncharged offenses.

At the same time, the majority's rule threatens the legal clarity necessary for effective law enforcement. That is because the majority, aware that the word "offense" ought to encompass something beyond "the four corners of the charging instrument," imports into Sixth Amendment law the definition of "offense" set forth in *Blockburger* v. *United States*, 284 U. S. 299 (1932), a case interpreting the Double Jeopardy Clause of the Fifth Amendment, which Clause uses the word "offence" but otherwise has no relevance here. Whatever Fifth Amendment virtues *Block-*

burger may have, to import it into this Sixth Amendment context will work havoc.

In theory, the test says that two offenses are the "same offense" unless each requires proof of a fact that the other does not. See *ante*, at 173 (majority opinion). That means that most of the different crimes mentioned above are not the "same offense." Under many States' laws, for example, the statute defining assault and the statute defining robbery each requires proof of a fact that the other does not. Compare, *e. g.*, Cal. Penal Code Ann. § 211 (West 1999) (robbery) (requiring taking of personal property of another) with § 240 (assault) (requiring attempt to commit violent injury). Hence the extension of the definition of "offense" that is accomplished by the use of the *Blockburger* test does nothing to address the substantial concerns about the circumvention of the Sixth Amendment right that are raised by the majority's rule.

But, more to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. See, *e. g.*, *United States* v. *Woodward*, 469 U. S. 105, 108 (1985) *(per curiam)* (holding that lower court misapplied *Blockburger* test). Compare *United States* v. *Dixon*, 509 U. S. 688, 697–700 (1993) (opinion of SCALIA, J.) (applying *Blockburger* and concluding that contempt is same offense as underlying substantive crime), with 509 U. S., at 716–720 (REHNQUIST, C. J., concurring in part and dissenting in part) (applying *Blockburger* and deciding that the two are separate offenses). The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz* v. *United States*, 450 U. S. 333, 343 (1981). Yet the Court now asks, not the lawyers and judges who ordinarily work with double jeopardy law, but police officers in the field, to navigate *Blockburger* when they ques-

tion suspects. Cf. *New York* v. *Belton*, 453 U. S. 454, 458 (1981) (noting importance of clear rules to guide police behavior). Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog . . . Where Armies whole have sunk."

There is, of course, an alternative. We can, and should, define "offense" in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument. This alternative is not perfect. The language used lacks the precision for which police officers may hope; and it requires lower courts to specify its meaning further as they apply it in individual cases. Yet virtually every lower court in the United States to consider the issue has defined "offense" in the Sixth Amendment context to encompass such closely related acts. See *ante*, at 168, n. 1 (majority opinion) (citing cases from the Third, Fourth, Fifth, Sixth, and Ninth Circuits as well as state courts in Massachusetts and Pennsylvania); *Taylor* v. *State*, 726 So. 2d 841, 845 (Fla. App. 1999); *People* v. *Clankie*, 124 Ill. 2d 456, 462–466, 530 N. E. 2d 448, 451–453 (1988); *State* v. *Tucker*, 137 N. J. 259, 277–278, 645 A. 2d 111, 120–121 (1994), cert. denied, 513 U. S. 1090 (1995). These courts have found offenses "closely related" where they involved the same victim, set of acts, evidence, or motivation. See, *e. g.*, *Taylor* v. *State*, *supra*, at 845 (stolen property charges and burglary); *State* v. *Tucker*, *supra*, at 278, 645 A. 2d, at 121 (burglary, robbery, and murder of home's occupant); *In re Pack*, 420 Pa. Super. 347, 355–356, 616 A. 2d 1006, 1010 (1992) (burglary, receiving stolen property, and theft charges), appeal denied, 535 Pa. 669, 634 A. 2d 1117 (1993). They have found offenses unrelated where time, location, or factual circumstances significantly separated the

one from the other. See, *e. g.*, *Commonwealth* v. *Rainwater*, 425 Mass. 540, 547–549, and n. 7, 681 N. E. 2d 1218, 1224, and n. 7 (1997) (vehicle theft charge and earlier vehicle thefts in same area), cert. denied, 522 U. S. 1095 (1998); *Whittlesey* v. *State*, 340 Md. 30, 56–57, 665 A. 2d 223, 236 (1995) (murder and making false statements charges), cert. denied, 516 U. S. 1148 (1996); *People* v. *Dotson*, 214 Ill. App. 3d 637, 646, 574 N. E. 2d 143, 149 (murder and weapons charges), appeal denied, 141 Ill. 2d 549, 580 N. E. 2d 123 (1991).

One cannot say in favor of this commonly followed approach that it is perfectly clear—only that, because it comports with common sense, it is far easier to apply than that of the majority. One might add that, unlike the majority's test, it is consistent with this Court's assumptions in previous cases. See *Maine* v. *Moulton*, 474 U. S., at 162, 167, 180 (affirming reversal of both burglary and theft convictions); *Brewer* v. *Williams*, 430 U. S., at 389, 390, 393, 406 (affirming grant of habeas which vacated murder conviction). And, most importantly, the "closely related" test furthers, rather than undermines, the Sixth Amendment's "right to counsel," a right so necessary to the realization in practice of that most "noble ideal," a fair trial. *Gideon* v. *Wainwright*, 372 U. S., at 344.

The Texas Court of Criminal Appeals, following this commonly accepted approach, found that the charged burglary and the uncharged murders were "closely related." All occurred during a short period of time on the same day in the same basic location. The victims of the murders were also victims of the burglary. Cobb committed one of the murders in furtherance of the robbery, the other to cover up the crimes. The police, when questioning Cobb, knew that he already had a lawyer representing him on the burglary charges and had demonstrated their belief that this lawyer also represented Cobb in respect to the murders by asking his permission to question Cobb about the murders on previous occasions. The relatedness of the crimes

is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary. See, *e. g.*, Tr. 157 (Feb. 19, 1997) (testimony by police officer who obtained murder confession) ("Basically what he told us is he had gone over to the house to burglarize it and nobody was home"); 22 Record, State's Exh. 20 (typed statement by Cobb) (admitting that he committed the murders after entering the house and stealing stereo parts). Nor, in my view, did Cobb waive his right to counsel. See *supra*, at 180–181. These considerations are sufficient. The police officers ought to have spoken to Cobb's counsel before questioning Cobb. I would affirm the decision of the Texas court.

Consequently, I dissent.

Syllabus

LUJAN, LABOR COMMISSIONER OF CALIFORNIA, ET AL. *v.* G & G FIRE SPRINKLERS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–152. Argued February 26, 2001—Decided April 17, 2001

The California Labor Code (Code) authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements; permits the contractor, in turn, to withhold similar sums from the subcontractor; and permits the contractor, or his assignee, to sue the awarding body for alleged breach of the contract in not making payment to recover the wages or penalties withheld. After petitioner State Division of Labor Standards Enforcement (DLSE) determined that respondent G & G Fire Sprinklers, Inc. (G & G), as a subcontractor on three public works projects, had violated the Code, it issued notices directing the awarding bodies on those projects to withhold from the contractors an amount equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld G & G's payment. G & G filed a 42 U. S. C. § 1983 suit against DLSE and other state petitioners in the District Court, claiming that the issuance of the notices without a hearing deprived it of property without due process in violation of the Fourteenth Amendment. The court granted G & G summary judgment, declared the relevant Code sections unconstitutional, and enjoined the State from enforcing the provisions against G & G. The Ninth Circuit affirmed. This Court granted certiorari, vacated that judgment, and remanded for reconsideration in light of its decision in *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, that the respondents there had no property interest in payment for disputed medical treatment pending review of the treatment's reasonableness and necessity, as authorized by state law. On remand, the Ninth Circuit reinstated its prior judgment and opinion, explaining that G & G's rights were violated not because it was deprived of immediate payment, but because the state statutory scheme afforded no hearing at all.

Held: Because state law affords G & G sufficient opportunity to pursue its claim for payment under its contracts in state court, the statutory scheme does not deprive it of due process. In each of this Court's

Syllabus

cases relied upon by the Ninth Circuit, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. See, *e. g.*, *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 62. Unlike those claimants, G & G has not been deprived of any present entitlement. It has been deprived of payment that it contends it is owed under a contract, based on the State's determination that it failed to comply with the contract's terms. That property interest can be fully protected by an ordinary breach-of-contract suit. If California makes ordinary judicial process available to G & G for resolving its contractual dispute, that process is due process. Here, the Code, by allowing a contractor to assign the right of suit, provides a means by which a subcontractor may bring a breach-of-contract suit to recover withheld payments. That damages may not be awarded until the suit's conclusion does not deprive G & G of its claim. Even if G & G could not obtain assignment, it appears that a breach-of-contract suit against the contractor remains available under state common law, although final determination of the question rests in the hands of the California courts. Pp. 195–199.

204 F. 3d 941, reversed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Thomas S. Kerrigan argued the cause and filed briefs for petitioners.

Jeffrey A. Lamken argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Jacob M. Lewis*, and *Daniel L. Kaplan.*

Stephen A. Seideman argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, *Scott A. Kronland*, and *Laurence Gold;* and for the Port of Oakland et al. by *David L. Alexander* and *Christopher H. Alonzi.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The California Labor Code (Code or Labor Code) authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements. The Code permits the contractor, in turn, to withhold similar sums from the subcontractor. The Court of Appeals for the Ninth Circuit held that the relevant Code provisions violate the Due Process Clause of the Fourteenth Amendment because the statutory scheme does not afford the subcontractor a hearing before or after such action is taken. We granted certiorari, 531 U. S. 924 (2000), and we reverse.

Petitioners are the California Division of Labor Standards Enforcement (DLSE), the California Department of Industrial Relations, and several state officials in their official capacities. Respondent G & G Fire Sprinklers, Inc. (G & G), is a fire-protection company that installs fire sprinkler systems. G & G served as a subcontractor on several California public works projects. "Public works" include construction work done under contract and paid for in whole or part by public funds. Cal. Lab. Code Ann. § 1720 (West Supp. 2001). The department, board, authority, officer, or agent awarding a contract for public work is called the "awarding body." § 1722 (West 1989). The California Labor Code requires that contractors and subcontractors on such projects pay their workers a prevailing wage that is determined by the State. §§ 1771, 1772, 1773 (West 1989 and Supp. 2001). At the time relevant here, if workers were not paid the prevailing wage, the contractor was required to pay each worker the difference between the prevailing wage and the wages paid, in addition to forfeiting a penalty to the State. § 1775

(West Supp. 2001).[1] The awarding body was required to include a clause in the contract so stipulating. *Ibid.*

The Labor Code provides that "[b]efore making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter." § 1727. If money is withheld from a contractor because of a subcontractor's failure to comply with the Code's provisions, "[i]t shall be lawful for [the] contractor to withhold from [the] subcontractor under him sufficient sums to cover any penalties withheld." § 1729 (West 1989).[2]

The Labor Code permits the contractor, or his assignee, to bring suit against the awarding body "on the contract for alleged breach thereof in not making . . . payment" to recover the wages or penalties withheld. §§ 1731, 1732 (West Supp. 2001). The suit must be brought within 90 days of completion of the contract and acceptance of the job. § 1730. Such a suit "is the exclusive remedy of the contrac-

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[1] The Code also imposes restrictions on recordkeeping and working hours, and at the time relevant here, the contractor was similarly penalized if the contractor or subcontractor failed to comply with them. Cal. Lab. Code Ann. §§ 1776(a), (b), (g) (West Supp. 2001), 1813 (West 1989). The awarding body was required to include a clause in the contract so stipulating. §§ 1776(h), 1813.

Sections 1775, 1776, and 1813 were subsequently amended to provide that both contractors and subcontractors may be penalized for failure to comply with the Labor Code. §§ 1775(a), 1776(g), 1813 (West Supp. 2001). Amendments to § 1775 also state that either the contractor or the subcontractor may pay workers the difference between the prevailing wage and wages paid. § 1775(a).

[2] Amendments to the Labor Code effective July 1, 2001, impose additional requirements on contractors. See § 1727(b) (West Supp. 2001) (contractor shall withhold money from subcontractor at request of Labor Commissioner in certain circumstances); § 1775(b)(3) (contractor shall take corrective action to halt subcontractor's failure to pay prevailing wages if aware of the failure or be subject to penalties).

tor or his or her assignees." § 1732. The awarding body retains the wages and penalties "pending the outcome of the suit." § 1731.[3]

In 1995, DLSE determined that G & G, as a subcontractor on three public works projects, had violated the Labor Code by failing to pay the prevailing wage and failing to keep and/or furnish payroll records upon request. DLSE issued notices to the awarding bodies on those projects, directing them to withhold from the contractors an amount equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld payment from G & G. The total withheld, according to respondent, exceeded $135,000. App. 68.

G & G sued petitioners in the District Court for the Central District of California. G & G sought declaratory and injunctive relief pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming that the issuance of withholding notices without a hearing constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment. The District Court granted respondent's motion for summary judgment, declared §§ 1727, 1730–1733, 1775, 1776(g), and 1813 of the Labor Code unconstitutional, and enjoined the State from enforcing these provisions

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[3] Sections 1730–1733 of the Code have been repealed, effective July 1, 2001. Section 1742 has replaced them. It provides that "[a]n affected contractor or subcontractor may obtain review of a civil wage and penalty assessment [under the Code] by transmitting a written request to the office of the Labor Commissioner." § 1742(a). The contractor or subcontractor is then entitled to a hearing before the Director of Industrial Relations, who shall appoint an impartial hearing officer. Within 45 days of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. A contractor or subcontractor may obtain review of the director's decision by filing a petition for a writ of the mandate in state superior court. §§ 1742(b), (c). These provisions are not yet in effect and these procedures were not available to respondent at the time of the withholding of payments at issue here.

against respondent. App. to Pet. for Cert. A85–A87. Petitioners appealed.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed. *G & G Fire Sprinklers, Inc.* v. *Bradshaw*, 156 F. 3d 893, 898 (1998) *(Bradshaw I)*. The court concluded that G & G "has a property interest in being paid in full for the construction work it has completed," *id.*, at 901, and found that G & G was deprived of that interest "as a result of the state's action," *id.*, at 903. It decided that because subcontractors were "afforded neither a pre- nor post-deprivation hearing when payments [were] withheld," the statutory scheme violated the Due Process Clause of the Fourteenth Amendment. *Id.*, at 904.

Following *Bradshaw I*, we decided *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40 (1999), where respondents also alleged a deprivation of property without due process of law, in violation of the Fourteenth Amendment. *Sullivan* involved a challenge to a private insurer's decision to withhold payment for disputed medical treatment pending review of its reasonableness and necessity, as authorized by state law. We held that the insurer's action was not "fairly attributable to the State," and that respondents therefore failed to satisfy a critical element of their § 1983 claim. *Id.*, at 58. We also decided that because state law entitled respondents to reasonable and necessary medical treatment, respondents had no property interest in payment for medical treatment not yet deemed to meet those criteria. *Id.*, at 61. We granted certiorari in *Bradshaw I*, vacated the judgment of the Court of Appeals, and remanded for reconsideration in light of *Sullivan*. *Bradshaw* v. *G & G Fire Sprinklers, Inc.*, 526 U. S. 1061 (1999).

On remand, the Court of Appeals reinstated its prior judgment and opinion, again by a divided vote. The court held that the withholding of payments was state action because it was "specifically directed by State officials . . . [and] the withholding party has no discretion." *G & G Fire*

Sprinklers, Inc. v. *Bradshaw*, 204 F. 3d 941, 944 (CA9 2000). In its view, its prior opinion was consistent with *Sullivan* because it "specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded," and "explicitly authorized the withholding of payments pending the hearing." 204 F. 3d, at 943. The court explained that G & G's rights were violated not because it was deprived of immediate payment, but "because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Id.*, at 943–944.

Where a state law such as this is challenged on due process grounds, we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process. *Sullivan*, *supra*, at 59. We assume, without deciding, that the withholding of money due respondent under its contracts occurred under color of state law, and that, as the Court of Appeals concluded, respondent has a property interest of the kind we considered in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), in its claim for payment under its contracts. 204 F. 3d, at 943–944. Because we believe that California law affords respondent sufficient opportunity to pursue that claim in state court, we conclude that the California statutory scheme does not deprive G & G of its claim for payment without due process of law. See *Logan*, *supra*, at 433 ("[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged").

The Court of Appeals relied upon several of our cases dealing with claims of deprivation of a property interest without due process to hold that G & G was entitled to a reasonably prompt hearing when payments were withheld. *Bradshaw I*, *supra*, at 903–904 (citing *United States* v. *James Daniel Good Real Property*, 510 U. S. 43 (1993); *FDIC* v. *Mallen*, 486 U. S. 230 (1988); *Barry* v. *Barchi*, 443 U. S. 55

(1979)). In *Good*, we held that the Government must afford the owner of a house subject to forfeiture as property used to commit or to facilitate commission of a federal drug offense notice and a hearing before seizing the property. 510 U. S., at 62. In *Barchi*, we held that a racetrack trainer suspended for 15 days on suspicion of horse drugging was entitled to a prompt postdeprivation administrative or judicial hearing. 443 U. S., at 63–64. And in *Mallen*, we held that the president of a Federal Deposit Insurance Corporation (FDIC) insured bank suspended from office by the FDIC was accorded due process by a notice and hearing procedure which would render a decision within 90 days of the suspension. 486 U. S., at 241–243. See also *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337 (1969) (holding that due process requires notice and a hearing before wages may be garnished).

In each of these cases, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. Unlike those claimants, respondent has not been denied any present entitlement. G & G has been deprived of payment that it contends it is owed under a contract, based on the State's determination that G & G failed to comply with the contract's terms. G & G has only a claim that it did comply with those terms and therefore that it is entitled to be paid in full. Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, see *supra*, at 195, it is an interest, unlike the interests discussed above, that can be fully protected by an ordinary breach-of-contract suit.

In *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961) (citations omitted), we said:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed

> content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions . . . .'"

We hold that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process.

The California Labor Code provides that "the contractor or his or her assignee" may sue the awarding body "on the contract for alleged breach thereof" for "the recovery of wages or penalties." §§ 1731, 1732 (West Supp. 2001). There is no basis here to conclude that the contractor would refuse to assign the right of suit to its subcontractor. In fact, respondent stated at oral argument that it has sued awarding bodies in state superior court pursuant to §§ 1731–1733 of the Labor Code to recover payments withheld on previous projects where it served as a subcontractor. See Tr. of Oral Arg. 27, 40–41, 49–50. Presumably, respondent brought suit as an assignee of the contractors on those projects, as the Code requires. § 1732 (West Supp. 2001). Thus, the Labor Code, by allowing assignment, provides a means by which a subcontractor may bring a claim for breach of contract to recover wages and penalties withheld.

Respondent complains that a suit under the Labor Code is inadequate because the awarding body retains the wages and penalties "pending the outcome of the suit," § 1731, which may last several years. Tr. of Oral Arg. 51. A lawsuit of that duration, while undoubtedly something of a hardship, cannot be said to deprive respondent of its claim for payment under the contract. Lawsuits are not known for expeditiously resolving claims, and the standard practice in breach-of-contract suits is to award damages, if appropriate, only at the conclusion of the case.

Even if respondent could not obtain assignment of the right to sue the awarding body under the contract, it appears that a suit for breach of contract against the contractor remains available under California common law. See 1

B. Witkin, Summary of California Law §§ 791, 797 (9th ed. 1987) (defining breach as the "unjustified or unexcused . . . failure to perform a contract" and describing the remedies available under state law). To be sure, § 1732 of the Labor Code provides that suit on the contract against the awarding body is the "exclusive remedy of the contractor or his or her assignees" with respect to recovery of withheld wages and penalties. § 1732 (West Supp. 2001). But the remedy is exclusive only with respect to the contractor and his assignees, and thus by its terms not the exclusive remedy for a subcontractor who does not receive assignment. See, *e. g., J & K Painting Co., Inc.* v. *Bradshaw,* 45 Cal. App. 4th 1394, 1402, 53 Cal. Rptr. 2d 496, 501 (1996) (allowing subcontractor to challenge Labor Commissioner's action by petition for a writ of the mandate).

In *J & K Painting,* the California Court of Appeal rejected the argument that § 1732 requires a subcontractor to obtain an assignment and that failure to do so is "fatal to any other attempt to secure relief." *Id.,* at 1401, n. 7, 53 Cal. Rptr. 2d, at 501, n. 7. The Labor Code does not expressly impose such a requirement, and that court declined to infer an intent to "create remedial exclusivity" in this context. *Ibid.* It thus appears that subcontractors like respondent may pursue their claims for payment by bringing a standard breach-of-contract suit against the contractor under California law. Our view is necessarily tentative, since the final determination of the question rests in the hands of the California courts, but respondent has not convinced us that this avenue of relief is closed to it. See *id.,* at 1401, and n. 4, 53 Cal. Rptr. 2d, at 500, and n. 4 (noting that the contractor might assert a variety of defenses to the subcontractor's suit for breach of contract without evaluating their soundness). As the party challenging the statutory withholding scheme, respondent bears the burden of demonstrating its unconstitutionality. Cf. *INS* v. *Chadha,* 462 U. S. 919, 944 (1983) (statutes presumed constitutional). We

therefore conclude that the relevant provisions of the California Labor Code do not deprive respondent of property without due process of law. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

UNITED STATES *v.* CLEVELAND INDIANS BASEBALL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00–203. Argued February 27, 2001—Decided April 17, 2001

Under a grievance settlement agreement, respondent Cleveland Indians Baseball Company (Company) owed 8 players backpay for wages due in 1986 and 14 players backpay for wages due in 1987. The Company paid the back wages in 1994. This case presents the question whether, under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), the back wages should be taxed by reference to the year they were actually paid (1994) or, instead, by reference to the years they should have been paid (1986 and 1987). Both tax rates and the amount of the wages subject to tax (the wage base) have risen over time. Consequently, allocating the 1994 payments back to 1986 and 1987 would generate no additional FICA or FUTA tax liability for the Company and its former employees, while treating the back wages as taxable in 1994 would subject both the Company and the employees to significant tax liability. The Company paid its share of employment taxes on the back wages according to 1994 tax rates and wage bases. After the Internal Revenue Service denied its claims for a refund of those payments, the Company initiated this action in District Court. The Company relied on Sixth Circuit precedent holding that a settlement for back wages should not be allocated to the period when the employer finally pays but to the periods when the wages were not paid as usual. The District Court, bound by that precedent, entered judgment for the Company and ordered the Government to refund FICA and FUTA taxes. The Sixth Circuit affirmed.

Held: Back wages are subject to FICA and FUTA taxes by reference to the year the wages are in fact paid. Pp. 208–220.

(a) The Internal Revenue Code imposes FICA and FUTA taxes "on every employer . . . equal to [a percentage of] wages . . . paid by him with respect to employment." 26 U. S. C. §§ 3111(a), 3111(b), 3301. The Social Security tax provision, § 3111(a), prescribes tax rates applicable to "wages paid during" each year from 1984 onward. The Medicare tax provision, § 3111(b)(6), sets the tax rate "with respect to wages paid after December 31, 1985." And the FUTA tax provision, § 3301, sets the rate as a percentage "in the case of calendar years 1988 through

2007 . . . of the total wages . . . paid by [the employer] during the calendar year." Section 3121(a) establishes the annual ceiling on wages subject to Social Security tax by defining "wages" to exclude any remuneration "paid to [an] individual by [an] employer during [a] calendar year" that exceeds "remuneration . . . equal to the contribution and benefit base . . . paid to [such] individual . . . during the calendar year with respect to which such contribution and benefit base is effective." Section 3306(b)(1) similarly limits annual wages subject to FUTA tax. Pp. 208–209.

(b) The Government calls attention to these provisions' constant references to *wages paid during a calendar year* as the touchstone for determining the applicable tax rate and wage base. The meaning of this language, the Government contends, is plain: Wages are taxed according to the calendar year they are in fact paid, regardless of when they should have been paid. The Court agrees with the Company that *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, undermines the Government's plain language argument. The *Nierotko* Court concluded that, for purposes of determining a wrongfully discharged worker's eligibility for Social Security benefits under § 209(g), as that provision was formulated in the 1939 Amendments to the Social Security Act, a backpay award had to be allocated as wages to calendar quarters of the year "when the regular wages were not paid as usual." *Id.*, at 370, and n. 25. The Court found no conflict between this allocation-back rule and language in § 209(g) tying benefits eligibility to the number of calendar quarters "in which" a minimum amount of "wages" "has been paid." *Nierotko*'s allocation holding for benefits eligibility purposes, which the Government does not here urge the Court to overrule, thus turned on an implicit construction of § 209(g)'s terms—"wages" "paid" "in" "a calendar quarter"—to include "regular wages" that should have been paid but "were not paid as usual," *id.*, at 370. Given this construction, it cannot be said that the FICA and FUTA provisions prescribing tax rates based on *wages paid during a calendar year* have a plain meaning that precludes allocation of backpay to the year it should have been paid. Pp. 209–212.

(c) However, the Court rejects the Company's contention that, because *Nierotko* read the 1939 "wages paid" language for benefits eligibility purposes to accommodate an allocation-back rule for backpay, the identical 1939 "wages paid" language for tax purposes must be read the same way. *Nierotko* dealt specifically and only with Social Security benefits eligibility, not with taxation. The Court's allocation holding in *Nierotko* in all likelihood reflected concern that the benefits scheme created in 1939 would be disserved by allowing an employer's wrong-

doing to reduce the quarters of coverage an employee would otherwise be entitled to claim toward eligibility. No similar concern underlies the tax provisions. The legislative history demonstrates that the 1939 Amendments adopting the "wages paid" rule for taxation were designed to address Congress' worry that, as tax rates increased from year to year, administrative difficulties and confusion would attend the taxation of wages payable in one year, but not actually paid until another year. Pp. 212–214.

(d) The Court is not persuaded Congress incorporated *Nierotko*'s treatment of backpay into the tax provisions when it amended the Social Security Act shortly after *Nierotko* was decided. Prior to 1946, the FICA and FUTA wage bases were defined in terms of remuneration paid with respect to employment during a given year. The 1946 law amended § 209(a), which defines the Social Security wage base for purposes of benefits calculation, by adopting the "wages paid" language already present in § 209(g), the provision construed in *Nierotko.* Congress also used identical "wages paid" language in redefining the FICA and FUTA wage bases for tax purposes. Although the legislative history makes clear that Congress sought to achieve conformity between the tax and benefits provisions, the conformity Congress sought had nothing to do with *Nierotko*'s treatment of backpay. Rather, Congress' purpose in amending the FICA and FUTA wage bases for tax and benefits purposes was to define the yardstick for measuring "wages" as *the amount paid during the calendar year without regard to the year in which the employment occurred.* Because the concern that animates *Nierotko*'s treatment of backpay in the benefits context has no relevance to the tax side, it makes no sense to attribute to Congress a desire for conformity not only with respect to the general rule for measuring "wages," but also with respect to *Nierotko*'s backpay exception. Pp. 214–216.

(e) There is some force to the Company's contention that the Government's refusal to allocate back wages to the year they should have been paid creates inequities in taxation and incentives for strategic behavior that Congress did not intend. But this case presents no structural unfairness in taxation comparable to the structural inequity in *Nierotko*'s context. In *Nierotko*, an inflexible rule allocating backpay to the year it is actually paid would never work to the employee's advantage; it could inure *only* to the detriment of the employee, counter to the thrust of the benefits eligibility provisions. Here, by contrast, the Government's rule sometimes disadvantages the taxpayer, as in this case; other times it works to the disadvantage of the fisc. Anomalous results must be considered in light of Congress' evident interest in reducing complexity and minimizing administrative confusion within the FICA and

Syllabus

FUTA tax schemes. Given these concerns, it cannot be said that the Government's rule is incompatible with the statutory scheme. The most that can be said is that Congress intended the tax provisions to be both efficiently administrable and fair, and that this case reveals the tension that sometimes exists when Congress seeks to meet those twin aims. Pp. 216–218.

(f) Confronted with this tension, the Court defers to the Internal Revenue Service's interpretation. The Court does not sit as a committee of revision to perfect the administration of the tax laws. *United States* v. *Correll*, 389 U. S. 299, 306–307. Instead, it defers to the Commissioner's regulations as long as they implement the congressional mandate in a reasonable manner. *Id.*, at 307. The Internal Revenue Service has long maintained regulations interpreting the FICA and FUTA tax provisions. In their current form, the regulations specify that wages must be taxed according to the year they are actually paid. Echoing the language in 26 U. S. C. § 3111(a) (FICA) and § 3301 (FUTA), these regulations have continued unchanged in their basic substance since 1940. Although the regulations, like the statute, do not specifically address backpay, the Service has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid, regardless of when those wages were earned or should have been paid. The Court need not decide whether the Revenue Rulings themselves are entitled to deference. In this case, the Rulings simply reflect the agency's longstanding interpretation of its own regulations. Because that interpretation is reasonable, it attracts substantial judicial deference. *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512. Pp. 218–220.

215 F. 3d 1325, reversed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 220.

James A. Feldman argued the cause for the United States. With him on the briefs were *Acting Solicitor General Underwood*, *former Solicitor General Waxman*, *Acting Assistant Attorney General Junghans*, *Deputy Solicitor General Wallace*, *Kent L. Jones*, *Kenneth L. Greene*, and *Robert W. Metzler*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Richard D. Bernstein*, *Stephen B. Kinnaird*, and *Anne Berleman Kearney*.*

JUSTICE GINSBURG delivered the opinion of the Court.

The Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) impose excise taxes on employee wages to fund Social Security, Medicare, and unemployment compensation programs. This case concerns the application of FICA and FUTA taxes to payments of back wages. The Internal Revenue Service has consistently maintained that, for tax purposes, backpay awards should be attributed to the year the award is actually paid. Respondent Cleveland Indians Baseball Company (Company) urges, and the Court of Appeals for the Sixth Circuit held, that such awards must be allocated, as they are for purposes of Social Security benefits eligibility, to the periods in which the wages should have been paid. According due respect to the Service's reasonable, longstanding construction of the governing statutes and its own regulations, we hold that back wages are subject to FICA and FUTA taxes by reference to the year the wages are in fact paid.

I

Pursuant to a settlement of grievances asserted by the Major League Baseball Players Association concerning players' free agency rights, several Major League Baseball clubs agreed to pay $280 million to players with valid claims for salary damages. Under the agreement, the Company owed 8 players a total of $610,000 in salary damages for 1986, and it owed 14 players a total of $1,457,848 in salary damages for 1987. The Company paid the awards in 1994. No award recipient was a Company employee in that year.

**Lawrence T. Perera* filed a brief for the Major League Baseball Players Association as *amicus curiae* urging affirmance.

This case concerns the proper FICA and FUTA tax treatment of the 1994 payments. Under FICA, both employees and employers must pay tax on wages to fund Social Security and Medicare; under FUTA, employers (but not employees) must pay tax on wages to fund unemployment benefits. For purposes of this litigation, the Government and the Company stipulated that the settlement payments awarded to the players qualify as "wages" within the meaning of FICA and FUTA. The question presented is whether those payments, characterized as back wages, should be taxed by reference to the year they were actually paid (1994), as the Government urges, or by reference to the years they should have been paid (1986 and 1987), as the Company and its supporting *amicus*, the Major League Baseball Players Association, contend.

In any given year, the amount of FICA and FUTA tax owed depends on two determinants. The first is the tax rate. 26 U. S. C. §§ 3101, 3111 (FICA), § 3301 (FUTA). The second is the statutory ceiling on taxable wages (also called the wage base), which limits the amount of annual wages subject to tax. § 3121(a)(1) (FICA), § 3306(b)(1) (FUTA). Both determinants have increased over time. In 1986, the Social Security tax on employees and employers was 5.7 percent on wages up to $42,000;[1] in 1987, it was 5.7 percent on wages up to $43,800;[2] and in 1994, 6.2 percent on wages up to $60,600.[3] Although the Medicare tax on employees and employers remained constant at 1.45 percent from 1986 to 1994,[4] the taxable wage base rose from $42,000 in 1986 to $43,800 in 1987,[5] and by 1994, Congress had abolished the

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[1] 26 U. S. C. §§ 3101(a), 3111(a), 3121(a)(1); 51 Fed. Reg. 40256, 40257 (1986).

[2] §§ 3101(a), 3111(a), 3121(a)(1); 50 Fed. Reg. 45558, 45559 (1985).

[3] §§ 3101(a), 3111(a), 3121(a)(1); 58 Fed. Reg. 58004, 58005 (1993).

[4] §§ 3101(b), 3111(b).

[5] 26 U. S. C. § 3121(a)(1) (1982 ed.); 51 Fed. Reg. 40256, 40257 (1986); 50 Fed. Reg. 45558, 45559 (1985).

wage ceiling, thereby subjecting all wages to the Medicare tax.[6] In 1986 and 1987, the FUTA tax was 6.0 percent on wages up to $7,000;[7] in 1994, it was 6.2 percent on wages up to $7,000.[8]

In this case, allocating the 1994 payments back to 1986 and 1987 works to the advantage of the Company and its former employees. The reason is that all but one of the employees who received back wages in 1994 had already collected wages from the Company exceeding the taxable maximum in 1986 and 1987. Because those employees as well as the Company paid the maximum amount of employment taxes chargeable in 1986 and 1987, allocating the 1994 payments back to those years would generate no additional FICA or FUTA tax liability. By contrast, treating the back wages as taxable in 1994 would subject both the Company and its former employees to significant tax liability. The Company paid none of the employees any other wages in 1994,[9] and FICA and FUTA taxes attributable to that year

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[6] 26 U. S. C. § 3121(a)(1).

[7] 26 U. S. C. §§ 3301, 3306(b)(1) (1982 ed. and Supp. III).

[8] 26 U. S. C. §§ 3301, 3306(b)(1).

[9] If a player received wages in 1994 from another employer in addition to receiving back wages from the Company, the player—but not the Company—would be entitled to a credit or refund of any Social Security tax paid in excess of the amount of tax due on a single taxable wage base ($60,600). 26 U. S. C. § 6413(c)(1). To illustrate, suppose a player received $50,000 in back wages from the Cleveland Indians and an additional $50,000 in wages from the New York Mets in 1994. Assuming all $100,000 in wages are taxed in 1994, the player would be entitled to a credit or refund of Social Security tax paid in excess of the amount of tax due on $60,600. By contrast, the Indians and the Mets would *each* be liable for Social Security taxes on $50,000 in wages paid to that player. 26 U. S. C. § 3111 (Social Security tax is "an excise tax, with respect to having individuals in his employ"). Thus, under the Government's proposed rule, the Cleveland Indians would owe Social Security taxes on all amounts up to $60,600 that it paid to each player in 1994, regardless of whether the players themselves had reached or exceeded the $60,600 ceiling through multiple wage sources.

would be calculated according to tax rates and wage bases higher than their levels in 1986 and 1987.

Uncertain about the proper rule of taxation, the Company paid its share of employment taxes on the back wages according to 1994 tax rates and wage bases. Its FICA payment totaled $99,382, and its FUTA payment totaled $1,008.[10] After the Internal Revenue Service denied its claims for a refund of those payments, the Company initiated this action in District Court, relying on *Bowman* v. *United States*, 824 F. 2d 528 (CA6 1987). In *Bowman*, the Sixth Circuit held that "[a] settlement for back wages should not be allocated to the period when the employer finally pays but 'should be allocated to the periods when the regular wages were not paid as usual.'" *Id.*, at 530 (quoting *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 370 (1946)). The District Court, bound by *Bowman*, entered judgment for the Company and ordered the Government to refund $97,202 in FICA and FUTA taxes.[11]

On appeal, the Government observed that two Courts of Appeals have held, in disagreement with *Bowman*, that under the law as implemented by Treasury Regulations, wages are to be taxed for FICA purposes in the year they are actually received. *Walker* v. *United States*, 202 F. 3d 1290, 1292–1293 (CA10 2000) (finding *Nierotko* "inapposite" and *Bowman* "unpersuasive"); *Hemelt* v. *United States*, 122 F. 3d 204, 210 (CA4 1997) (finding it "clear under the Treasury Regulations that 'wages' are to be taxed for FICA purposes in the year in which they are received"). The Court

[10] Although the Company also withheld $99,382 to pay the employees' share of FICA taxes, it does not seek to recover any taxes paid on behalf of the employees in this suit.

[11] This amount is slightly less than the total FICA and FUTA taxes paid by the Company in 1994. The reason is that one of the employees who received a 1994 payment for wages due in 1987 received no wages from the Company in 1987. The Company thus owed a small amount of FICA and FUTA taxes on the back wages paid to him even when those wages were allocated back to 1987.

of Appeals for the Sixth Circuit nevertheless affirmed on the authority of *Bowman*. 215 F. 3d 1325 (2000) (judgt. order).

We granted certiorari to resolve the conflict among the Courts of Appeals, 531 U. S. 943 (2000), and now reverse the Sixth Circuit's judgment.

II

The Internal Revenue Code imposes employment taxes "on every employer . . . equal to [a percentage of] wages . . . paid by him with respect to employment." 26 U. S. C. §§ 3111(a), 3111(b), 3301. The Social Security tax provision, § 3111(a), contains a table prescribing tax rates applicable to "wages paid during" each year from 1984 onward (*e. g.*, "In cases of wages paid during . . . 1990 or thereafter . . . [t]he rate shall be . . . 6.2 percent."). The Medicare tax provision, § 3111(b)(6), says "with respect to wages paid after December 31, 1985, the rate shall be 1.45 percent." And the FUTA tax provision, 26 U. S. C. § 3301 (1994 ed., Supp. IV), says the rate shall be "6.2 percent in the case of calendar years 1988 through 2007 . . . of the total wages (as defined in section 3306(b)) paid by [the employer] during the calendar year."

Section 3121(a) of the Code establishes the annual ceiling on wages subject to Social Security tax. It does so by defining "wages" to exclude any remuneration "paid to [an] individual by [an] employer during [a] calendar year" that exceeds "remuneration . . . equal to the contribution and benefit base . . . paid to [such] individual by [such] employer during the calendar year with respect to which such contribution and benefit base is effective." Section 3306(b)(1) similarly limits annual wages subject to FUTA tax by excluding from "wages" any remuneration "paid to [an] individual by [an] employer during [a] calendar year" that exceeds "remuneration . . . equal to $7,000 . . . paid to [such] individual by [such] employer during [the] calendar year."

Both sides in this controversy have offered plausible interpretations of Congress' design. We set out next the parties' positions and explain why we ultimately defer to the Internal Revenue Service's reasonable, consistent, and longstanding interpretation of the FICA and FUTA provisions in point. Under that interpretation, wages must be taxed according to the year they are actually paid.

A

In the Government's view, the text of the controlling FICA and FUTA tax provisions explicitly instructs that employment taxes shall be computed by applying the tax rate and wage base in effect when wages are actually paid. In particular, the Government calls attention to the statute's constant references to *wages paid during a calendar year* as the touchstone for determining the applicable tax rate and wage base. 26 U. S. C. § 3111(a) (setting Social Security tax rates for "wages paid during" particular calendar years); § 3121(a) (defining Social Security wage base in terms of "remuneration . . . paid . . . during the calendar year"); § 3301 (setting FUTA tax rate as a percentage of "wages . . . paid . . . during the calendar year"); § 3306(b)(1) (defining FUTA wage base in terms of "remuneration . . . paid . . . during any calendar year"). The meaning of this language, the Government contends, is plain: Wages are taxed according to the calendar year they are in fact paid, regardless of when they should have been paid.

In support of this reading, the Government observes that Congress chose the words in the current statute specifically to replace language in the original 1935 Social Security Act providing that FICA and FUTA tax rates applied to wages paid or received "with respect to *employment during the calendar year.*" Social Security Act (1935 Act), §§ 801, 804, 901, 49 Stat. 636–637, 639 (emphasis added). The Treasury Department had interpreted this 1935 language to mean that wages are taxed at "the rate in effect *at the time of the*

performance of the services for which the wages were paid." Treas. Regs. 91, Arts. 202, 302 (1936) (emphasis added). In 1939, Congress amended the 1935 Act to provide that FICA and FUTA tax rates would no longer apply on the basis of when services were performed, but would instead apply "with respect to *wages paid during the calendar yea[r].*" Social Security Act Amendments of 1939 (1939 Amendments), §§ 604, 608, 53 Stat. 1383, 1387 (emphasis added). This 1939 language remains essentially unchanged in the current FICA and FUTA tax provisions, 26 U. S. C. §§ 3111(a) and 3301.

Acknowledging that the 1939 Amendments established a "wages paid" rule for FICA and FUTA taxation, the Company nevertheless argues that *Social Security Bd.* v. *Nierotko*, 327 U. S. 358 (1946), undermines the Government's plain language argument. According due weight to our precedent, we agree.

In *Nierotko*, the National Labor Relations Board had ordered the reinstatement of a wrongfully discharged employee with "back pay" covering wages lost during the period from February 1937 to September 1939. *Id.*, at 359. The employer paid the award in July 1941. *Id.*, at 359–360. The primary question presented and aired in the Court's opinion was whether backpay for a time in which the employee was not on the job should nevertheless count as "wages" in determining the employee's eligibility for Social Security benefits. *Id.*, at 359. Notwithstanding the contrary view of the Social Security Board and the Bureau of Internal Revenue, the Court held that backpay covering the wrongful discharge period met the definition of "wages" in the 1935 Act. *Id.*, at 360–370.

In the final two paragraphs of the *Nierotko* opinion, the Court took up the question of how the backpay award should be allocated for purposes of determining the worker's eligibility for benefits. As originally enacted, the Social Security Act extended benefits to persons over 65 who had

earned at least $2,000 in wages in each of any five years after 1936. 1935 Act, §§ 201(a), 210(c), 49 Stat. 622, 625. In 1939, however, Congress introduced a new scheme, which remains in place today, tying eligibility for benefits to the number of calendar-year "quarters of coverage" accumulated by an individual. 1939 Amendments, §§ 209(g), (h), 53 Stat. 1376–1377 (codified at 42 U. S. C. §§ 413(a)(2), 414). Section 209(g) defined a "quarter of coverage" as either "a calendar quarter in which the individual has been paid not less than $50 in wages" or any quarter except the first "where an individual has been paid in a calendar year $3,000 or more in wages." 53 Stat. 1377.

Nierotko swiftly dispatched the question whether "'back pay' must be allocated as wages . . . to the 'calendar quarters' of the year in which the money would have been earned, if the employee had not been wrongfully discharged." 327 U. S., at 370. Rejecting the Government's argument that such allocation was impermissible because the 1939 Amendments to the benefits scheme refer to "'wages' to be 'paid' in certain 'quarters,'" *id.*, at 370, and n. 25 (citing *id.*, at 362, n. 7 (citing § 209(g))), the Court concluded: "If, as we have held above, 'back pay' is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual." *Id.*, at 370.

Although the allocation question in *Nierotko* was a secondary issue addressed summarily by the Court, we think the Company is correct that *Nierotko* undercuts the plain meaning argument urged by the Government here. *Nierotko* found no conflict between an allocation-back rule for backpay and the language in § 209(g) tying benefits eligibility to the number of calendar quarters "in which" a minimum amount of "wages" "has been paid." The Court's allocation holding for benefits eligibility purposes, which the Government does not urge us to overrule, Tr. of Oral Arg. 9, thus turned on an implicit construction of § 209(g)'s terms—"wages" "paid" "in" "a calendar quarter"—to include "regular wages" that

should have been paid but "were not paid as usual," 327 U. S., at 370. Given this construction of § 209(g), now codified in 42 U. S. C. § 413(a)(2), we cannot say that the FICA and FUTA provisions prescribing tax rates based on *wages paid during a calendar year*, codified in 26 U. S. C. §§ 3111(a), 3301, have a plain meaning that precludes allocation of back-pay to the year it should have been paid. Cf. *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 205 (1991) ("*stare decisis* is most compelling" where "a pure question of statutory construction" is involved).

B

From here, we part ways with the Company. Although we agree that *Nierotko* blocks the Government's argument that the "wages paid" formulation in 26 U. S. C. §§ 3111(a) and 3301 has a dispositively plain meaning, we reject the Company's next contention. Because *Nierotko* read the 1939 "wages paid" language for benefits eligibility purposes to accommodate an allocation-back rule for backpay, the Company urges, the identical 1939 "wages paid" language for tax purposes must be read the same way. We do not agree that the latter follows from the former like the night, the day.

Nierotko dealt specifically and only with Social Security benefits eligibility, not with taxation. The Court's allocation holding in *Nierotko* in all likelihood reflected concern that the benefits scheme created in 1939 would be disserved by allowing an employer's wrongdoing to reduce the quarters of coverage an employee would otherwise be entitled to claim toward eligibility. No similar concern underlies the tax provisions. Although Social Security taxes are used to pay for Social Security benefits in the aggregate, there is no direct relation between taxes and benefits at the level of an individual employee. As the Company itself acknowledges, "Social Security tax 'contributions,' unlike private pension contributions, do not create in the contributor a property right to benefits against the government, and wages rather

than [tax] contributions are the statutory basis for calculating an individual's benefits." Brief for Respondent 14.

Nierotko thus does not compel symmetrical construction of the "wages paid" language in the discrete taxation and benefits eligibility contexts. Although we generally presume that "identical words used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932), the presumption "is not rigid," and "the meaning [of the same words] well may vary to meet the purposes of the law," *ibid.* Cf. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against."). The benefits scheme delineated in Title 42 would "no doubt" be set awry without an allocation-back rule for back wages, notwithstanding "accounting difficulties." *Nierotko*, 327 U. S., at 370. But that surely cannot be said for the taxation scheme described in Title 26, where Congress' evident concern was not worker eligibility for benefits, but fiscal administrability.[12]

[12] In determining that "accounting difficulties" were "not . . . insuperable" to its allocation holding, *Nierotko* noted that "'backpay' is now treated distributively" under § 119 of the Revenue Act of 1943. 327 U. S., at 370, and n. 26. Section 119 provided that backpay exceeding 15 percent of gross income may be allocated to earlier periods for income tax purposes if such allocation would reduce the taxpayer's liability. § 119(a), 58 Stat. 39. But Congress eliminated the 1943 backpay allocation rule in 1964, see Pub. L. 88–272, § 232(a), 78 Stat. 107, leaving behind the principle, "too firmly embedded in the income tax law to permit of any question," that "payments of compensation are income to a taxpayer on a cash basis in the year of receipt, as distinguished from the year in which the compensation is earned," 2 J. Mertens, Law of Federal Income Taxation § 12.42, p. 179 (1973). The symmetry urged by the Company in construing the tax and benefits provisions of FICA and FUTA thus comes only at the expense of asymmetry in the collection of income taxes and employment taxes.

The 1939 Amendments adopting the "wages paid" rule for taxation reflected Congress' worry that, as tax rates increase from year to year, "difficulties and confusion" would attend the taxation of wages payable in one year, but not actually paid until another year. S. Rep. No. 734, 76th Cong., 1st Sess., 75–76; see also H. R. Rep. No. 728, 76th Cong., 1st Sess., 57–58. Congress understood that an employee's annual compensation may be "based on a percentage of profits, or on future royalties, the amount of which cannot be determined until long after the close of the year." S. Rep. No. 734, 76th Cong., 1st Sess., at 75. Requiring employers to "estimate unascertained amounts and pay taxes and contributions on that basis" would "cause a burden on employers and administrative authorities alike." *Id.*, at 75–76. Congress correctly anticipated that "[t]he placing of [FICA and FUTA] tax[es] on the 'wages paid' basis [would] relieve this situation." *Id.*, at 76. "Under the amendment the rate applicable would be the rate in effect at the time that the wages are paid and received without reference to the rate which was in effect at the time the services were performed." H. R. Rep. No. 728, *supra*, at 58.

As an additional ground for construing the tax and benefits provisions *in pari materia*, the Company insists that Congress incorporated *Nierotko*'s treatment of backpay into the tax provisions when it amended the Social Security Act shortly after *Nierotko* was decided. Prior to 1946, the FICA and FUTA wage bases had been defined in terms of remuneration "paid . . . with respect to employment during" a given year. 1935 Act, § 811(a), 49 Stat. 639 (FICA); 1939 Amendments, § 606, 53 Stat. 1383 (FUTA). Paralleling the 1939 Amendments to the tax rate provisions, Congress in 1946 established the current "wages paid" rule for identifying the wages that compose the FICA and FUTA wage bases in a given year. Social Security Act Amendments of 1946 (1946 Amendments), §§ 412, 414, 60 Stat. 989–991 (codified at 26 U. S. C. §§ 3121(a), 3306(b)(1)). The 1946 law amended

§ 209(a), which defines the Social Security wage base for purposes of benefits calculation, by adopting the "wages paid" language already present in § 209(g), the provision construed in *Nierotko*. § 414, 60 Stat. 990–991. Congress also used identical "wages paid" language in redefining the FICA and FUTA wage bases for tax purposes. § 412, 60 Stat. 989. Relying on the presumption that § 209(a), as amended, incorporated *Nierotko*'s construction of § 209(g), see *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–699 (1979), and observing that Congress redefined the wage bases for taxation to "confor[m] with the changes in section 209(a)," S. Rep. No. 1862, 79th Cong., 2d Sess., 36 (1946); H. R. Rep. No. 2447, 79th Cong., 2d Sess., 35 (1946), the Company urges that the amended benefits and tax provisions codified *Nierotko*'s backpay allocation rule.

We are unpersuaded. Even assuming that the benefits provision, § 209(a), is properly construed as incorporating *Nierotko*'s reading of § 209(g), we think the "confor[mity]" Congress sought to achieve between the tax and benefits provisions, S. Rep. No. 1862, *supra*, at 36; H. R. Rep. No. 2447, *supra*, at 35, had nothing to do with *Nierotko*'s treatment of backpay. The Committee Reports make clear that Congress' purpose in amending the FICA and FUTA wage bases was to define the "yardstick" for measuring "wages" as "*the amount paid during the calendar year . . . , without regard to the year in which the employment occurred.*" S. Rep. No. 1862, *supra*, at 35 (emphasis added); H. R. Rep. No. 2447, *supra*, at 35 (emphasis added). It is with respect to this rule—measuring "wages" based on "the amount paid during the calendar year"—that Congress sought conformity between the Title 26 tax provisions and the Title 42 benefits provision. See S. Rep. No. 1862, *supra*, at 36 (tax wage base), 37 (benefits wage base); H. R. Rep. No. 2447, *supra*, at 35 (tax wage base), 36 (benefits wage base). Far from indicating an intent to codify *Nierotko*, those Reports suggest that Congress, if it considered

Nierotko at all, considered it an exception to the general rule for measuring "wages" in a given year.[13] Because the concern that animates *Nierotko*'s treatment of backpay in the benefits context has no relevance to the tax side, *supra*, at 212–213, it makes no sense to attribute to Congress a desire for conformity not only with respect to the general rule for measuring "wages," but also with respect to *Nierotko*'s backpay exception.

C

Were the Company to rely solely on arguments for symmetry in statutory construction, we would be inclined to conclude, given *Nierotko*'s lack of concern with taxation, that the tax provisions themselves, informed by legislative purpose, require back wages to be taxed according to the year they are actually paid. But the Company has one more arrow in its quiver.

Apart from its arguments for symmetry, the Company contends that the Government's refusal to allocate back wages to the year they should have been paid creates in-

[13] Indeed, the contemporaneous understanding of the Commissioner of Internal Revenue was that the 1946 Amendments supplanted *Nierotko*'s allocation rule for backpay. See Letter from Joseph D. Nunan, Jr., Commissioner of Internal Revenue, to Social Security Administration, Bureau of Old-Age and Survivors Insurance (Mar. 6, 1947) ("The *Nierotko* decision requiring your Agency to make an allocation of the back pay award to prior periods was rendered on the basis of the law in effect at that time. The Social Security Act Amendments of 1946, having been enacted subsequent to the date of the *Nierotko* decision, must be interpreted in the light of the language contained in such Amendments and the Congressional intent.") (available in Lodging for Respondent, Exh. F). Nevertheless, for benefits eligibility and calculation purposes, the Social Security Administration (SSA) by regulation continues to apply the *Nierotko* rule to "[b]ack pay under a statute," 20 CFR § 404.1242(b) (2000) (such backpay "is allocated to the periods of time in which it should have been paid if the employer had not violated the statute"), while declining to apply *Nierotko* to "[b]ack pay not under a statute," § 404.1242(c) ("This back pay cannot be allocated to prior periods of time but must be reported by the employer for the period in which it is paid.").

equities in taxation and incentives for strategic behavior that Congress did not intend. This contention is not without force. Under the Government's rule, an employee who should have been paid $100,000 in 1986, but is instead paid $50,000 in 1986 and $50,000 in backpay in 1994, would owe more tax than if she had been paid the full $100,000 due in 1986. Conversely, a wrongdoing employer who should have paid an employee $50,000 in each of five years covered by a $250,000 backpay award would pay only one year's worth of employment taxes (limited by the annual ceilings on taxable wages) in the year the award is actually paid. The Government's rule thus appears to exempt some wages that should be taxed and to tax some wages that should be exempt.

Applying the Government's rule to other provisions of the Code produces similar anomalies. Section 3121(a)(4), for example, exempts disability benefits from FICA tax if paid by an employer to an employee more than six months after the employee worked for the employer. 26 U. S. C. § 3121(a)(4). Disability benefits included in a backpay award would be exempt from FICA tax if the employee had not worked for the employer for six months prior to the backpay award, even if the benefits should have been paid within six months after the employee stopped working for the employer. According to the Company, such results amount to tax windfalls and invite employers wrongfully to withhold pay or benefits in order to reap the advantages of a strategically timed payment. See Brief for Respondent 33–40 (additional examples of windfalls and avoidance schemes). These outcomes may be avoided, the Company argues, by construing the tax provisions to require taxation of back wages according to the year the wages should have been paid.

It is, of course, true that statutory construction "is a holistic endeavor" and that the meaning of a provision is "clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive

effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). The Company's examples leave little doubt that the Government's rule generates a degree of arbitrariness in the operation of the tax statutes. But in *Nierotko*'s context, an inflexible rule allocating backpay to the year it is actually paid would never work to the employee's advantage; it could inure *only* to the detriment of the employee, counter to the thrust of the benefits eligibility provisions.[14] In this case, by contrast, there is no comparable structural unfairness in taxation. The Government's rule sometimes disadvantages the taxpayer, as in this case. Other times it works to the disadvantage of the fisc, as the Company's examples show. The anomalous results to which the Company points must be considered in light of Congress' evident interest in reducing complexity and minimizing administrative confusion within the FICA and FUTA tax schemes. See *supra*, at 214. Given the practical administrability concerns that underpin the tax provisions, we cannot say that the Government's rule is incompatible with the statutory scheme. The most we can say is that Congress intended the tax provisions to be both efficiently administrable and fair, and that this case reveals the tension that sometimes exists when Congress seeks to meet those twin aims.

D

Confronted with this tension, "we do not sit as a committee of revision to perfect the administration of the tax laws." *United States* v. *Correll*, 389 U. S. 299, 306–307 (1967). In-

[14] The SSA has interpreted its regulation governing "[b]ack pay under a statute," 20 CFR § 404.1242(b) (2000), to allow the employee to choose whether to allocate the backpay to the year it is paid or to the year it should have been paid. Social Security Administration, Reporting Back Pay and Special Wage Payments to the Social Security Administration 2, Pub. 957 (Sept. 1997).

stead, we defer to the Commissioner's regulations as long as they "implement the congressional mandate in some reasonable manner." *Id.*, at 307. "We do this because Congress has delegated to the [Commissioner], not to the courts, the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code." *National Muffler Dealers Assn., Inc.* v. *United States,* 440 U. S. 472, 477 (1979) (citing *Correll*, 389 U. S., at 307 (citing 26 U. S. C. § 7805(a))). This delegation "helps guarantee that the rules will be written by 'masters of the subject' . . . who will be responsible for putting the rules into effect." 440 U. S., at 477 (quoting *United States* v. *Moore*, 95 U. S. 760, 763 (1878)).

The Internal Revenue Service has long maintained regulations interpreting the FICA and FUTA tax provisions. In their current form, the regulations specify that the employer tax "attaches *at the time that the wages are paid* by the employer," 26 CFR § 31.3111–3 (2000) (emphasis added), and "is computed by applying to the wages paid by the employer the rate in effect *at the time such wages are paid,*" § 31.3111–2(c) (emphasis added); see §§ 31.3301–2, –3(b) (same for FUTA). Echoing the language in 26 U. S. C. § 3111(a) (FICA tax) and § 3301 (FUTA tax), these regulations have continued unchanged in their basic substance since 1940. See T. D. 6516, 25 Fed. Reg. 13032 (1960); Treas. Regs. 107 (as amended by T. D. 5566, 1947–2 Cum. Bull. 148); Treas. Regs. 106 (as amended by T. D. 5566, 1947–2 Cum. Bull. 148); Treas. Regs. 106, §§ 402.301–.303, 402.401–.403 (1940). Cf. *National Muffler*, 440 U. S., at 477 ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").

Although the regulations, like the statute, do not specifically address backpay, the Internal Revenue Service has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid,

regardless of when those wages were earned or should have been paid. Rev. Rul. 89–35, 1989–1 Cum. Bull. 280; Rev. Rul. 78–336, 1978–2 Cum. Bull. 255. We need not decide whether the Revenue Rulings themselves are entitled to deference. In this case, the Rulings simply reflect the agency's longstanding interpretation of its own regulations. Because that interpretation is reasonable, it attracts substantial judicial deference. *Thomas Jefferson Univ.* v. *Shalala,* 512 U. S. 504, 512 (1994). We do not resist according such deference in reviewing an agency's steady interpretation of its own 61-year-old regulation implementing a 62-year-old statute. "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Savings Assn.* v. *Commissioner,* 499 U. S. 554, 561 (1991) (citing *Correll,* 389 U. S., at 305–306).

* * *

In line with the text and administrative history of the relevant taxation provisions, we hold that, for FICA and FUTA tax purposes, back wages should be attributed to the year in which they are actually paid. Accordingly, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

If I believed that the text of the tax statutes addressed the issue before us, I might well find for the respondent, giving that text the same meaning the Court found it to have in the benefits provisions of the Social Security Act. See *Social Security Bd.* v. *Nierotko,* 327 U. S. 358, 370, and n. 25 (1946). The Court's principal reason for assigning the identical language a different meaning in the present case—

leaving aside statements in testimony and Committee Reports that I have no reason to believe Congress was aware of—is that tax assessments do not present the equitable considerations implicated by the potential arbitrary decrease of benefits in *Nierotko*. See *ante,* at 212–213. But the Court acknowledges that departing from *Nierotko* will produce arbitrary variations in tax liability. See *ante,* at 216–218. As between an immediate arbitrary increase in tax liability and a deferred arbitrary decrease in benefits, I cannot say the latter is the greater inequity. The difference is at least not so stark as to cause me to regard the two regulatory schemes as different in kind, which I would insist upon before giving different meanings to identical statutory texts.

In fact, however, I do not think that the text of the FICA and FUTA provisions, 26 U. S. C. §§ 3111(a), 3111(b), 3301, addresses the issue we face today. Those provisions, which direct that taxes shall be assessed against "wages paid" during the calendar year, would be controlling if the income we had before us were "wages" within the normal meaning of that term; but it is not. The question we face is whether *damages awards compensating an employee for lost wages* should be regarded for tax purposes as wages paid when the award is received, or rather as wages paid when they would have been paid but for the employer's unlawful actions. (The parties have stipulated that the damages awards should be regarded as taxable "wages paid" of some sort, see also *Social Security Bd.* v. *Nierotko*, *supra,* at 364–370.) The proper treatment of such damages awards is an issue the statute does not address, and hence it is an issue left to the reasonable resolution of the administering agency, here the Internal Revenue Service. In *Nierotko,* which we decided at a time when it was common for courts to fill statutory gaps that would now be left to the agency, we provided one rule for purposes of the benefits provisions. The Internal Revenue Service has since provided another

rule for purposes of the tax provisions. Both rules are reasonable; neither is compelled; and neither involves a direct application of the statutory term "wages paid" which would require (or at least strongly suggest) a uniform result. I therefore concur in the Court's judgment deferring to the Government's regulations.

Syllabus

SHAW ET AL. *v.* MURPHY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–1613. Argued January 16, 2001—Decided April 18, 2001

While respondent Murphy was incarcerated in state prison, he learned that a fellow inmate had been charged with assaulting a correctional officer. Murphy decided to assist the inmate with his defense and sent him a letter, which was intercepted in accordance with prison policy. Based on the letter's content, the prison sanctioned Murphy for violating prison rules prohibiting insolence and interfering with due process hearings. Murphy then sought declaratory and injunctive relief under 42 U. S. C. § 1983, alleging that the disciplinary action violated, *inter alia*, his First Amendment rights, including the right to provide legal assistance to other inmates. In granting petitioners summary judgment, the District Court applied the decision in *Turner* v. *Safley*, 482 U. S. 78, 89—that a prison regulation impinging on inmates' constitutional rights is valid if it is reasonably related to legitimate penological interests—and found a valid, rational connection between the inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation. The Ninth Circuit reversed, finding that inmates have a First Amendment right to give legal assistance to other inmates and that this right affected the *Turner* analysis.

Held:

1. Inmates do not possess a special First Amendment right to provide legal assistance to fellow inmates that enhances the protections otherwise available under *Turner*. Prisoners' constitutional rights are more limited in scope than the constitutional rights held by individuals in society at large. For instance, some First Amendment rights are simply inconsistent with the corrections system's "legitimate penological objectives," *Pell* v. *Procunier*, 417 U. S. 817, 822, and thus this Court has sustained restrictions on, *e. g.*, inmate-to-inmate written correspondence, *Turner*, *supra*, at 93. Moreover, because courts are ill equipped to deal with the complex and intractable problems of prisons, *Procunier* v. *Martinez*, 416 U. S. 396, 404–405, this Court has generally deferred to prison officials' judgment in upholding such regulations against constitutional challenge. *Turner* reflects this understanding, setting a unitary, deferential standard for reviewing prisoners' claims that does not permit an increase in the constitutional protection whenever a prisoner's communication includes legal advice. To increase

Syllabus

the constitutional protection based upon a communication's content first requires an assessment of that content's value. But the *Turner* test simply does not accommodate valuations of content. On the contrary, it concerns only the relationship between the asserted penological interests and the prison regulation. Moreover, prison officials are to remain the primary arbiters of the problems that arise in prison management. 482 U. S., at 89. Seeking to avoid unnecessarily perpetuating federal courts' involvement in prison administration affairs, the Court rejects an alteration of the *Turner* analysis that would entail additional federal-court oversight. Even if this Court were to consider giving special protection to particular kinds of speech based on content, it would not do so for speech that includes legal advice. Augmenting First Amendment protection for such advice would undermine prison officials' ability to address the complex and intractable problems of prison administration. *Id.*, at 84. The legal text could be an excuse for making clearly inappropriate comments, which may circulate among prisoners despite prison measures to screen individual inmates or officers from the remarks. Pp. 228–232.

2. To prevail on remand on the question whether the prison regulations, as applied to Murphy, are reasonably related to legitimate penological interests, he must overcome the presumption that the prison officials acted within their broad discretion. P. 232.

195 F. 3d 1121, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, *post*, p. 232.

David L. Ohler, Special Assistant Attorney General of Montana, argued the cause for petitioners. With him on the briefs were *Joseph P. Mazurek*, Attorney General, and *Diana Leibinger-Koch*, Special Assistant Attorney General.

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Ogden*, *Deputy Solicitor General Underwood*, *Gregory G. Garre*, *Barbara L. Herwig*, and *John Hoyle*.

Jeffrey T. Renz argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, *Thomas E. Warner*, Solicitor General, and *Cecilia Bradley*, Assistant Attorney

JUSTICE THOMAS delivered the opinion of the Court.

Under our decision in *Turner* v. *Safley*, 482 U. S. 78 (1987), restrictions on prisoners' communications to other inmates are constitutional if the restrictions are "reasonably related to legitimate penological interests." *Id.*, at 89. In this case, we are asked to decide whether prisoners possess a First Amendment right to provide legal assistance that enhances the protections otherwise available under *Turner*. We hold that they do not.

I

While respondent Kevin Murphy was incarcerated at the Montana State Prison, he served as an "inmate law clerk," providing legal assistance to fellow prisoners. Upon learning that inmate Pat Tracy had been charged with assaulting Correctional Officer Glen Galle, Murphy decided to assist Tracy with his defense. Prison rules prohibited Murphy's assignment to the case,[1] but he nonetheless investigated the assault. After discovering that other inmates had complained about Officer Galle's conduct, Murphy sent Tracy a letter, which included the following:

General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Mark Pryor* of Arkansas, *M. Jane Brady* of Delaware, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Don Stenberg* of Nebraska, *Philip T. McLaughlin* of New Hampshire, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *Mark L. Earley* of Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Daniel L. Greenberg, John Boston, Elizabeth Alexander, Margaret Winter, David C. Fathi, and *Stephen Bright* filed a brief for the Legal Aid Society of the City of New York et al. as *amici curiae* urging affirmance.

[1] Tracy had requested that Murphy be assigned to his case. App. 84. Prison officials, however, denied that request because prison policy forbade high-security inmates, such as Murphy, from meeting with maximum-security inmates, including Tracy. App. to Pet. for Cert. 19. Prison officials offered Tracy another law clerk to assist him. App. 84.

> "I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass *[sic]* inmates. He has made homo-sexual *[sic]* advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> "Another poiont *[sic]* is that he grabbed you from behind. You tell your lawyer to get ahold of me on this. Don't take a plea bargain unless it's for no more time." App. 50.

In accordance with prison policy, prison officials intercepted the letter, and petitioner Robert Shaw, an officer in the maximum-security unit, reviewed it. Based on the accusations against Officer Galle, Shaw cited Murphy for violations of the prison's rules prohibiting insolence, interference with due process hearings, and conduct that disrupts or interferes with the security and orderly operation of the institution. After a hearing, Murphy was found guilty of violating the first two prohibitions. The hearings officer sanctioned him by imposing a suspended sentence of 10 days' detention and issuing demerits that could affect his custody level.

In response, Murphy brought this action, seeking declaratory and injunctive relief under Rev. Stat. § 1979, 42 U. S. C. § 1983. The case was styled as a class action, brought on behalf of himself, other inmate law clerks, and other prisoners. The complaint alleged that the disciplining of Mur-

phy violated due process, the rights of inmates to access the courts, and, as relevant here, Murphy's First Amendment rights, including the right to provide legal assistance to other inmates.

After discovery, the District Court granted petitioners' motion for summary judgment on all of Murphy's claims. On the First Amendment claim, the court found that Murphy was not formally acting as an inmate law clerk when he wrote the letter, and that Murphy's claims should therefore "be analyzed without consideration of any privilege that law clerk status might provide." App. to Pet. for Cert. 24. The District Court then applied our decision in *Turner* v. *Safley*, 482 U. S. 78 (1987), which held that a prison regulation impinging on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests," *id.*, at 89. Finding a "valid, rational connection between the prison inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation," the District Court rejected Murphy's First Amendment claim. App. to Pet. for Cert. 25.

The Court of Appeals for the Ninth Circuit reversed. It premised its analysis on the proposition that "inmates have a First Amendment right to assist other inmates with their legal claims." 195 F. 3d 1121, 1124 (1999). Murphy enjoyed this right of association, the court concluded, because he was providing legal advice that potentially was relevant to Tracy's defense. The Court of Appeals then applied our decision in *Turner*, but it did so only against the backdrop of this First Amendment right, which, the court held, affected the balance of the prisoner's interests against the government's interests. Concluding that the balance tipped in favor of Murphy, the Court of Appeals upheld Murphy's First Amendment claim.

Other Courts of Appeals have rejected similar claims. See, *e. g.*, *Gibbs* v. *Hopkins*, 10 F. 3d 373, 378 (CA6 1993) (no constitutional right to assist other inmates with legal

claims); *Smith* v. *Maschner*, 899 F. 2d 940, 950 (CA10 1990) (same); *Gassler* v. *Rayl*, 862 F. 2d 706, 707–708 (CA8 1988) (same). To resolve the conflict, we granted certiorari. 530 U. S. 1303 (2000).

II

In this case, we are not asked to decide whether prisoners have *any* First Amendment rights when they send legal correspondence to one another. In *Turner*, we held that restrictions on inmate-to-inmate communications pass constitutional muster only if the restrictions are reasonably related to legitimate and neutral governmental objectives. 482 U. S., at 89. We did not limit our holding to nonlegal correspondence, and petitioners do not ask us to construe it that way. Instead, the question presented here simply asks whether Murphy possesses a First Amendment right to provide legal advice that enhances the protections otherwise available under *Turner*. The effect of such a right, as the Court of Appeals described it, 195 F. 3d, at 1127, would be that inmate-to-inmate correspondence that includes legal assistance would receive more First Amendment protection than correspondence without any legal assistance. We conclude that there is no such special right.

Traditionally, federal courts did not intervene in the internal affairs of prisons and instead "adopted a broad hands-off attitude toward problems of prison administration." *Procunier* v. *Martinez*, 416 U. S. 396, 404 (1974). Indeed, for much of this country's history, the prevailing view was that a prisoner was a mere "slave of the State," who "not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 139 (1977) (Marshall, J., dissenting) (quoting *Ruffin* v. *Commonwealth*, 62 Va. 790, 796 (1871)) (alterations and internal quotation marks omitted). In recent decades, however, this Court has determined that incarceration does not divest prisoners of all constitutional protections. Inmates

retain, for example, the right to be free from racial discrimination, *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)*, the right to due process, *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), and, as relevant here, certain protections of the First Amendment, *Turner*, *supra*.

We nonetheless have maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or "with the legitimate penological objectives of the corrections system," *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974). We have thus sustained proscriptions of media interviews with individual inmates, see *id.*, at 833–835, prohibitions on the activities of a prisoners' labor union, see *North Carolina Prisoners' Labor Union, Inc.*, *supra*, at 133, and restrictions on inmate-to-inmate written correspondence, see *Turner*, *supra*, at 93. Moreover, because the "problems of prisons in America are complex and intractable," and because courts are particularly "ill equipped" to deal with these problems, *Martinez*, *supra*, at 404–405, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.

Reflecting this understanding, in *Turner* we adopted a unitary, deferential standard for reviewing prisoners' constitutional claims: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U. S., at 89. Under this standard, four factors are relevant. First and foremost, "there must be a 'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." *Ibid.* (quoting *Block* v. *Rutherford*, 468 U. S. 576, 586 (1984)). If the connection between the regulation and the asserted goal is "arbitrary or irrational," then the regulation fails, irrespective of whether the other factors tilt in its

favor. 482 U. S., at 89–90. In addition, courts should consider three other factors: the existence of "alternative means of exercising the right" available to inmates; "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and "the absence of ready alternatives" available to the prison for achieving the governmental objectives. *Id.*, at 90.

Because *Turner* provides the test for evaluating prisoners' First Amendment challenges, the issue before us is whether *Turner* permits an increase in constitutional protection whenever a prisoner's communication includes legal advice. We conclude that it does not. To increase the constitutional protection based upon the content of a communication first requires an assessment of the value of that content.[2] But the *Turner* test, by its terms, simply does not accommodate valuations of content. On the contrary, the *Turner* factors concern only the relationship between the asserted penological interests and the prison regulation. *Id.*, at 89.

Moreover, under *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management. *Ibid.;* see also *Martinez*, *supra*, at 405 ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform"). If courts were permitted to enhance constitutional protection based on their assessments of the content of the particular communications, courts would be in a position to assume a greater role in decisions affecting prison administration. Seeking to avoid "'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration,'" *Turner*, 482 U. S., at 89 (quoting *Martinez*, *supra*, at 407) (alteration in original), we reject

[2] The Court of Appeals made such an assessment when it "'balance[d] the importance of the prisoner's infringed right against the importance of the penological interest served by the rule.'" 195 F. 3d 1121, 1127 (CA9 1999) (quoting *Bradley* v. *Hall*, 64 F. 3d 1276, 1280 (CA9 1995)).

an alteration of the *Turner* analysis that would entail additional federal-court oversight.

Finally, even if we were to consider giving special protection to particular kinds of speech based upon content, we would not do so for speech that includes legal advice.[3] Augmenting First Amendment protection for inmate legal advice would undermine prison officials' ability to address the "complex and intractable" problems of prison administration. *Turner*, *supra*, at 84. Although supervised inmate legal assistance programs may serve valuable ends, it is "indisputable" that inmate law clerks "are sometimes a menace to prison discipline" and that prisoners have an "acknowledged propensity . . . to abuse both the giving and the seeking of [legal] assistance." *Johnson* v. *Avery*, 393 U. S. 483, 488, 490 (1969). Prisoners have used legal correspondence as a means for passing contraband and communicating instructions on how to manufacture drugs or weapons. See Brief for State of Florida et al. as *Amici Curiae* 6–8; see also *Turner*, *supra*, at 93 ("[P]risoners could easily write in jargon or codes to prevent detection of their real messages"). The legal text also could be an excuse for making clearly inappropriate comments, which "may be expected to circulate among prisoners," *Thornburgh* v. *Abbott*, 490 U. S. 401, 412 (1989), despite prison measures to screen individual inmates or officers from the remarks.

We thus decline to cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoners' speech. In-

[3] Murphy suggests that the right to provide legal advice follows from a right to receive legal advice. However, even if one right followed from the other, Murphy is incorrect in his assumption that there is a free-standing right to receive legal advice. Under our right-of-access precedents, inmates have a right to receive legal advice from other inmates only when it is a necessary "means for ensuring a 'reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Lewis* v. *Casey*, 518 U. S. 343, 350–351 (1996) (quoting *Bounds* v. *Smith*, 430 U. S. 817, 825 (1977)).

stead, the proper constitutional test is the one we set forth in *Turner*. Irrespective of whether the correspondence contains legal advice, the constitutional analysis is the same.

III

Under *Turner*, the question remains whether the prison regulations, as applied to Murphy, are "reasonably related to legitimate penological interests." 482 U. S., at 89. To prevail, Murphy must overcome the presumption that the prison officials acted within their "broad discretion." *Abbott*, *supra*, at 413. Petitioners ask us to answer, rather than remand, the question whether Murphy has satisfied this heavy burden. We decline petitioners' request, however, because we granted certiorari only to decide whether inmates possess a special First Amendment right to provide legal assistance to fellow inmates.

* * *

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

It is so ordered.

JUSTICE GINSBURG, concurring.

I agree with the Court that the Ninth Circuit erred in holding that the First Amendment secures to prisoners a freestanding right to provide legal assistance to other inmates. I note, furthermore, that Murphy does not contest the prison's right to intercept prisoner-to-prisoner correspondence. But Murphy's § 1983 complaint does allege that the prison rules under which he was disciplined—rules forbidding insolence and interference with due process hearings—are vague and overbroad as applied to him in this case.* The Ninth Circuit passed over that charge when it

*The rule forbidding insolence defines "insolence" as "[w]ords, actions or other behavior which is *intended* to harass or cause alarm in an employee." Mont. State Prison Policy No. 15–001, Inmate Disciplinary Pol-

ruled, erroneously, that an inmate's provision of legal assistance to another inmate is an activity specially protected by the First Amendment. 195 F. 3d 1121, 1128 (1999). The remand for which the Court provides should not impede Murphy from reasserting claims that the Court of Appeals so far has left untouched.

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icy, Rule 009 (App. 10) (emphasis added). The policy includes the following examples of insolence: "Cursing; abusive language, writing or gestures *directed to* an employee." *Ibid.* (emphasis added). The disciplinary report citing Murphy for violating the rule against insolence contains no finding that Murphy's letter was "directed to" Officer Galle or that the letter was "intended to harass" Officer Galle. App. 52. Although Murphy undoubtedly knew that his letter to Tracy would be read by prison officials, there is no record evidence contesting Murphy's sworn statement that he "did not believe that Officer Galle would read the letter." Murphy Affidavit ¶ 10 (App. 88).

Syllabus

EASLEY,* GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 99–1864. Argued November 27, 2000—Decided April 18, 2001†

After this Court found that North Carolina's Legislature violated the Constitution by using race as the predominant factor in drawing its Twelfth Congressional District's 1992 boundaries, *Shaw* v. *Hunt*, 517 U. S. 899, the State redrew those boundaries. A three-judge District Court subsequently granted appellees summary judgment, finding that the new 1997 boundaries had also been created with racial considerations dominating all others. This Court reversed, finding that there was a genuine issue of material fact as to whether the evidence was consistent with a race-based objective or the constitutional political objective of creating a safe Democratic seat. *Hunt* v. *Cromartie*, 526 U. S. 541. Among other things, this Court relied on evidence proposed to be submitted by appellants to conclude that, because the State's African-American voters overwhelmingly voted Democratic, one could not easily distinguish a legislative effort to create a majority-minority district from a legislative effort to create a safely Democratic one; that data showing voter registration did not indicate how voters would actually vote; and that data about actual behavior could affect the litigation's outcome. *Id.*, at 547–551. On remand, the District Court again held, after a 3-day trial, that the legislature had used race driven criteria in drawing the 1997 boundaries. It based that conclusion on three findings—the district's shape, its splitting of towns and counties, and its heavily African-American voting population—that this Court had considered when it found summary judgment inappropriate, and on the new finding that the legislature had drawn the boundaries to collect precincts with a high racial, rather than political, identification.

Held: The District Court's conclusion that the State violated the Equal Protection Clause in drawing the 1997 boundaries is based on clearly erroneous findings. Pp. 241–258.

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*Governor Michael F. Easley is hereby substituted for former Governor James B. Hunt, Jr., pursuant to this Court's Rule 35.3.

†Together with No. 99–1865, *Smallwood et al.* v. *Cromartie et al.*, also on appeal from the same court.

Syllabus

(a) The issue here is evidentiary: whether there is adequate support for the District Court's finding that race, rather than politics, drove the legislature's districting decision. Those attacking the district have the demanding burden of proof to show that a facially neutral law is unexplainable on grounds other than race. *Cromartie*, *supra*, at 546. Because the underlying districting decision falls within a legislature's sphere of competence, *Miller* v. *Johnson*, 515 U. S. 900, 915, courts must exercise extraordinary caution in adjudicating claims such as this one, *id.*, at 916, especially where, as here, the State has articulated a legitimate political explanation for its districting decision and the voting population is one in which race and political affiliation are highly coordinated, see *Cromartie*, *supra*, at 551–552. This Court will review the District Court's findings only for "clear error," asking whether "on the entire evidence" the Court is "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. An extensive review of the District Court's findings is warranted here because there was no intermediate court review, the trial was not lengthy, the key evidence consisted primarily of documents and expert testimony, and credibility evaluations played a minor role. Pp. 241–243.

(b) The critical District Court determination that "race, not politics," predominantly explains the 1997 boundaries rests upon the three findings that this Court found insufficient to support summary judgment, and which cannot in and of themselves, as a matter of law, support the District Court's judgment here. See *Bush* v. *Vera*, 517 U. S. 952, 968. Its determination also rests upon five new subsidiary findings, which this Court also cannot accept as adequate. First, the District Court primarily relied on evidence of voting registration, not voting behavior, which is precisely the kind of evidence that this Court found inadequate the last time the case was here. White registered Democrats "crossover" to vote Republican more often than do African-Americans, who register and vote Democratic between 95% and 97% of the time. Thus, a legislature trying to secure a safe Democratic seat by placing reliable Democratic precincts within a district may end up with a district containing more heavily African-American precincts for political, not racial, reasons. Second, the evidence to which appellees' expert, Dr. Weber, pointed—that a reliably Democratic voting population of 60% is necessary to create a safe Democratic seat, but this district was 63% reliable; that certain white-Democratic precincts were excluded while African-American-Democratic precincts were included; that one precinct was split between Districts 9 and 12; and that other plans would have created a safely Democratic district with fewer African-American precincts—simply does not provide significant additional support for the

Syllabus

District Court's conclusion. Also, portions of Dr. Weber's testimony not cited by the District Court undercut his conclusions. Third, the District Court, while not accepting the contrary conclusion of appellants' expert, Dr. Peterson, did not (and as far as the record reveals, could not) reject much of the significant supporting factual information he provided, which showed that African-American-Democratic voters were more reliably Democratic and that District 12's boundaries were drawn to include reliable Democrats. Fourth, a statement about racial balance made by Senator Cooper, the legislative redistricting leader, shows that the legislature considered race along with other partisan and geographic considerations, but says little about whether race played a predominant role. And an e-mail sent by Gerry Cohen, a legislative staff member responsible for drafting districting plans, offers some support for the District Court's conclusion, but is less persuasive than the kinds of direct evidence that this Court has found significant in other redistricting cases. Fifth, appellees' maps summarizing voting behavior evidence tend to refute the District Court's "race, not politics," conclusion. Pp. 243–257.

(c) The modicum of evidence supporting the District Court's conclusion—the Cohen e-mail, Senator Cooper's statement, and some aspects of Dr. Weber's testimony—taken together, does not show that racial considerations predominated in the boundaries' drawing, because race in this case correlates closely with political behavior. Where majority-minority districts are at issue and racial identification correlates highly with political affiliation, the party attacking the boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles and that those alternatives would have brought about significantly greater racial balance. Because appellees failed to make any such showing here, the District Court's contrary findings are clearly erroneous. Pp. 257–258.

133 F. Supp. 2d 407, reversed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 259.

Walter E. Dellinger argued the cause for the state appellants. With him on the briefs were *Michael F. Easley*, former Attorney General of North Carolina, *Tiare B. Smiley* and *Norma S. Harrell*, Special Deputy Attorneys General,

and *Brian D. Boyle*. *Adam Stein* argued the cause for appellants Smallwood et al. With him on the briefs were *Todd A. Cox*, *Norman J. Chachkin*, and *Jacqueline A. Berrien*.

Robinson O. Everett argued the cause for appellees in both cases. With him on the brief were *Martin B. McGee* and *Douglas E. Markham*.‡

JUSTICE BREYER delivered the opinion of the Court.

In this appeal, we review a three-judge District Court's determination that North Carolina's Legislature used race as the "predominant factor" in drawing its 12th Congressional District's 1997 boundaries. The court's findings, in our view, are clearly erroneous. We therefore reverse its conclusion that the State violated the Equal Protection Clause. U. S. Const., Amdt. 14, § 1.

I

This "racial districting" litigation is before us for the fourth time. Our first two holdings addressed North Carolina's *former* Congressional District 12, one of two North Carolina congressional districts drawn in 1992 that contained a majority of African-American voters. See *Shaw* v. *Reno*, 509 U. S. 630 (1993) *(Shaw I); Shaw* v. *Hunt*, 517 U. S. 899 (1996) *(Shaw II)*.

A

In *Shaw I*, the Court considered whether plaintiffs' factual allegation—that the legislature had drawn the former district's boundaries for race-based reasons—if true, could underlie a legal holding that the legislature had violated the Equal Protection Clause. The Court held that it could. It wrote that a violation may exist where the legislature's boundary drawing, though "race neutral on its face," none-

‡Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Waxman*, *Acting Assistant Attorney General Yeomans*, *Deputy Solicitor General Underwood*, *James A. Feldman*, *David K. Flynn*, and *Louis E. Peraertz;* and for the American Civil Liberties Union by *Laughlin McDonald*, *Neil Bradley*, and *Cristina Correia*.

theless can be understood only as an effort to "separate voters into different districts on the basis of race," and where the "separation lacks sufficient justification." 509 U. S., at 649.

In *Shaw II*, the Court reversed a subsequent three-judge District Court's holding that the boundary-drawing law in question did not violate the Constitution. This Court found that the district's "unconventional," snakelike shape, the way in which its boundaries split towns and counties, its predominately African-American racial makeup, and its history, together demonstrated a deliberate effort to create a "majority-black" district in which race "could not be compromised," not simply a district designed to "protec[t] Democratic incumbents." 517 U. S., at 902–903, 905–907. And the Court concluded that the legislature's use of racial criteria was not justified. *Id.*, at 909–918.

B

Our third holding focused on a new District 12, the boundaries of which the legislature had redrawn in 1997. *Hunt* v. *Cromartie*, 526 U. S. 541 (1999). A three-judge District Court, with one judge dissenting, had granted summary judgment in favor of those challenging the district's boundaries. The court found that the legislature again had "used criteria . . . that are facially race driven," in violation of the Equal Protection Clause. App. to Juris. Statement in No. 99–1864, p. 262a (hereinafter App. to Juris. Statement). It based this conclusion upon "uncontroverted material facts" showing that the boundaries created an unusually shaped district, split counties and cities, and in particular placed almost all heavily Democratic-registered, predominantly African-American voting precincts, inside the district while locating some heavily Democratic-registered, predominantly white precincts, outside the district. This latter circumstance, said the court, showed that the legislature was trying to maximize new District 12's African-

American voting strength, not the district's Democratic voting strength. *Ibid.*

This Court reversed. We agreed with the District Court that the new district's shape, the way in which it split towns and counties, and its heavily African-American voting population all helped the plaintiffs' case. 526 U. S., at 547–549. But neither that evidence by itself, nor when coupled with the evidence of Democratic registration, was sufficient to show, on summary judgment, the unconstitutional race-based objective that plaintiffs claimed. That is because there was a genuine issue of material fact as to whether the evidence also was consistent with a constitutional political objective, namely, the creation of a safe Democratic seat. *Id.*, at 549–551.

We pointed to the affidavit of an expert witness for defendants, Dr. David W. Peterson. Dr. Peterson offered to show that, because North Carolina's African-American voters are overwhelmingly Democratic voters, one cannot easily distinguish a legislative effort to create a majority-African-American district from a legislative effort to create a safely Democratic district. *Id.*, at 550. And he also provided data showing that *registration* did not indicate how voters would actually vote. *Id.*, at 550–551. We agreed that data showing how voters actually behave, not data showing only how those voters are registered, could affect the outcome of this litigation. *Ibid.* We concluded that the case was "not suited for summary disposition" and we reversed the District Court. *Id.*, at 554.

C

On remand, the parties undertook additional discovery. The three-judge District Court held a 3-day trial. And the court again held (over a dissent) that the legislature had unconstitutionally drawn District 12's new 1997 boundaries. It found that the legislature had tried "(1) [to] cur[e] the [previous district's] constitutional defects" while also "(2) drawing the plan to maintain the existing partisan bal-

ance in the State's congressional delegation." *Cromartie* v. *Hunt*, 133 F. Supp. 2d 407, 413 (EDNC 2000). It added that to "achieve the second goal," the legislature "drew the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts." *Ibid.* The court concluded that the "plan as enacted largely reflects these directives." *Ibid.* But the court also found "as a matter of fact that the General Assembly . . . used criteria . . . that are facially race driven" without any compelling justification for doing so. *Id.*, at 420.

The court based its latter, constitutionally critical, conclusion in part upon the district's snakelike shape, the way in which it split cities and towns, and its heavily African-American (47%) voting population, *id.*, at 413–415—all matters that this Court had considered when it found summary judgment inappropriate, *Cromartie,* 526 U. S., at 544. The court also based this conclusion upon a specific finding—absent when we previously considered this litigation—that the legislature had drawn the boundaries in order "to collect precincts with *high racial identification rather than political identification.*" 133 F. Supp. 2d, at 420 (emphasis added).

This last-mentioned finding rested in turn upon five subsidiary determinations:

(1) that "the legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately border the Twelfth and would have established a far more compact district," *id.*, at 419; see also *id.*, at 421 ("more heavily Democratic precincts . . . were bypassed . . . in favor of precincts with a higher African-American population");

(2) that "[a]dditionally, Plaintiffs' expert, Dr. Weber, showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district," *id.*, at 419;

(3) that Dr. Peterson's testimony was "'unreliable' and not relevant," *id.*, at 420 (citing testimony of Dr. Weber);

(4) that a legislative redistricting leader, Senator Roy Cooper, had alluded at the time of redistricting "to a need for 'racial and partisan' balance," *ibid.;* and

(5) that the Senate's redistricting coordinator, Gerry Cohen, had sent Senator Cooper an e-mail reporting that Cooper had "moved Greensboro Black community into the 12th, and now need[ed] to take [about] 60,000 out of the 12th," App. 369; 133 F. Supp. 2d, at 420.

The State and intervenors filed a notice of appeal. 28 U. S. C. § 1253. We noted probable jurisdiction. 530 U. S. 1260 (2000). And we now reverse.

II

The issue in this case is evidentiary. We must determine whether there is adequate support for the District Court's key findings, particularly the ultimate finding that the legislature's motive was predominantly racial, not political. In making this determination, we are aware that, under *Shaw I* and later cases, the burden of proof on the plaintiffs (who attack the district) is a "demanding one." *Miller* v. *Johnson*, 515 U. S. 900, 928 (1995) (O'Connor, J., concurring). The Court has specified that those who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the "legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.*, at 916 (majority opinion). Race must not simply have been "*a* motivation for the drawing of a majority-minority district," *Bush* v. *Vera*, 517 U. S. 952, 959 (1996) (O'Connor, J., principal opinion) (emphasis in original), but "the '*predominant* factor' motivating the legislature's districting decision," *Cromartie, supra,* at 547 (quoting *Miller*, *supra,* at 916) (emphasis added). Plaintiffs

must show that a facially neutral law "'is "unexplainable on grounds other than race."'" *Cromartie*, *supra*, at 546 (quoting *Shaw I*, 509 U. S., at 644, in turn quoting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)).

The Court also has made clear that the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence. *Miller*, 515 U. S., at 915. Hence, the legislature "must have discretion to exercise the political judgment necessary to balance competing interests," *ibid.*, and courts must "exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race," *id.*, at 916 (emphasis added). Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated. See *Cromartie*, *supra*, at 551–552 (noting that "[e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference").

We also are aware that we review the District Court's findings only for "clear error." In applying this standard, we, like any reviewing court, will not reverse a lower court's finding of fact simply because we "would have decided the case differently." *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). Rather, a reviewing court must ask whether, "on the entire evidence," it is "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not "lightly overturn" the concurrent findings of the two lower courts. *E. g.*, *Neil*

v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972). But in this instance there is no intermediate court, and we are the only court of review. Moreover, the trial here at issue was not lengthy and the key evidence consisted primarily of documents and expert testimony. Credibility evaluations played a minor role. Accordingly, we find that an extensive review of the District Court's findings, for clear error, is warranted. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 500–501 (1984). That review leaves us "with the definite and firm conviction," *United States Gypsum Co.*, *supra*, at 395, that the District Court's key findings are mistaken.

III

The critical District Court determination—the matter for which we remanded this litigation—consists of the finding that race *rather than* politics *predominantly* explains District 12's 1997 boundaries. That determination rests upon three findings (the district's shape, its splitting of towns and counties, and its high African-American voting population) that we previously found insufficient to support summary judgment. *Cromartie*, 526 U. S., at 547–549. Given the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina, these facts in and of themselves cannot, as a matter of law, support the District Court's judgment. See *Vera*, 517 U. S., at 968 (O'Connor, J., principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify"). The District Court rested, however, upon five new subsidiary findings to conclude that District 12's lines are the product of no "mer[e] correlat[ion]," *ibid.*, but are instead a result of the predominance of race in the legislature's line-drawing process. See *supra*, at 240–241.

In considering each subsidiary finding, we have given weight to the fact that the District Court was familiar with

this litigation, heard the testimony of each witness, and considered all the evidence with care. Nonetheless, we cannot accept the District Court's findings as adequate for reasons which we shall spell out in detail and which we can summarize as follows:

First, the primary evidence upon which the District Court relied for its "race, not politics," conclusion is evidence of voting registration, not voting behavior; and that is precisely the kind of evidence that we said was inadequate the last time this case was before us. See *infra*, at 245–246. Second, the additional evidence to which appellees' expert, Dr. Weber, pointed, and the statements made by Senator Cooper and Gerry Cohen, simply do not provide significant additional support for the District Court's conclusion. See *infra*, at 246–250, 253–254. Third, the District Court, while not accepting the contrary conclusion of appellants' expert, Dr. Peterson, did not (and as far as the record reveals, could not) reject much of the significant supporting factual information he provided. See *infra*, at 251–253. Fourth, in any event, appellees themselves have provided us with charts summarizing evidence of voting behavior and those charts tend to refute the court's "race, not politics," conclusion. See *infra*, at 254–257; Appendixes, *infra*.

A

The District Court primarily based its "race, not politics," conclusion upon its finding that "the legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately border the Twelfth and would have established a far more compact district." 133 F. Supp. 2d, at 419; see also *id.*, at 420 ("[M]ore heavily Democratic precincts . . . were bypassed . . . in favor of precincts with a higher African-American population"). This finding, however—insofar as it differs from the remaining four—rests solely upon evidence that the legislature excluded heavily white precincts with high Democratic Party *registra-*

tion, while including heavily African-American precincts with equivalent, or lower, Democratic Party registration. See *id.*, at 413–414, 415. Indeed, the District Court cites at length figures showing that the legislature included "several precincts with racial compositions of 40 to 100 percent African-American," while excluding certain adjacent precincts "with less than 35 percent African-American population" but which contain between 54% and 76% *registered* Democrats. *Id.*, at 414.

As we said before, the problem with this evidence is that it focuses upon party registration, not upon voting behavior. And we previously found the same evidence, compare *ibid.* (District Court's opinion after trial) with App. to Juris. Statement 249a–250a (District Court's summary judgment opinion), inadequate because registration figures do not accurately predict preference at the polls. See *id.*, at 174a; see also *Cromartie, supra,* at 550–551 (describing Dr. Peterson's analysis as "more thorough" because in North Carolina, "party registration and party preference do not always correspond"). In part this is because white voters registered as Democrats "cross-over" to vote for a Republican candidate more often than do African-Americans, who register and vote Democratic between 95% and 97% of the time. See Record, Deposition of Gerry Cohen 37–42 (discussing data); App. 304 (stating that white voters cast about 60% to 70% of their votes for Republican candidates); *id.*, at 139 (Dr. Weber's testimony that 95% to 97% of African-Americans register and vote as Democrats); see also *id.*, at 118 (testimony by Dr. Weber that registration data were the least reliable information upon which to predict voter behavior). A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial.

Insofar as the District Court relied upon voting registration data, particularly data that were previously before us, it tells us nothing new; and the data do not help answer the question posed when we previously remanded this litigation. *Cromartie*, 526 U. S., at 551.

B

The District Court wrote that "[a]dditionally, [p]laintiffs' expert, Dr. Weber, showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." 133 F. Supp. 2d, at 419. In support of this conclusion, the court relied upon six different citations to Dr. Weber's trial testimony. We have examined each reference.

1

At the first cited pages of the trial transcript, Dr. Weber says that a reliably Democratic voting population of 60% is sufficient to create a safe Democratic seat. App. 91. Yet, he adds, the legislature created a more-than-60% reliable Democratic voting population in District 12. Hence (we read Dr. Weber to infer), the legislature likely was driven by race, not politics. Tr. 163; App. 314–315.

The record indicates, however, that, although Dr. Weber is right that District 12 is more than 60% reliably Democratic, it exceeds that figure by very little. Nor did Dr. Weber ask whether other districts, unchallenged by appellees, were significantly less "safe" than was District 12. *Id.*, at 148. In fact, the figures the legislature used showed that District 12 would be 63% reliably Democratic. App. to Juris. Statement 80a (Democratic vote over three representative elections averaged 63%). By the same measures, at least two Republican districts (Districts 6 and 10) are 61% reliably Republican. *Ibid.* And, as Dr. Weber conceded, incumbents might have urged legislators (trying to maintain a

six/six Democrat/Republican delegation split) to make their seats, not 60% safe, but as safe as possible. App. 149. In a field such as voting behavior, where figures are inherently uncertain, Dr. Weber's tiny calculated percentage differences are simply too small to carry significant evidentiary weight.

2

The District Court cited two parts of the transcript where Dr. Weber testified about a table he had prepared listing all precincts in the six counties, portions of which make up District 12. Tr. 204–205, 262. Dr. Weber said that District 12 contains between 39% and 56% of the precincts (depending on the county) that are more-than-40% reliably Democratic, but it contains almost every precinct with more-than-40% African-American voters. *Id.*, at 204–205. Why, he essentially asks, if the legislature had had politics primarily in mind, would its effort to place reliably Democratic precincts within District 12 not have produced a greater racial mixture?

Dr. Weber's own testimony provides an answer to this question. As Dr. Weber agreed, the precincts listed in the table were at least *40%* reliably Democratic, but virtually all the African-American precincts included in District 12 were *more* than 40% reliably Democratic. Moreover, *none* of the excluded white precincts were *as* reliably Democratic as the African-American precincts that were included in the district. App. 140. Yet the legislature sought precincts that were reliably Democratic, not precincts that were *40%* reliably Democratic, for obvious political reasons.

Neither does the table specify whether the excluded white-reliably-Democratic precincts were located near enough to District 12's boundaries or each other for the legislature as a practical matter to have drawn District 12's boundaries to have included them, without sacrificing other important political goals. The contrary is suggested by the

fact that Dr. Weber's own proposed alternative plan, see *id.*, at 106–107, would have pitted two incumbents against each other (Sue Myrick, a Republican from former District 9 and Mel Watt, a Democrat from former District 12). Dr. Weber testified that such a result—"a very competitive race with one of them losing their seat"—was desirable. *Id.*, at 153. But the legislature, for political, not racial, reasons, believed the opposite. And it drew its plan to protect incumbents—a legitimate political goal recognized by the District Court. 133 F. Supp. 2d, at 412–413.

For these reasons, Dr. Weber's table offers little insight into the legislature's true motive.

3

The next part of the transcript the District Court cited contains Dr. Weber's testimony about a Mecklenburg County precinct (precinct 77) which the legislature split between Districts 9 and 12. Tr. 221. Dr. Weber apparently thought that the legislature did not have to split this precinct, placing the more heavily African-American segment within District 12—unless, of course, its motive was racial rather than political. But Dr. Weber simultaneously conceded that he had not considered whether District 9's incumbent Republican would have wanted the whole of precinct 77 left in her own district where it would have burdened her with a significant additional number of reliably Democratic voters. App. 156–157. Nor had Dr. Weber "test[ed]" his conclusion that this split helped to show a racial (rather than political) motive, say, by adjusting other boundary lines and determining the political, or other nonracial, consequences of such adjustments. *Id.*, at 132.

The maps in evidence indicate that to have placed all of precinct 77 within District 12 would have created a District 12 peninsula that invaded District 9, neatly dividing that latter district in two, see *id.*, at 496—a conclusive nonracial reason for the legislature's decision not to do so.

4

The District Court cited Dr. Weber's conclusion that "race is the predominant factor." Tr. 251. But this statement of the conclusion is no stronger than the evidence that underlies it.

5

The District Court's final citation is to Dr. Weber's assertion that there are other ways in which the legislature could have created a safely Democratic district without placing so many primarily African-American districts within District 12. *Id.*, at 288. And we recognize that *some* such other ways may exist. But, unless the evidence also shows that these hypothetical alternative districts would have better satisfied the legislature's other nonracial political goals as well as traditional nonracial districting principles, this fact alone cannot show an improper legislative motive. After all, the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations. And Dr. Weber's testimony does not, at the pages cited, provide evidence of a politically practical alternative plan that the legislature failed to adopt predominantly for racial reasons.

6

In addition, we have read the whole of Dr. Weber's testimony, including portions not cited by the District Court. Some of those portions further undercut Dr. Weber's conclusions. Dr. Weber said, for example, that he had developed those conclusions while under the erroneous impression that the legislature's computer-based districting program provided information about racial, but not political, balance. App. 137–138; see also *id.*, at 302 (reflecting Dr. Weber's erroneous impression in the declaration he submitted to

the District Court). He also said he was not aware of "anything about political dynamics going on in the [l]egislature involving" District 12, *id.*, at 135, sometimes expressing disdain for a process that we have cautioned courts to respect, *id.*, at 150–151; *Miller*, 515 U. S., at 915–916.

Other portions support Dr. Weber's conclusions. Dr. Weber testified, for example, about a different alternative plan that, in his view, would have provided both greater racial balance and political security, namely, a plan that the legislature did enact in 1998, and which has been in effect during the time the courts have been reviewing the constitutionality of the 1997 plan. App. 156–157. The existence of this alternative plan, however, cannot help appellees significantly. Although it created a somewhat more compact district, it still divides many communities along racial lines, while providing fewer reliably Democratic District 12 voters and transferring a group of highly Democratic precincts into two safely Republican districts, namely, the 5th and 6th Districts, which political result the 1997 plan sought to avoid. See Tr. 352, 355. Furthermore, the 1997 plan before this Court, unlike the 1998 plan, joined three major cities in a manner legislators regarded as reflecting "a real commonality of urban interests, with inner city schools, urban health care . . . problems, public housing problems." App. 430 (statement of Sen. Winner); see also *id.*, at 421 (statement of Sen. Martin). Consequently, we cannot tell whether the existence of the 1998 plan shows that the 1997 plan was drawn with racial considerations predominant. And, in any event, the District Court did not rely upon the existence of the 1998 plan to support its ultimate conclusion. See *Kelley* v. *Everglades Drainage Dist.*, 319 U. S. 415, 420–422 (1943) *(per curiam)*.

We do not see how Dr. Weber's testimony, taken as a whole, could have provided more than minimal support for the District Court's conclusion that race predominantly underlay the legislature's districting decision.

C

The District Court found that the testimony of the State's primary expert, Dr. Peterson, was " 'unreliable' and not relevant." 133 F. Supp. 2d, at 420 (quoting Dr. Weber and citing Tr. 222–224, 232). Dr. Peterson's testimony was designed to show that African-American Democratic voters were more reliably Democratic and that District 12's boundaries were drawn to include reliable Democrats. Specifically, Dr. Peterson compared precincts immediately within District 12 and those immediately without to determine whether the boundaries of the district corresponded better with race than with politics. The principle underlying Dr. Peterson's analysis is that if the district were drawn with race predominantly in mind, one would expect the boundaries of the district to correlate with race more than with politics.

The pages cited in support of the District Court's rejection of Dr. Peterson's conclusions contain testimony by Dr. Weber, who says that Dr. Peterson's analysis is unreliable because (1) it "ignor[es] the core" of the district, *id.*, at 223, and (2) it fails to take account of the fact that different precincts have different populations, *id.*, at 223–224. The first matter—ignoring the "core"—apparently reflects Dr. Weber's view that in context the fact that District 12's heart or "core" is heavily African-American by itself shows that the legislature's motive was predominantly racial, not political. The District Court did not argue that the racial makeup of a district's "core" is critical. Nor do we see why "core" makeup alone could help the court discern the relevant legislative motive. Nothing here suggests that only "core" makeup could answer the "political/racial" question that this Court previously found critical. *Cromartie*, 526 U. S., at 551–552.

The second matter—that Dr. Peterson's boundary segment analysis did not account for differences in population between precincts—relates to one aspect of Dr. Peterson's

testimony. Appellants presented Dr. Peterson's testimony and data in support of four propositions: first, that registration figures do not accurately reflect actual voting behavior, see App. to Juris. Statement 173a–174a; second, that African-Americans are more reliable Democrats than whites, see *id.*, at 159a–160a; third, that political affiliation explains splitting cities and counties as well as does race, see *id.*, at 189a, 191a–192a, 182a–185a; and fourth, that differences in the racial and political makeup of the precincts just inside and outside the boundaries of District 12 show that politics is as good an explanation as is race for the district's boundaries, see *id.*, at 161a–167a; 181a–182a. The District Court's criticism of Dr. Peterson's testimony at most affects the reliability of the fourth element of Dr. Peterson's testimony, his special boundary segment analysis. The District Court's criticism of Dr. Peterson's boundary segment analysis does not undermine the data related to the split communities. The criticism does not undercut Dr. Peterson's presentation of statistical evidence showing that registration was a poor indicator of party preference and that African-Americans are much more reliably Democratic voters, nor have we found in the record any significant evidence refuting that data.

At the same time, appellees themselves have used the information available in the record to create maps comparing the district's boundaries with Democratic/Republican voting behavior. See Appendixes A, B, and C, *infra.* Because no one challenges the accuracy of these maps, we assume that they are reliable; and we can assume that Dr. Peterson's testimony is reliable insofar as it confirms what the maps themselves contain and appellees themselves concede. Those maps, with certain exceptions discussed below, see *infra,* at 254–257, further indicate that the legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliably Democratic voters outside the district. And that fact, in turn,

supports the State's answers to the questions we previously found critical.

D

The District Court also relied on two pieces of "direct" evidence of discriminatory intent.

1

The court found that a legislative redistricting leader, Senator Roy Cooper, when testifying before a legislative committee in 1997, had said that the 1997 plan satisfies a "need for 'racial and partisan' balance." 133 F. Supp. 2d, at 419. The court concluded that the words "racial balance" referred to a 10-to-2 Caucasian/African-American balance in the State's 12-member congressional delegation. *Ibid.* Hence, Senator Cooper had admitted that the legislature had drawn the plan with race in mind.

Senator Cooper's full statement reads as follows:

> "Those of you who dealt with Redistricting before realize that you cannot solve each problem that you encounter and everyone can find a problem with this Plan. However, I think that overall it provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina. I think in order to come to an agreement all sides had to give a little bit, but I think we've reached an agreement that we can live with." App. 460.

We agree that one can read the statement about "racial . . . balance" as the District Court read it—to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking. See *Vera,* 517 U. S., at 958 (O'Connor, J., principal opinion) ("Strict scrutiny does not apply merely because redistricting

is performed with consciousness of race"); see also *Miller*, 515 U. S., at 916 (legislatures "will . . . almost always be aware of racial demographics"); *Shaw I*, 509 U. S., at 646 (same).

2

The second piece of "direct" evidence relied upon by the District Court is a February 10, 1997, e-mail sent from Gerry Cohen, a legislative staff member responsible for drafting districting plans, to Senator Cooper and Senator Leslie Winner. Cohen wrote: "I have moved Greensboro Black community into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this." App. 369.

The reference to race—*i. e.*, "Black community"—is obvious. But the e-mail does not discuss the point of the reference. It does not discuss why Greensboro's African-American voters were placed in the 12th District; it does not discuss the political consequences of failing to do so; it is addressed only to two members of the legislature; and it suggests that the legislature paid less attention to race in respect to the 12th District than in respect to the 1st District, where the e-mail provides a far more extensive, detailed discussion of racial percentages. It is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases. See *Vera*, *supra*, at 959 (O'Connor, J., principal opinion) (State conceded that one of its goals was to create a majority-minority district); *Miller*, *supra*, at 907 (State set out to create majority-minority district); *Shaw II*, 517 U. S., at 906 (recounting testimony by Cohen that creating a majority-minority district was the "principal reason" for the 1992 version of District 12). Nonetheless, the e-mail offers some support for the District Court's conclusion.

E

As we have said, we assume that the maps appended to appellees' brief reflect the record insofar as that record

describes the relation between District 12's boundaries and reliably Democratic voting behavior. Consequently we shall consider appellees' related claims, made on appeal, that the maps provide significant support for the District Court, in that they show how the legislature might have "swapped" several more heavily African-American District 12 precincts for other less heavily African-American adjacent precincts—without harming its basic "safely Democratic" political objective. Cf. *supra,* at 246–247.

First, appellees suggest, without identifying any specific swap, that the legislature could have brought within District 12 several reliably Democratic, primarily white, precincts in Forsyth County. See Brief for Appellees 30. None of these precincts, however, is more reliably Democratic than the precincts immediately adjacent and within District 12. See Appendix A, *infra* (showing Democratic strength reflected by Republican victories in each precinct); App. 484 (showing Democratic strength reflected by Democratic registration). One of them, the Brown/Douglas Recreation Precinct, is heavily African-American. See *ibid.* And the remainder form a buffer between the home precinct of Fifth District Representative Richard Burr and the District 12 border, such that their removal from District 5 would deprive Representative Burr of a large portion of his own hometown, making him more vulnerable to a challenge from elsewhere within his district. App. to Juris. Statement 209a; App. 623. Consequently the Forsyth County precincts do not significantly help appellees' "race, not politics," thesis.

Second, appellees say that the legislature might have swapped two District 12 Davidson County precincts (Thomasville 1 and Lexington 3) for a District 6 Guilford County precinct (Greensboro 17). See Brief for Appellees 30, n. 25. Whatever the virtues of such a swap, however, it would have diminished the size of District 12, geographically producing an unusually narrow isthmus linking District 12's north with its south and demographically producing the State's smallest

district, deviating by about 1,300 below the legislatively endorsed ideal mean of 552,386 population. Traditional districting considerations consequently militated against any such swap. See Record, Deposition of Linwood Lee Jones 122 (stating that legislature's goal was to keep deviations from ideal population to less than 1,000); App. 199 (testimony of Sen. Cooper to same effect).

Third, appellees suggest that, in Mecklenburg County, two District 12 precincts (Charlotte 81 and LCI-South) be swapped with two District 9 precincts (Charlotte 10 and 21). See Brief for Appellees 30, n. 25. This suggestion is difficult to evaluate, as the parties provide no map that specifically identifies each precinct in Mecklenburg County by name. Nonetheless, from what we can tell, such a swap would make the district marginally more white (decreasing the African-American population by about 300 persons) while making the shape more questionable, leaving the precinct immediately to the south of Charlotte 81 jutting out into District 9. We are not convinced that this proposal materially advances appellees' claim.

Fourth, appellees argue that the legislature could have swapped two reliably Democratic Greensboro precincts outside District 12 (11 and 14) for four reliably Republican High Point precincts (1, 13, 15, and 19) placed within District 12. See *ibid.* The swap would not have improved racial balance significantly, however, for each of the six precincts have an African-American population of less than 35%. Additionally, it too would have altered the shape of District 12 for the worse. See Appendix D, *infra;* see also App. 622 (testimony of Gerry Cohen). And, in any event, the decision to exclude the two Greensboro precincts seems to reflect the legislature's decision to draw boundaries that follow main thoroughfares in Guilford County. App. to Juris. Statement 205a; App. 575.

Even if our judgments in respect to a few of these precincts are wrong, a showing that the legislature might

have "swapped" a handful of precincts out of a total of 154 precincts, involving a population of a few hundred out of a total population of about half a million, cannot significantly strengthen appellees' case.

IV

We concede the record contains a modicum of evidence offering support for the District Court's conclusion. That evidence includes the Cohen e-mail, Senator Cooper's reference to "racial balance," and to a minor degree, some aspects of Dr. Weber's testimony. The evidence taken together, however, does not show that racial considerations predominated in the drawing of District 12's boundaries. That is because race in this case correlates closely with political behavior. The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations). It is not, as the dissent contends, see *post*, at 266 (opinion of THOMAS, J.), whether a legislature may defend its districting decisions based on a "stereotype" about African-American voting behavior. And given the fact that the party attacking the legislature's decision bears the burden of proving that racial considerations are "dominant and controlling," *Miller*, 515 U. S., at 913, given the "demanding" nature of that burden of proof, *id.*, at 929 (O'CONNOR, J., concurring), and given the sensitivity, the "extraordinary caution," that district courts must show to avoid treading upon legislative prerogatives, *id.*, at 916 (majority opinion), the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result. The record leaves us with the "definite and firm conviction," *United States Gypsum Co.*, 333 U. S., at 395, that the District Court erred in finding to the contrary. And we do not believe that providing appellees a further opportunity to make their "precinct swapping" arguments in the District Court could change this result.

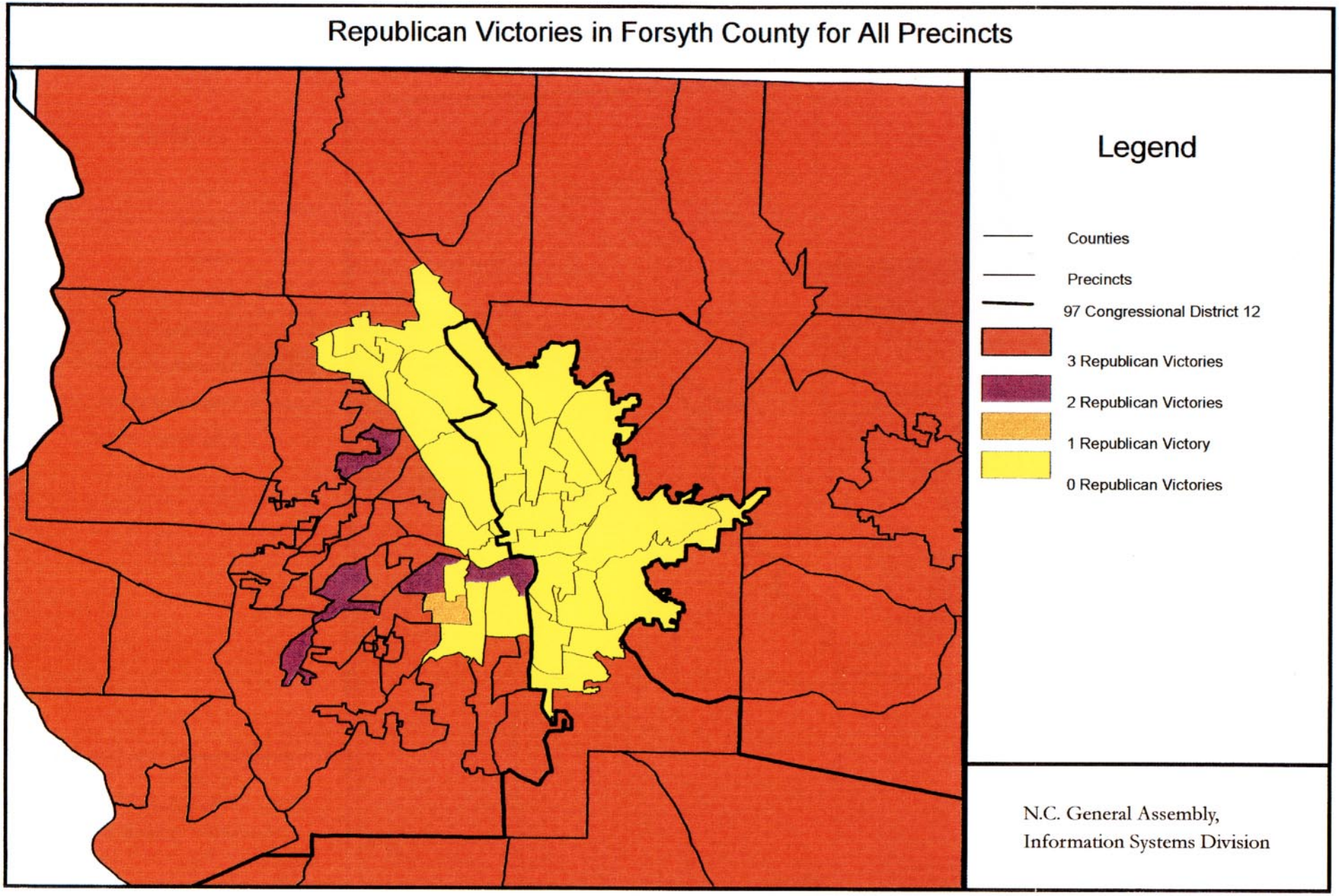
We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here. We conclude that the District Court's contrary findings are clearly erroneous. Because of this disposition, we need not address appellants' alternative grounds for reversal.

The judgment of the District Court is

Reversed.

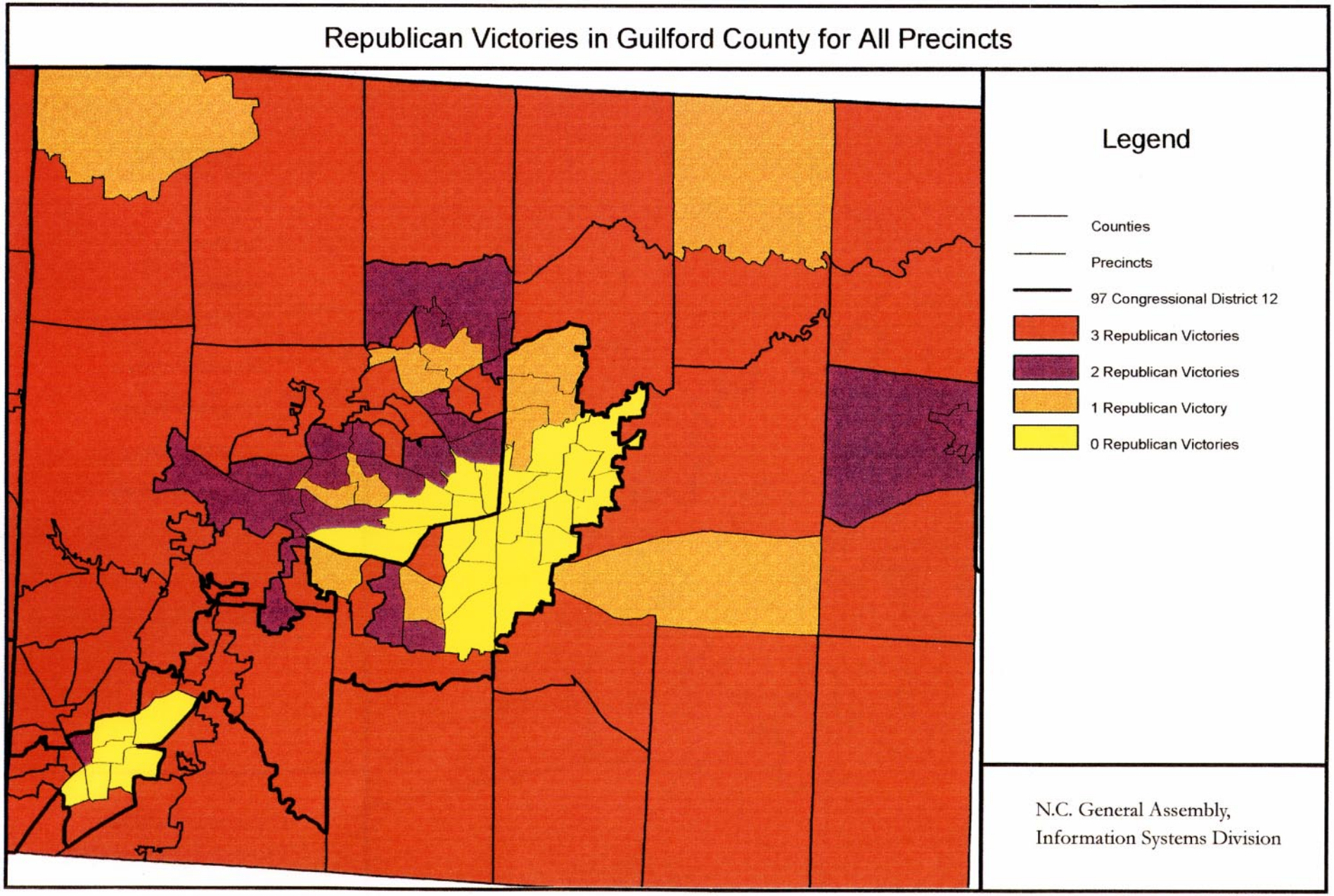
[Appendixes containing maps from appellees' and appellants' briefs follow this page.]

APPENDIX A



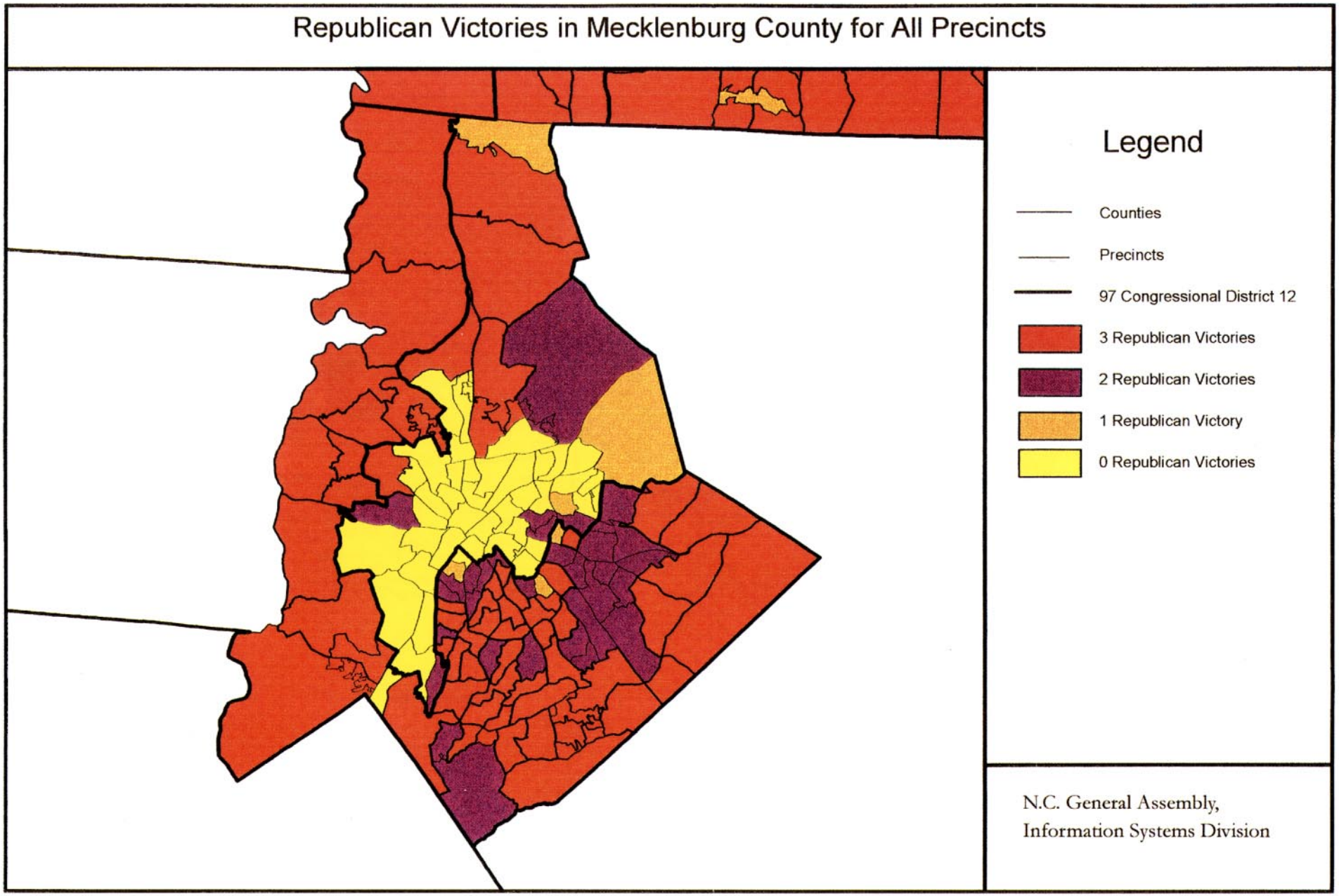
Source: App. to Brief for Appellees 2a.

APPENDIX B



Source: App. to Brief for Appellees 3a.

APPENDIX C



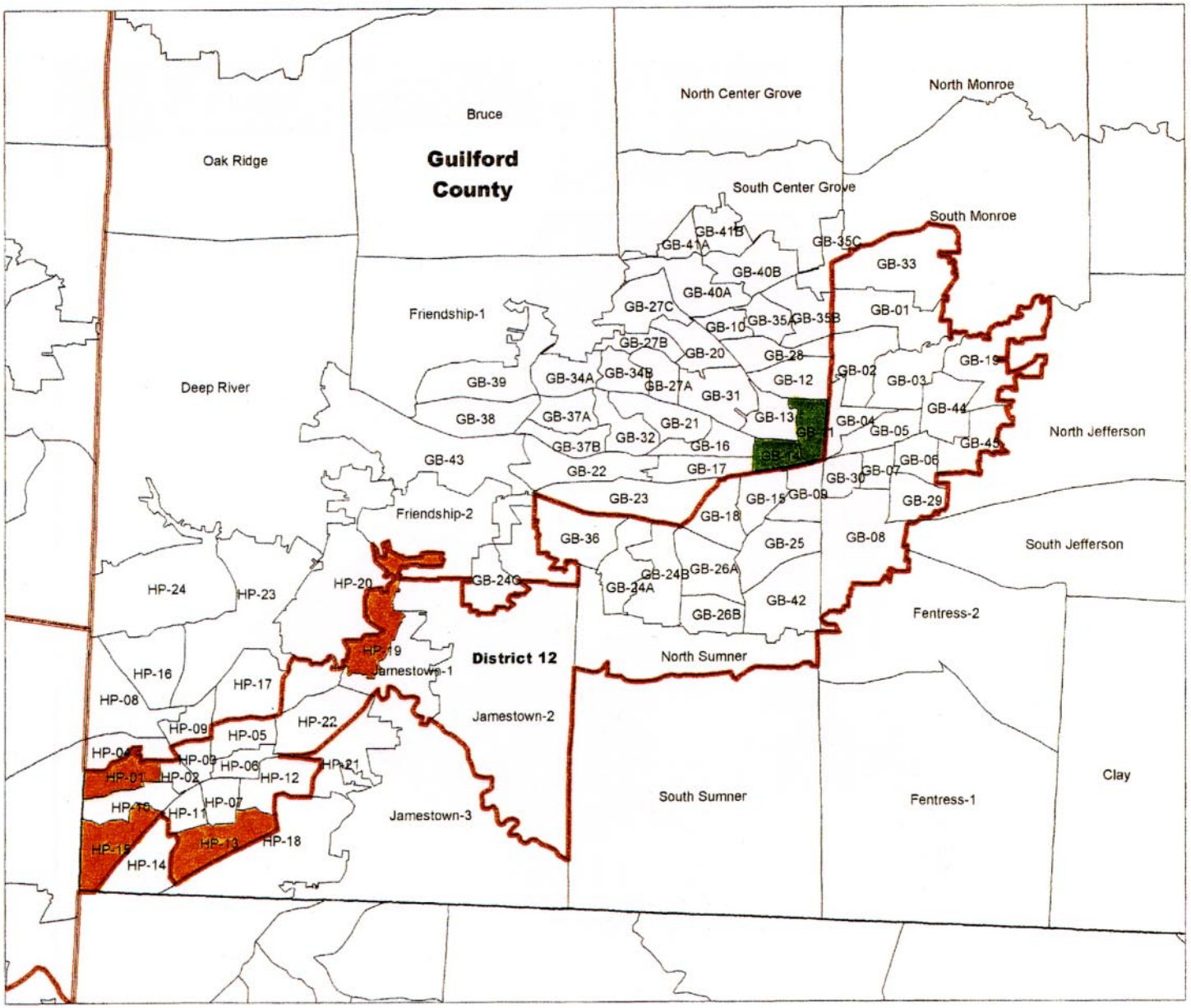
Source: App. to Brief for Appellees 4a.

APPENDIX D

EFFECT OF APPELLEES' PROPOSED SWAPS BETWEEN HIGH POINT AND GREENSBORO PRECINCTS

LEGEND

- County Lines
- Precinct Lines
- District Line
- Precincts moved into District 12
- Precincts moved out of District 12



Source: App. to Reply Brief for State Appellants 1a.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The issue for the District Court was whether racial considerations were predominant in the design of North Carolina's Congressional District 12. The issue for this Court is simply whether the District Court's factual finding—that racial considerations did predominate—was clearly erroneous. Because I do not believe the court below committed clear error, I respectfully dissent.

I

The District Court's conclusion that race was the predominant factor motivating the North Carolina Legislature is a factual finding. See *Hunt* v. *Cromartie*, 526 U. S. 541, 549 (1999); *Lawyer* v. *Department of Justice*, 521 U. S. 567, 580 (1997); *Shaw* v. *Hunt*, 517 U. S. 899, 905 (1996); *Miller* v. *Johnson*, 515 U. S. 900, 910 (1995). See also *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985) ("[I]ntentional discrimination is a finding of fact . . ."). Accordingly, we should not overturn the District Court's determination unless it is clearly erroneous. See *Lawyer*, *supra*, at 580; *Shaw*, *supra*, at 910; *Miller*, *supra*, at 917. We are not permitted to reverse the court's finding "simply because [we are] convinced that [we] would have decided the case differently." *Anderson*, *supra*, at 573. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." 470 U. S., at 574. We should upset the District Court's finding only if we are "'left with the definite and firm conviction that a mistake has been committed.'" *Id.*, at 573 (quoting *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)).

The Court does cite cases that address the correct standard of review, see *ante*, at 242, and does couch its conclusion in "clearly erroneous" terms, see *ante*, at 257–258. But these incantations of the correct standard are empty gestures, contradicted by the Court's conclusion that it must

engage in "extensive review." See *ante*, at 243. In several ways, the Court ignores its role as a reviewing court and engages in its own factfinding enterprise.[1] First, the Court suggests that there is some significance to the absence of an intermediate court in this action. See *ante*, at 242–243. This cannot be a legitimate consideration. If it were legitimate, we would have mentioned it in prior redistricting cases. After all, in *Miller* and *Shaw*, we also did not have the benefit of intermediate appellate review. See also *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, 330, 332 (1952) (engaging in clear error review of factual findings in a Sherman Act case where there was no intermediate appellate review). In these cases, we stated that the standard was simply "clearly erroneous." Moreover, the implication of the Court's argument is that intermediate courts, because they are the first reviewers of the factfinder's conclusions, should engage in a level of review more rigorous than clear error review. This suggestion is not supported by law. See Fed. Rule Civ. Proc. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . ."). In fact, the very case the Court cited to articulate clear error review discussed the standard as it applied to an intermediate appellate court, which obviously did not have the benefit of another layer of review. See *ante*, at 242 (citing *Anderson*, *supra*, at 573).

Second, the Court appears to discount clear error review here because the trial was "not lengthy." *Ante*, at 243. Even if considerations such as the length of the trial were relevant in deciding how to review factual findings, an as-

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[1] Despite its citation of *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), *ante*, at 243, I do not read the Court's opinion to suggest that the predominant factor inquiry, like the actual malice inquiry in *Bose*, should be reviewed *de novo* because it is a "constitutional fac[t]." 466 U. S., at 515 (REHNQUIST, J., dissenting). Nor could it, given our holdings in *Lawyer* v. *Department of Justice*, 521 U. S. 567 (1997), *Miller* v. *Johnson*, 515 U. S. 900 (1995), and *Shaw* v. *Hunt*, 517 U. S. 899 (1996).

sumption about which I have my doubts,[2] these considerations would not counsel against deference in this action. The trial was not "just a few hours" long, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 500 (1984); it lasted for three days in which the court heard the testimony of 12 witnesses. And quite apart from the total trial time, the District Court sifted through hundreds of pages of deposition testimony and expert analysis, including statistical analysis. It also should not be forgotten that one member of the panel has reviewed the iterations of District 12 since 1992. If one were to calibrate clear error review according to the trier of fact's familiarity with the case, there is simply no question that the court here gained a working knowledge of the facts of this litigation in myriad ways over a period far longer than three days.

Third, the Court downplays deference to the District Court's finding by highlighting that the key evidence was expert testimony requiring no traditional credibility determinations. See *ante,* at 243. As a factual matter, the Court overlooks the District Court's express assessment of the legislative redistricting leader's credibility. See *Cromartie* v. *Hunt*, 133 F. Supp. 2d 407, 419, 420, n. 8 (EDNC 2000). It is also likely that the court's interpretation of the e-mail written by Gerry Cohen, the primary drafter of District 12, was influenced by its evaluation of Cohen as a witness. See *id.*, at 420, n. 8. See also App. 261–268. And, as a legal matter, the Court's emphasis on the technical nature of the

[2] *Bose*, which the Court cites to support its discounting of clear error review, *ante,* at 243, does state that "the likelihood that the appellate court will rely on the presumption [of correctness of factual findings] tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours." 466 U. S., at 500. It is unclear, however, what bearing this statement of fact—that appellate courts will defer to factual findings more often when the trial was long—had on our understanding of the scope of clear error review. In *Bose,* we held that a lower court's "actual malice" finding must be reviewed *de novo,* see *id.*, at 514, not that clear error review must be calibrated to the length of trial.

evidence misses the mark. Although we have recognized that particular weight should be given to a trial court's credibility determinations, we have never held that factual findings based on documentary evidence and expert testimony justify "extensive review," *ante*, at 243. On the contrary, we explained in *Anderson* that "[t]he rationale for deference . . . is not limited to the superiority of the trial judge's position to make determinations of credibility." 470 U. S., at 574. See also Fed. Rule Civ. Proc. 52(a) (specifically referring to oral and documentary evidence). Instead, the rationale for deference extends to all determinations of fact because of the trial judge's "expertise" in making such determinations. 470 U. S., at 574. Accordingly, deference to the factfinder "is the rule, not the exception," *id.*, at 575, and I see no reason to depart from this rule in the case before us now.

Finally, perhaps the best evidence that the Court has emptied clear error review of meaningful content in the redistricting context (and the strongest testament to the fact that the District Court was dealing with a complex fact pattern) is the Court's foray into the minutiae of the record. I do not doubt this Court's ability to sift through volumes of facts or to argue *its* interpretation of those facts persuasively. But I do doubt the wisdom, efficiency, increased accuracy, and legitimacy of an extensive review that is any more searching than clear error review. See *id.*, 574–575 ("Duplication of the trial judge's efforts . . . would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources"). Thus, I would follow our precedents and simply review the District Court's finding for clear error.

II

Reviewing for clear error, I cannot say that the District Court's view of the evidence was impermissible.[3] First, the

[3] I assume, because the District Court did, that the goal of protecting incumbents is legitimate, even where, as here, individuals are incumbents

court relied on objective measures of compactness, which show that District 12 is the most geographically scattered district in North Carolina, to support its conclusion that the district's design was not dictated by traditional districting concerns. 133 F. Supp. 2d, at 419. Although this evidence was available when we held that summary judgment was inappropriate, we certainly did not hold that it was irrelevant in determining whether racial gerrymandering occurred. On the contrary, we determined that there was a triable issue of fact. Moreover, although we acknowledged "that a district's unusual shape can give rise to an inference of political motivation," we "doubt[ed] that a bizarre shape *equally* supports a political inference and a racial one." *Hunt*, 526 U. S., at 547, n. 3. As we explained, "[s]ome districts . . . are 'so highly irregular that [they] rationally cannot be understood as anything other than an effort to segregat[e] . . . voters' on the basis of race." *Ibid.* (internal quotation marks omitted).

Second, the court relied on the expert opinion of Dr. Weber, who interpreted statistical data to conclude that there were Democratic precincts with low black populations excluded from District 12, which would have created a more compact district had they been included.[4] 133 F. Supp. 2d, at 419. And contrary to the Court's assertion, Dr. Weber did not merely examine the registration data in reaching his conclusions. Dr. Weber explained that he refo-

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by virtue of their election in an unconstitutional racially gerrymandered district. No doubt this assumption is a questionable proposition. Because the issue was not presented in this action, however, I do not read the Court's opinion as addressing it.

[4] I do not think it necessary to impose a new burden on appellees to show that districting alternatives would have brought about "significantly greater racial balance." *Ante*, at 258. I cannot say that it was impermissible for the court to conclude that race predominated in this action even if only a slightly better district could be drawn absent racial considerations. The District Court may reasonably have found that racial motivations predominated in selecting one alternative over another even if the net effect on racial balance was not "significant."

cused his analysis on *performance*. He did so in response to our concerns, when we reversed the District Court's summary judgment finding, that voter registration might not be the best measure of the Democratic nature of a precinct. See *ibid.* (citing Trial Tr., which appears at App. 90–92, 105–107, 156–157). This fact was not lost on the District Court, which specifically referred to those pages of the record covering Dr. Weber's analysis of performance.

Third, the court credited Dr. Weber's testimony that the districting decisions could not be explained by political motives.[5] 133 F. Supp. 2d, at 419. In the first instance, I, like the Court, *ante*, at 246–247, might well have concluded that District 12 was not significantly "safer" than several other districts in North Carolina merely because its Democratic reliability exceeded the optimum by only 3 percent. And I might have concluded that it would make political sense for incumbents to adopt a "the more reliable the better" policy

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[5] Dr. Weber admitted that, when he first concluded that race was the motivating factor, he was under the mistaken impression that the legislature's computer program provided only racial, not political, data. The Court finds that this admission undercut the validity of Dr. Weber's conclusions. See *ante*, at 249–250. Although the District Court could have found that this impression was a sufficiently significant assumption in Dr. Weber's analysis that the conclusions drawn from the analysis were suspect, it was not required to do so as a matter of logic. The court reasonably could have believed that the false impression had very little to do with the statistical analysis that was largely responsible for Dr. Weber's conclusions.

In addition, the Court discounts Dr. Weber's testimony because he "express[ed] disdain for a process that we have cautioned courts to respect," *ante*, at 250. Dr. Weber did openly state that he believes that the best districts he had seen in the 1990's were those drawn by judges, not by legislatures. App. 150–151. However, whether Dr. Weber was simply stating the conclusions he has reached through his experience or was expressing a feeling of contempt toward the legislature is precisely the kind of tone, demeanor, and bias determination that even the Court acknowledges should be left to the factfinder, cf. *ante*, at 243.

in districting. However, I certainly cannot say that the court's inference from the facts was impermissible.[6]

Fourth, the court discredited the testimony of the State's witness, Dr. Peterson. 133 F. Supp. 2d, at 420 (explaining that Dr. Weber testified that Dr. Peterson's analysis "ignor[ed] the core," "ha[d] not been appropriately done," and was "unreliable"). Again, like the Court, if I were a district court judge, I might have found that Dr. Weber's insistence that one could not ignore the core was unpersuasive.[7] However, even if the core could be ignored, it seems to me that Dr. Weber's testimony—that Dr. Peterson had failed to analyze all of the segments and thus that his analysis was incomplete, App. 119–120—reasonably could have supported the court's conclusion.

Finally, the court found that other evidence demonstrated that race was foremost on the legislative agenda: an e-mail

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[6] The Court also criticizes Dr. Weber's testimony that Precinct 77's split was racially motivated and his proposed alternative that all of Precinct 77 could have been moved into District 9. Apparently the Court believes that it is obvious that the Republican incumbent in District 9 would not have wanted the whole of Precinct 77 in her district. See *ante*, at 248. But the Court addresses only part of Dr. Weber's alternative of how the districts could have been drawn in a race-neutral fashion. Dr. Weber explained that the alternative was not simply to move Precinct 77 into District 9. The alternative would also include moving other reliably Democratic precincts out of District 9 and into District 12, which presumably would have satisfied the incumbent. App. 157. This move would have had the result, not only of keeping Precinct 77 intact, but also of widening the corridor between the eastern and western portions of District 9 and thereby increasing the functional contiguity. The Court's other criticism, that moving all of Precinct 77 into District 12 would not work, is simply a red herring. Dr. Weber talked only of moving all of Precinct 77 into District 9, not of moving all of Precinct 77 into District 12.

[7] Of course, considering that District 12 has never been constitutionally drawn, Dr. Weber's criticism—that the problem with the district lies not just at its edges, but at its core—is not without force.

from the drafter of the 1992 and 1997 plans to senators in charge of legislative redistricting, the computer capability to draw the district by race, and statements made by Senator Cooper that the legislature was going to be able to avoid *Shaw*'s majority-minority trigger by ending just short of the majority.[8] 133 F. Supp. 2d, at 420. The e-mail, in combination with the indirect evidence, is evidence ample enough to support the District Court's finding for purposes of clear error review. The drafter of the redistricting plans reported in the bluntest of terms: "I have moved Greensboro Black community into the 12th [District], and now need to take . . . 60,000 out of the 12th [District]." App. 369. Certainly the District Court was entitled to believe that the drafter was targeting voters and shifting district boundaries purely on the basis of race. The Court tries to belittle the import of this evidence by noting that the e-mail does not discuss *why* blacks were being targeted. See *ante,* at 254. However, the District Court was assigned the task of determining *whether,* not *why,* race predominated. As I see it, this inquiry is sufficient to answer the constitutional question because racial gerrymandering offends the Constitution whether the motivation is malicious or benign. It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Demo-

[8] The court also relied on the statement of legislative redistricting leader Senator Cooper to the North Carolina Legislature, see 133 F. Supp. 2d, at 419, in which the senator mentioned the goals of geographical, political, and *racial* balance, App. 460. In isolation, this statement does appear to support only the finding that race was *a* motive. Unlike this Court, however, the District Court had the advantage of listening to and watching Senator Cooper testify. I therefore am in no position to question the court's likely analysis that, although Senator Cooper mentioned all three motives, the predominance of race was apparent. This determination was made all the more reasonable by the fact that the District Court found the senator's claim regarding the "happenstance" final composition of the district to lack credibility in light of the e-mail. 133 F. Supp. 2d, at 420, n. 8.

cratic voters. And regardless of whether the e-mail tended to show that the legislature was operating under an even stronger racial motivation when it was drawing District 1 than when it was drawing District 12, cf. *ibid.*, I am convinced that the District Court permissibly could have accorded great weight to this e-mail as direct evidence of a racial motive. Surely, a decision can be racially motivated even if another decision was also racially motivated.

If I were the District Court, I might have reached the same conclusion that the Court does, that "[t]he evidence taken together . . . does not show that racial considerations predominated in the drawing of District 12's boundaries," *ante*, at 257. But I am not the trier of fact, and it is not my role to weigh evidence in the first instance. The only question that this Court should decide is whether the District Court's finding of racial predominance was clearly erroneous. In light of the direct evidence of racial motive and the inferences that may be drawn from the circumstantial evidence, I am satisfied that the District Court's finding was permissible, even if not compelled by the record.

Syllabus

CLARK COUNTY SCHOOL DISTRICT *v.* BREEDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–866. Decided April 23, 2001

At a meeting with respondent and a male employee to review job applicants' psychological evaluation reports, respondent's male supervisor read aloud a sexually explicit remark that one applicant had made to a co-worker, looked at respondent, and stated, "I don't know what that means." The other employee replied, "Well, I'll tell you later," and both men chuckled. Respondent complained about the comment to the offending supervisor and other officials of their employer, petitioner Clark County School District. Pursuant to Title VII of the Civil Rights Act of 1964, she subsequently filed a 42 U. S. C. § 2000e–3(a) retaliation claim against petitioner, asserting that she was punished for these complaints and also for filing charges against petitioner with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission and for filing the present suit. The District Court granted petitioner summary judgment, but the Ninth Circuit reversed.

Held: Respondent's claims are insufficient to withstand a summary judgment motion. No one could reasonably believe that the incident of which respondent complained violated Title VII. Sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. *Faragher* v. *Boca Raton*, 524 U. S. 775, 786. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in employment terms and conditions. The actions of respondent's supervisor and co-worker are at worst an isolated incident that cannot remotely be considered "extremely serious." Regarding respondent's claim that she was punitively transferred for filing charges and the present suit, she failed to show the requisite causal connection between her protected activities and the transfer. Petitioner did not implement the transfer until 20 months after respondent filed her charges, and it was contemplating the transfer before it learned of her suit.

Certiorari granted; 232 F. 3d 893, reversed.

PER CURIAM.

Under Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–3(a), it is unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." In 1997, respondent filed a § 2000e–3(a) retaliation claim against petitioner Clark County School District. The claim as eventually amended alleged that petitioner had taken two separate adverse employment actions against her in response to two different protected activities in which she had engaged. The District Court granted summary judgment to petitioner, No. CV–S–97–365–DWH(RJJ) (D. Nev., Feb. 9, 1999), but a panel of the Court of Appeals for the Ninth Circuit reversed over the dissent of Judge Fernandez, No. 99–15522, 2000 WL 991821 (July 19, 2000) *(per curiam)* (unpublished), judgt. order reported at 232 F. 3d 893. We grant the writ of certiorari and reverse.

On October 21, 1994, respondent's male supervisor met with respondent and another male employee to review the psychological evaluation reports of four job applicants. The report for one of the applicants disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." Brief in Opposition 3. At the meeting respondent's supervisor read the comment aloud, looked at respondent and stated, "I don't know what that means." *Ibid.* The other employee then said, "Well, I'll tell you later," and both men chuckled. *Ibid.* Respondent later complained about the comment to the offending employee, to Assistant Superintendent George Ann Rice, the employee's supervisor, and to another assistant

superintendent of petitioner. Her first claim of retaliation asserts that she was punished for these complaints.

The Court of Appeals for the Ninth Circuit has applied § 2000e–3(a) to protect employee "oppos[ition]" not just to practices that are actually "made . . . unlawful" by Title VII, but also to practices that the employee could reasonably believe were unlawful. 2000 WL 991821, at *1 (stating that respondent's opposition was protected "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment"); *Trent* v. *Valley Electric Assn. Inc.*, 41 F. 3d 524, 526 (CA9 1994). We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.

Title VII forbids actions taken on the basis of sex that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U. S. C. § 2000e–2(a)(1). Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher* v. *Boca Raton*, 524 U. S. 775, 786 (1998) (quoting *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67 (1986) (some internal quotation marks omitted)). See also *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 752 (1998) (Only harassing conduct that is "severe or pervasive" can produce a "constructive alteratio[n] in the terms or conditions of employment"); *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 81 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"). Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the dis-

criminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher* v. *Boca Raton*, *supra*, at 787–788 (quoting *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 23 (1993)). Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher* v. *Boca Raton*, *supra*, at 788 (citation and internal quotation marks omitted).

No reasonable person could have believed that the single incident recounted above violated Title VII's standard. The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants. Her co-workers who participated in the hiring process were subject to the same requirement, and indeed, in the District Court respondent "conceded that it did not bother or upset her" to read the statement in the file. App. to Pet. for Cert. 15 (District Court opinion). Her supervisor's comment, made at a meeting to review the application, that he did not know what the statement meant; her co-worker's responding comment; and the chuckling of both are at worst an "isolated inciden[t]" that cannot remotely be considered "extremely serious," as our cases require, *Faragher* v. *Boca Raton*, *supra*, at 788. The holding of the Court of Appeals to the contrary must be reversed.

Besides claiming that she was punished for complaining to petitioner's personnel about the alleged sexual harassment, respondent also claimed that she was punished for filing charges against petitioner with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission (EEOC) and for filing the present suit. Respondent filed her lawsuit on April 1, 1997; on April 10, 1997, respondent's supervisor, Assistant Superintendent Rice, "mentioned

to Allin Chandler, Executive Director of plaintiff's union, that she was contemplating transferring plaintiff to the position of Director of Professional Development Education," App. to Pet. for Cert. 11–12 (District Court opinion); and this transfer was "carried through" in May, Brief in Opposition 8. In order to show, as her defense against summary judgment required, the existence of a causal connection between her protected activities and the transfer, respondent "relie[d] wholly on the temporal proximity of the filing of her complaint on April 1, 1997 and Rice's statement to plaintiff's union representative on April 10, 1997 that she was considering transferring plaintiff to the [new] position." App. to Pet. for Cert. 21–22 (District Court opinion). The District Court, however, found that respondent did not serve petitioner with the summons and complaint until April 11, 1997, one day *after* Rice had made the statement, and Rice filed an affidavit stating that she did not become aware of the lawsuit until after April 11, a claim that respondent did not challenge. Hence, the court concluded, respondent "ha[d] not shown that any causal connection exists between her protected activities and the adverse employment decision." *Id.*, at 21.

The Court of Appeals reversed, relying on two facts: The EEOC had issued a right-to-sue letter to respondent three months before Rice announced she was contemplating the transfer, and the actual transfer occurred one month after Rice learned of respondent's suit. 2000 WL 991821, at *3. The latter fact is immaterial in light of the fact that petitioner concededly was contemplating the transfer before it learned of the suit. Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.

As for the right-to-sue letter: Respondent did not rely on that letter in the District Court and did not mention it in

her opening brief on appeal. Her demonstration of causality all along had rested upon the connection between the transfer and the filing of her lawsuit—to which connection the letter was irrelevant. When, however, petitioner's answering brief in the Court of Appeals demonstrated conclusively the lack of causation between the filing of respondent's lawsuit and Rice's decision, respondent mentioned the letter for the first time in her reply brief, Reply Brief in No. 99–15522 (CA9) pp. 9–10. The Ninth Circuit's opinion did not adopt respondent's utterly implausible suggestion that the *EEOC's* issuance of a right-to-sue letter—an action in which the employee takes no part—is a protected activity of the employee, see 42 U. S. C. § 2000e–3(a). Rather, the opinion suggests that the letter provided petitioner with its first notice of respondent's charge before the EEOC, and hence allowed the inference that the transfer proposal made three months later was petitioner's reaction to the charge. See 2000 WL 991821, at *3. This will not do.

First, there is no indication that Rice even knew about the right-to-sue letter when she proposed transferring respondent. And second, if one presumes she knew about it, one must also presume that she (or her predecessor) knew *almost two years earlier* about the protected action (filing of the EEOC complaint) that the letter supposedly disclosed. (The complaint had been filed on August 23, 1995, and both Title VII and its implementing regulations require that an employer be given notice within 10 days of filing, 42 U. S. C. §§ 2000e–5(b), (e)(1); 29 CFR § 1601.14 (2000).) The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," *O'Neal* v. *Ferguson Constr. Co.*, 237 F. 3d 1248, 1253 (CA10 2001). See, *e. g.*, *Richmond* v. *Oneok, Inc.*, 120 F. 3d 205, 209 (CA10 1997) (3-month period insufficient); *Hughes* v. *Derwinski*, 967 F. 2d 1168, 1174–1175 (CA7 1992)

(4-month period insufficient). Action taken (as here) 20 months later suggests, by itself, no causality at all.

In short, neither the grounds that respondent presented to the District Court, nor the ground she added on appeal, nor even the ground the Court of Appeals developed on its own, sufficed to establish a dispute substantial enough to withstand the motion for summary judgment. The District Court's granting of that motion was correct. The judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

ALEXANDER, DIRECTOR, ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL. *v.* SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99–1908. Argued January 16, 2001—Decided April 24, 2001

As a recipient of federal financial assistance, the Alabama Department of Public Safety (Department), of which petitioner Alexander is the director, is subject to Title VI of the Civil Rights Act of 1964. Section 601 of that title prohibits discrimination based on race, color, or national origin in covered programs and activities. Section 602 authorizes federal agencies to effectuate § 601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. Respondent Sandoval brought this class action to enjoin the Department's decision to administer state driver's license examinations only in English, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. Agreeing, the District Court enjoined the policy and ordered the Department to accommodate non-English speakers. The Eleventh Circuit affirmed. Both courts rejected petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation.

Held: There is no private right of action to enforce disparate-impact regulations promulgated under Title VI. Pp. 279–293.

(a) Three aspects of Title VI must be taken as given. First, private individuals may sue to enforce § 601. See, *e. g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 694, 696, 699, 703, 710–711. Second, § 601 prohibits only intentional discrimination. See, *e. g.*, *Alexander* v. *Choate*, 469 U. S. 287, 293. Third, it must be assumed for purposes of deciding this case that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Pp. 279–282.

(b) This Court has not, however, held that Title VI disparate-impact regulations may be enforced through a private right of action. *Cannon* was decided on the assumption that the respondent there had inten-

tionally discriminated against the petitioner, see 441 U. S., at 680. In *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, the Court *held* that private individuals could not recover compensatory damages under Title VI except for intentional discrimination. Of the five Justices who also voted to uphold disparate-impact regulations, three expressly reserved the question of a direct private right of action to enforce them, *id.*, at 645, n. 18. Pp. 282–284.

(c) Nor does it follow from the three points taken as given that Congress must have intended such a private right of action. There is no doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. But the disparate-impact regulations do not simply apply § 601—since they forbid conduct that § 601 permits—and thus the private right of action to enforce § 601 does not include a private right to enforce these regulations. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173. That right must come, if at all, from the independent force of § 602. Pp. 284–286.

(d) Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578. This Court will not revert to the understanding of private causes of action, represented by *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433, that held sway when Title VI was enacted. That understanding was abandoned in *Cort* v. *Ash*, 422 U. S. 66, 78. Nor does the Court agree with the Government's contention that cases interpreting statutes enacted prior to *Cort* v. *Ash* have given dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378–379; *Cannon*, *supra*, at 698–699; and *Thompson* v. *Thompson*, 484 U. S. 174, distinguished. Pp. 286–288.

(e) The search for Congress's intent in this case begins and ends with Title VI's text and structure. The "rights-creating" language so critical to *Cannon*'s § 601 analysis, 441 U. S., at 690, n. 13, is completely absent from § 602. Whereas § 601 decrees that "[n]o person . . . shall . . . be subjected to discrimination," § 602 limits federal agencies to "effectuat[ing]" rights created by § 601. And § 602 focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the regulating agencies. Hence, there is far less reason to infer a private remedy in favor of individual persons, *Cannon*, *supra*, at 690–691. The methods § 602 expressly provides for enforcing its regulations, which place elaborate restrictions on agency enforcement, also suggest a congressional intent not to create a private remedy through

Syllabus

§ 602. See, *e. g., Karahalios* v. *Federal Employees,* 489 U. S. 527, 533. Pp. 288–291.

(f) The Court rejects arguments that the regulations at issue contain rights-creating language and so must be privately enforceable; that amendments to Title VI in § 1003 of the Rehabilitation Act Amendments of 1986 and § 6 of the Civil Rights Restoration Act of 1987 "ratified" decisions finding an implied private right of action to enforce the regulations; and that the congressional intent to create a right of action must be inferred under *Curran*, *supra,* at 353, 381–382. Pp. 291–293.

197 F. 3d 484, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 293.

Jeffrey S. Sutton argued the cause for petitioners. With him on the briefs were *Bill Pryor*, Attorney General of Alabama, and *John J. Park, Jr.*, Assistant Attorney General.

Eric Schnapper argued the cause for private respondents. With him on the brief were *J. Richard Cohen*, *Rhonda Brownstein*, *Steven R. Shapiro*, *Edward Chen*, and *Christopher Ho.*

Solicitor General Waxman argued the cause for the United States as respondent under this Court's Rule 12.6. With him on the brief were *Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *Paul R. Q. Wolfson*, *Dennis J. Dimsey*, and *Seth M. Galanter.**

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*Briefs of *amici curiae* urging reversal were filed for Beauty Enterprises, Inc., by *Joseph E. Schmitz* and *Richard C. Robinson;* for the Eagle Forum Education & Legal Defense Fund by *Karen Tripp* and *Phyllis Schlafly;* for the National Association of Manufacturers by *Michael W. Steinberg*, *Michael A. McCord*, and *Jan Amundson;* for the National Collegiate Athletic Association by *David P. Bruton*, *Michael W. McTigue, Jr.*, and *Elsa Kircher Cole;* for Pro-English et al. by *Barnaby W. Zall;* for U. S. English by *Mr. Schmitz;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for Robert C. Jubelirer et al. by *John P. Krill, Jr.*, and *David R. Fine.*

Briefs of *amici curiae* urging affirmance were filed for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Elaine R. Jones*,

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

I

The Alabama Department of Public Safety (Department), of which petitioner James Alexander is the director, accepted grants of financial assistance from the United States Department of Justice (DOJ) and Department of Transportation (DOT) and so subjected itself to the restrictions of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.* Section 601 of that Title provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 U. S. C. § 2000d. Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability," 42 U. S. C. § 2000d–1, and the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 CFR § 42.104(b)(2) (2000). See also 49 CFR § 21.5(b)(2) (2000) (similar DOT regulation).

The State of Alabama amended its Constitution in 1990 to declare English "the official language of the state of

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Norman J. Chachkin, David T. Goldberg, Kenneth Kimerling, Barbara J. Olshansky, Robert García, John Payton, Norman Redlich, Barbara R. Arnwine, and *Thomas J. Henderson;* and for the National Women's Law Center et al. by *George W. Jones, Jr., Jacqueline G. Cooper, Marcia D. Greenberger, Verna L. Williams,* and *Leslie T. Annexstein.*

Briefs of *amici curiae* were filed for the Center on Race, Poverty and the Environment et al. by *Luke W. Cole* and *Douglas Parker;* for the Pacific Legal Foundation et al. by *John H. Findley;* and for the Central Puget Sound Regional Transit Authority by *Paul J. Lawrence.*

Alabama." Amdt. 509. Pursuant to this provision and, petitioners have argued, to advance public safety, the Department decided to administer state driver's license examinations only in English. Respondent Sandoval, as representative of a class, brought suit in the United States District Court for the Middle District of Alabama to enjoin the English-only policy, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. The District Court agreed. It enjoined the policy and ordered the Department to accommodate non-English speakers. *Sandoval* v. *Hagan*, 7 F. Supp. 2d 1234 (1998). Petitioners appealed to the Court of Appeals for the Eleventh Circuit, which affirmed. *Sandoval* v. *Hagan*, 197 F. 3d 484 (1999). Both courts rejected petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation.

We do not inquire here whether the DOJ regulation was authorized by § 602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin. The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation. 530 U. S. 1305 (2000).

II

Although Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands. For purposes of the present case, however, it is clear from our decisions, from Congress's amendments of Title VI, and from the parties' concessions that three aspects of Title VI must be taken as given. First, private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages. In *Cannon* v. *University of Chicago*, 441

U. S. 677 (1979), the Court held that a private right of action existed to enforce Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* The reasoning of that decision embraced the existence of a private right to enforce Title VI as well. "Title IX," the Court noted, "was patterned after Title VI of the Civil Rights Act of 1964." 441 U. S., at 694. And, "[i]n 1972 when Title IX was enacted, the [parallel] language in Title VI had already been construed as creating a private remedy." *Id.*, at 696. That meant, the Court reasoned, that Congress had intended Title IX, like Title VI, to provide a private cause of action. *Id.*, at 699, 703, 710–711. Congress has since ratified *Cannon*'s holding. Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U. S. C. § 2000d–7, expressly abrogated States' sovereign immunity against suits brought in federal court to enforce Title VI and provided that in a suit against a State "remedies (including remedies both at law and in equity) are available . . . to the same extent as such remedies are available . . . in the suit against any public or private entity other than a State," § 2000d–7(a)(2). We recognized in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), that § 2000d–7 "cannot be read except as a validation of *Cannon*'s holding." *Id.*, at 72; see also *id.*, at 78 (SCALIA, J., concurring in judgment) (same). It is thus beyond dispute that private individuals may sue to enforce § 601.

Second, it is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination. In *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), the Court reviewed a decision of the California Supreme Court that had enjoined the University of California Medical School from "according any consideration to race in its admissions process." *Id.*, at 272. Essential to the Court's holding reversing that aspect of the California court's decision was the determination that § 601 "proscribe[s] only those racial classifications that would violate the Equal Pro-

tection Clause or the Fifth Amendment." *Id.*, at 287 (opinion of Powell, J.); see also *id.*, at 325, 328, 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). In *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983), the Court made clear that under *Bakke* only intentional discrimination was forbidden by § 601. 463 U. S., at 610–611 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring in judgment); *id.*, at 612 (O'CONNOR, J., concurring in judgment); *id.*, at 642 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). What we said in *Alexander* v. *Choate*, 469 U. S. 287, 293 (1985), is true today: "Title VI itself directly reach[es] only instances of intentional discrimination."[1]

Third, we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Though no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at

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[1] Since the parties do not dispute this point, it is puzzling to see JUSTICE STEVENS go out of his way to disparage the decisions in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), and *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983), as "somewhat haphazard," *post*, at 307 (dissenting opinion), particularly since he had already accorded *stare decisis* effect to the former 18 years ago, see *Guardians*, 463 U. S., at 639–642 (dissenting opinion), and since he participated in creating the latter, see *ibid.* Nor does JUSTICE STEVENS's reliance on *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), see *post*, at 309–310, explain his about-face, since he expressly reaffirms, see *post*, at 309, n. 18, the settled principle that decisions of this Court declaring the meaning of statutes prior to *Chevron* need not be reconsidered after *Chevron* in light of agency regulations that were already in force when our decisions were issued, *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 536–537 (1992); *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 131 (1990); see also *Sullivan* v. *Everhart*, 494 U. S. 83, 103–104, n. 6 (1990) (STEVENS, J., dissenting) ("It is, of course, of no importance that [an opinion] predates *Chevron* . . . . As we made clear in *Chevron*, the interpretive maxims summarized therein were 'well-settled principles' ").

least as alternative grounds for their decisions, see 463 U. S., at 591–592 (opinion of White, J.); *id.*, at 623, n. 15 (Marshall, J., dissenting); *id.*, at 643–645 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting), and dictum in *Alexander* v. *Choate* is to the same effect, see 469 U. S., at 293, 295, n. 11. These statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination, see, *e. g.*, *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, *supra*, at 612–613 (O'CONNOR, J., concurring in judgment), but petitioners have not challenged the regulations here. We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.

Respondents assert that the issue in this case, like the first two described above, has been resolved by our cases. To reject a private cause of action to enforce the disparate-impact regulations, they say, we would "[have] to ignore the actual language of *Guardians* and *Cannon*." Brief for Respondents 13. The language in *Cannon* to which respondents refer does not in fact support their position, as we shall discuss at length below, see *infra*, at 288–290. But in any event, this Court is bound by holdings, not language. *Cannon* was decided on the assumption that the University of Chicago had intentionally discriminated against petitioner. See 441 U. S., at 680 (noting that respondents "admitted *arguendo*" that petitioner's "applications for admission to medical school were denied by the respondents because she is a woman"). It therefore *held* that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations barring disparate-impact discrimination.[2] In *Guardians*, the Court *held* that private individu-

[2] Although the dissent acknowledges that "the breadth of [*Cannon*'s] precedent is a matter upon which reasonable jurists may differ," *post*, at 313, it disagrees with our reading of *Cannon*'s holding because it thinks

als could not recover compensatory damages under Title VI except for intentional discrimination. Five Justices in addition voted to uphold the disparate-impact regulations (four would have declared them invalid, see 463 U. S., at 611, n. 5 (Powell, J., concurring in judgment); *id.*, at 612–614 (O'Connor, J., concurring in judgment)), but of those five, three expressly reserved the question of a direct private right of action to enforce the regulations, saying that "[w]hether a cause of action against private parties exists directly under the regulations . . . [is a] questio[n] that [is] not presented by this case." *Id.*, at 645, n. 18 (Stevens, J., dissenting).[3] Thus, only two Justices had cause to reach the issue

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the distinction we draw between disparate-impact and intentional discrimination was "wholly foreign" to that opinion, see *post*, at 297. *Cannon*, however, was decided less than one year after the Court in *Bakke* had drawn precisely that distinction *with respect to Title VI*, see *supra*, at 280–281, and it is absurd to think that *Cannon* meant, without discussion, to ban under Title IX the very disparate-impact discrimination that *Bakke* said Title VI permitted. The *only* discussion in *Cannon* of Title IX's scope is found in Justice Powell's dissenting opinion, which simply assumed that the conclusion that Title IX would be limited to intentional discrimination was "forgone in light of our holding" in *Bakke*. *Cannon* v. *University of Chicago*, 441 U. S. 677, 748, n. 19 (1979). The dissent's additional claim that *Cannon* provided a private right of action for "all the discrimination prohibited by the *regulatory scheme* contained in Title IX," *post*, at 297–298, n. 4 (emphasis added), simply begs the question at the heart of this case, which is whether a right of action to enforce disparate-impact regulations must be independently identified, see *infra*, at 284–286.

[3] We of course accept the statement by the author of the dissent that he "thought" at the time of *Guardians* that disparate-impact regulations could be enforced "in an implied action against private parties," *post*, at 301, n. 6. But we have the better interpretation of what our colleague *wrote* in *Guardians*. In the closing section of his opinion, Justice Stevens concluded that because respondents in that case had "violated the petitioners' rights under [the] regulations . . . [t]he petitioners were therefore entitled to the compensation they sought under 42 U. S. C. § 1983 and were awarded by the District Court." 463 U. S., at 645. The passage omits any mention of a direct private right of action to enforce the regulations, and the footnote we have quoted in text—which appears immedi-

that respondents say the "actual language" of *Guardians* resolves. Neither that case,[4] nor any other in this Court, has held that the private right of action exists.

Nor does it follow straightaway from the three points we have taken as given that Congress must have intended a private right of action to enforce disparate-impact regulations. We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself, see *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 257 (1995); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984), and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well. The many cases that respondents say have "assumed" that a cause of action to enforce a statute includes one to enforce its regulations illustrate (to the extent that cases in which an issue was not presented can illustrate anything) only this point; each involved regulations of the type we have just described, as respondents conceded at oral argument, Tr. of Oral Arg. 33. See *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 468 (1999) (regulation defining who is a "recipient" under Title IX); *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 279–281 (1987) (regulations defining the terms "physical impairment" and "major life activities" in § 504 of the Rehabilitation Act of 1973); *Bazemore* v. *Friday*, 478 U. S. 385, 408–409 (1986) (White, J., joined by four other

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ately after this concluding sentence, see *id.*, at 645, n. 18—makes clear that the omission was not accidental.

[4] Ultimately, the dissent agrees that "the holding in *Guardians* does not compel the conclusion that a private right of action exists to enforce the Title VI regulations against private parties . . . ." *Post*, at 301.

Justices, concurring) (regulation interpreting Title VI to require "affirmative action" remedying effects of intentional discrimination); *Alexander* v. *Choate*, 469 U. S., at 299, 309 (regulations clarifying what sorts of disparate impacts upon the handicapped were covered by § 504 of the Rehabilitation Act of 1973, which the Court assumed included some such impacts). Our decision in *Lau* v. *Nichols*, 414 U. S. 563 (1974), falls within the same category. The Title VI regulations at issue in *Lau*, similar to the ones at issue here, forbade funding recipients to take actions which had the effect of discriminating on the basis of race, color, or national origin. *Id.*, at 568. Unlike our later cases, however, the Court in *Lau* interpreted § 601 itself to proscribe disparate-impact discrimination, saying that it "rel[ied] solely on § 601 . . . to reverse the Court of Appeals," *id.*, at 566, and that the disparate-impact regulations simply "[made] sure that recipients of federal aid . . . conduct[ed] any federally financed projects consistently with § 601," *id.*, at 567.[5]

We must face now the question avoided by *Lau*, because we have since rejected *Lau*'s interpretation of § 601 as reaching beyond intentional discrimination. See *supra*, at 280–281. It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations. See *Central Bank of Denver*,

[5] It is true, as the dissent points out, see *post*, at 296, that three Justices who concurred in the result in *Lau* relied on regulations promulgated under § 602 to support their position, see 414 U. S., at 570–571 (Stewart, J., concurring in result). But the five Justices who made up the majority did not, and their holding is not made coextensive with the concurrence because their opinion does not expressly preclude (is "consistent with," see *post*, at 296) the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found it unnecessary (and did not wish) to address, under compulsion of JUSTICE STEVENS's new principle that silence implies agreement.

N. A. v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]"). That right must come, if at all, from the independent force of § 602. As stated earlier, we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations;[6] the question remains whether it confers a private right of action to enforce them. If not, we must conclude that a failure to comply with regulations promulgated under § 602 that is not also a failure to comply with § 601 is not actionable.

Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15 (1979). Statutory intent on this latter point is determinative. See, *e. g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1102 (1991); *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 812, n. 9 (1986) (collecting cases). Without it, a cause of action does not exist and courts may not

[6] For this reason, the dissent's extended discussion of the scope of agencies' regulatory authority under § 602, see *post*, at 305–307, is beside the point. We cannot help observing, however, how strange it is to say that disparate-impact regulations are "inspired by, at the service of, and inseparably intertwined with" § 601, *post*, at 307, when § 601 permits the very behavior that the regulations forbid. See *Guardians*, 463 U. S., at 613 (O'Connor, J., concurring in judgment) ("If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply 'further' the purpose of Title VI; they go well *beyond* that purpose").

create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. See, *e. g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 145, 148 (1985); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, at 23; *Touche Ross & Co.* v. *Redington*, *supra*, at 575–576. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment).

Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975)—which itself interpreted a statute enacted under the *ancien regime*—and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*'s method for discerning and defining causes of action. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, *supra*, at 188; *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 291–293 (1993); *Virginia Bankshares, Inc.* v. *Sandberg*, *supra*, at 1102–1103; *Touche Ross & Co.* v. *Redington*, *supra*, at 576–578. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

Nor do we agree with the Government that our cases interpreting statutes enacted prior to *Cort* v. *Ash* have given "dispositive weight" to the "expectations" that the enacting Congress had formed "in light of the 'contemporary legal

context.'" Brief for United States 14. Only three of our legion implied-right-of-action cases have found this sort of "contemporary legal context" relevant, and two of those involved Congress's enactment (or reenactment) of the verbatim statutory text that courts had previously interpreted to create a private right of action. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378–379 (1982); *Cannon* v. *University of Chicago*, 441 U. S., at 698–699. In the third case, this sort of "contemporary legal context" simply buttressed a conclusion independently supported by the text of the statute. See *Thompson* v. *Thompson*, 484 U. S. 174 (1988). We have never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, see *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 784 (1991), legal context matters only to the extent it clarifies text.

We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.[7] Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U. S. C. § 2000d–1. It is immediately clear that the "rights-creating" language so critical to the Court's analysis in *Cannon* of § 601, see 441 U. S., at 690, n. 13, is completely absent from § 602. Whereas § 601 decrees that "[n]o person . . . shall . . . be subjected to discrimination," 42 U. S. C. § 2000d, the text of § 602 provides that "[e]ach Federal department and

[7] Although the dissent claims that we "adop[t] a methodology that blinds itself to important evidence of congressional intent," see *post*, at 313, our methodology is not novel, but well established in earlier decisions (including one authored by JUSTICE STEVENS, see *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 94, n. 31 (1981)), which explain that the interpretive inquiry begins with the text and structure of the statute, see *id.*, at 91, and ends once it has become clear that Congress did not provide a cause of action.

agency . . . is authorized and directed to effectuate the provisions of [§ 601]," 42 U. S. C. § 2000d–1. Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuat[ing]" rights already created by § 601. And the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *California* v. *Sierra Club*, 451 U. S. 287, 294 (1981). Section 602 is yet a step further removed: It focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754 (1981), § 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds," *id.*, at 772. When this is true, "[t]here [is] far less reason to infer a private remedy in favor of individual persons," *Cannon* v. *University of Chicago*, *supra*, at 690–691. So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action.

Nor do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. Section 602 empowers agencies to enforce their regulations either by terminating funding to the "particular program, or part thereof," that has violated the regulation or "by any other means authorized by law," 42 U. S. C. § 2000d–1. No enforcement action may be taken, however, "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." *Ibid.* And every agency enforcement action is subject to judicial review. § 2000d–2. If an agency attempts to terminate program funding, still

more restrictions apply. The agency head must "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." § 2000d–1. And the termination of funding does not "become effective until thirty days have elapsed after the filing of such report." *Ibid.* Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created *outside* of § 602, compare *Cannon* v. *University of Chicago*, *supra*, at 706, n. 41, 712, n. 49; *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S., at 419, n. 26 (STEVENS, J., concurring in judgment in part and dissenting in part), with *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S., at 609–610 (Powell, J., concurring in judgment); *Regents of Univ. of Cal.* v. *Bakke*, *supra*, at 382–383 (opinion of White, J.), they tend to contradict a congressional intent to create privately enforceable rights through § 602 itself. The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. See, *e. g.*, *Karahalios* v. *Federal Employees*, 489 U. S. 527, 533 (1989); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 93–94 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 19–20. Sometimes the suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff "a member of the class for whose benefit the statute was enacted") suggest the contrary. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S., at 145; see *id.*, at 146–147. And as our Rev. Stat. § 1979, 42 U. S. C. § 1983, cases show, some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights. See, *e. g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19–20 (1981). In the present case, the claim of exclusivity for the

express remedial scheme does not even have to overcome such obstacles. The question whether § 602's remedial scheme can overbear other evidence of congressional intent is simply not presented, since we have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.

Both the Government and respondents argue that the *regulations* contain rights-creating language and so must be privately enforceable, see Brief for United States 19–20; Brief for Respondents 31, but that argument skips an analytical step. Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. *Touche Ross & Co.* v. *Redington*, 442 U. S., at 577, n. 18 ("[T]he language of the statute and not the rules must control"). Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

The last string to respondents' and the Government's bow is their argument that two amendments to Title VI "ratified" this Court's decisions finding an implied private right of action to enforce the disparate-impact regulations. See Rehabilitation Act Amendments of 1986, § 1003, 42 U. S. C. § 2000d–7; Civil Rights Restoration Act of 1987, § 6, 102 Stat. 31, 42 U. S. C. § 2000d–4a. One problem with this argument is that, as explained above, none of our decisions establishes (or even assumes) the private right of action at issue here, see *supra*, at 282–285, which is why in *Guardians* three Justices were able expressly to reserve the question. See 463 U. S., at 645, n. 18 (STEVENS, J., dissenting). Incorporating

our cases in the amendments would thus not help respondents. Another problem is that the incorporation claim itself is flawed. Section 1003 of the Rehabilitation Act Amendments of 1986, on which only respondents rely, by its terms applies only to suits "for a violation of a *statute*," 42 U. S. C. § 2000d–7(a)(2) (emphasis added). It therefore does not speak to suits for violations of regulations that go beyond the statutory proscription of § 601. Section 6 of the Civil Rights Restoration Act of 1987 is even less on point. That provision amends Title VI to make the term "program or activity" cover larger portions of the institutions receiving federal financial aid than it had previously covered, see *Grove City College* v. *Bell*, 465 U. S. 555 (1984). It is impossible to understand what this has to do with implied causes of action—which is why we declared in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 73, that § 6 did not "in any way alte[r] the existing rights of action and the corresponding remedies permissible under . . . Title VI." Respondents point to *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S., at 381–382, which inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend that provision. But we recently criticized *Curran*'s reliance on congressional inaction, saying that "[a]s a general matter . . . [the] argumen[t] deserve[s] little weight in the interpretive process." *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S., at 187. And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson*

v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 671–672 (1987) (SCALIA, J., dissenting)).

Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.[8] We therefore hold that no such right of action exists. Since we reach this conclusion applying our standard test for discerning private causes of action, we do not address petitioners' additional argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). See *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 656–657, 684–685 (1999) (KENNEDY, J., dissenting).

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In 1964, as part of a groundbreaking and comprehensive civil rights Act, Congress prohibited recipients of federal funds from discriminating on the basis of race, ethnicity, or national origin. Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. §§ 2000d to 2000d–7. Pursuant to pow-

[8] The dissent complains that we "offe[r] little affirmative support" for this conclusion. *Post*, at 315. But as JUSTICE STEVENS has previously recognized in an opinion for the Court, "affirmative" evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent "the essential predicate for implication of a private remedy simply does not exist," *Northwest Airlines, Inc.*, 451 U. S., at 94. The dissent's assertion that "respondents *have* marshaled substantial affirmative evidence that a private right of action exists to enforce Title VI *and the regulations validly promulgated thereunder*," *post*, at 316, n. 26 (second emphasis added), once again begs the question whether authorization of a private right of action to enforce a statute constitutes authorization of a private right of action to enforce regulations that go beyond what the statute itself requires.

ers expressly delegated by that Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the "effect" of discriminating on those bases. At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regulations.

In separate lawsuits spanning several decades, we have endorsed an action identical in substance to the one brought in this case, see *Lau* v. *Nichols*, 414 U. S. 563 (1974); demonstrated that Congress intended a private right of action to protect the rights guaranteed by Title VI, see *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979); and concluded that private individuals may seek declaratory and injunctive relief against state officials for violations of regulations promulgated pursuant to Title VI, see *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983). Giving fair import to our language and our holdings, every Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed both by the text of Title VI and by any regulations validly promulgated pursuant to that Title, and Congress has adopted several statutes that appear to ratify the status quo.

Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI. In so doing, the

Court makes three distinct, albeit interrelated, errors. First, the Court provides a muddled account of both the reasoning and the breadth of our prior decisions endorsing a private right of action under Title VI, thereby obscuring the conflict between those opinions and today's decision. Second, the Court offers a flawed and unconvincing analysis of the relationship between §§ 601 and 602 of the Civil Rights Act of 1964, ignoring more plausible and persuasive explanations detailed in our prior opinions. Finally, the Court badly misconstrues the theoretical linchpin of our decision in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), mistaking that decision's careful contextual analysis for judicial fiat.

I

The majority is undoubtedly correct that this Court has never said in so many words that a private right of action exists to enforce the disparate-impact regulations promulgated under § 602. However, the failure of our cases to state this conclusion explicitly does not absolve the Court of the responsibility to canvass our prior opinions for guidance. Reviewing these opinions with the care they deserve, I reach the same conclusion as the Courts of Appeals: This Court has already considered the question presented today and concluded that a private right of action exists.[1]

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[1] Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations. For decisions holding so most explicitly, see, *e. g.*, *Powell* v. *Ridge*, 189 F. 3d 387, 400 (CA3 1999); *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F. 3d 925, 936–937 (CA3 1997), summarily vacated and remanded, 524 U. S. 974 (1998); *David K.* v. *Lane*, 839 F. 2d 1265, 1274 (CA7 1988); *Sandoval* v. *Hagan*, 197 F. 3d 484 (CA11 1999) (case below). See also *Latinos Unidos De Chelsea* v. *Secretary of Housing and Urban Development*, 799 F. 2d 774, 785, n. 20 (CA1 1986); *New York Urban League, Inc.* v. *New York*, 71 F. 3d 1031, 1036 (CA2 1995); *Ferguson* v. *Charleston*, 186 F. 3d 469 (CA4 1999), rev'd on other grounds, *ante*, p. 67; *Castaneda* v. *Pickard*, 781 F. 2d 456, 465, n. 11 (CA5 1986); *Buchanan* v. *Bolivar*, 99

When this Court faced an identical case 27 years ago, all the Justices believed that private parties could bring lawsuits under Title VI and its implementing regulations to enjoin the provision of governmental services in a manner that discriminated against non-English speakers. See *Lau* v. *Nichols*, 414 U. S. 563 (1974). While five Justices saw no need to go beyond the command of § 601, Chief Justice Burger, Justice Stewart, and Justice Blackmun relied specifically and exclusively on the regulations to support the private action, see *id.*, at 569 (Stewart, J., concurring in result) (citing *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 280–281 (1969)). There is nothing in the majority's opinion in *Lau*, or in earlier opinions of the Court, that is not fully consistent with the analysis of the concurring Justices or that would have differentiated between private actions to enforce the text of § 601 and private actions to enforce the regulations promulgated pursuant to § 602. See *Guardians*, 463 U. S., at 591 (principal opinion of White, J.) (describing this history and noting that, up to that point, no Justice had ever expressed disagreement with Justice Stewart's analysis in *Lau*).[2]

F. 3d 1352, 1356, n. 5 (CA6 1996); *Larry P.* v. *Riles*, 793 F. 2d 969, 981–982 (CA9 1986); *Villanueva* v. *Carere*, 85 F. 3d 481, 486 (CA10 1996). No Court of Appeals has ever reached a contrary conclusion. But cf. *New York City Environmental Justice Alliance* v. *Giuliani*, 214 F. 3d 65, 72 (CA2 2000) (suggesting that the question may be open).

[2] Indeed, it would have been remarkable if the majority had offered any disagreement with the concurring analysis as the concurring Justices grounded their argument in well-established principles for determining the availability of remedies under regulations, principles that all but one Member of the Court had endorsed the previous Term. See *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *id.*, at 378 (Douglas, J., joined by Stewart and REHNQUIST, JJ., concurring in part and dissenting in part) (agreeing with the majority's analysis of the regulation in question); but see *id.*, at 383, n. 1 (Powell, J., dissenting) (reserving analysis of the regulation's validity). The other decision the concurring Justices cited for this well-established principle was unanimous and only

Five years later, we more explicitly considered whether a private right of action exists to enforce the guarantees of Title VI and its gender-based twin, Title IX. See *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). In that case, we examined the text of the statutes, analyzed the purpose of the laws, and canvassed the relevant legislative history. Our conclusion was unequivocal: "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." *Id.*, at 703.

The majority acknowledges that *Cannon* is binding precedent with regard to both Title VI and Title IX, *ante*, at 279–280, but seeks to limit the scope of its holding to cases involving allegations of intentional discrimination. The distinction the majority attempts to impose is wholly foreign to *Cannon*'s text and reasoning. The opinion in *Cannon* consistently treats the question presented in that case as whether a private right of action exists to enforce "Title IX" (and by extension "Title VI"),[3] and does not draw any distinctions between the various types of discrimination outlawed by the operation of those statutes. Though the opinion did not reach out to affirmatively preclude the drawing of every conceivable distinction, it could hardly have been more clear as to the scope of its holding: A private right of action exists for "victims of *the* prohibited discrimination." 441 U. S., at 703 (emphasis added). Not some of the prohibited discrimination, but all of it.[4]

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five years old. See *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969).

[3] See *Cannon*, 441 U. S., at 687, 699, 702, n. 33, 703, 706, n. 40, 709.

[4] The majority is undoubtedly correct that *Cannon* was not a case about the substance of Title IX but rather about the remedies available under that statute. Therefore, *Cannon* cannot stand as a precedent for the proposition either that Title IX and its implementing regulations reach intentional discrimination or that they do not do so. What *Cannon* did hold is that all the discrimination prohibited by the regulatory scheme

Moreover, *Cannon* was itself a disparate-impact case. In that case, the plaintiff brought suit against two private universities challenging medical school admissions policies that set age limits for applicants. Plaintiff, a 39-year-old woman, alleged that these rules had the effect of discriminating against women because the incidence of interrupted higher education is higher among women than among men. In providing a shorthand description of her claim in the text of the opinion, we ambiguously stated that she had alleged that she was denied admission "because she is a woman," but we appended a lengthy footnote setting forth the details of her disparate-impact claim. Other than the shorthand description of her claim, there is not a word in the text of the opinion even suggesting that she had made the improbable allegation that the University of Chicago and Northwestern University had intentionally discriminated against women. In the context of the entire opinion (including both its analysis and its uncontested description of the facts of the case), that single ambiguous phrase provides no basis for limiting the case's holding to incidents of intentional discrimination. If anything, the fact that the phrase "because she is a woman" encompasses both intentional and disparate-impact claims should have made it clear that the reasoning in the opinion was equally applicable to both types of claims. In any event, the *holding* of the case certainly applied to the disparate-impact claim that was described in detail in footnote 1 of the opinion, *id.*, at 680.

Our fractured decision in *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983), reinforces the conclusion that this issue is effectively settled. While

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contained in Title IX may be the subject of a private lawsuit. As the Court today concedes that *Cannon*'s holding applies to Title VI claims as well as Title IX claims, *ante*, at 279–280, and assumes that the regulations promulgated pursuant to § 602 are validly promulgated antidiscrimination measures, *ante*, at 281–282, it is clear that today's opinion is in substantial tension with *Cannon*'s reasoning and holding.

the various opinions in that case took different views as to the spectrum of relief available to plaintiffs in Title VI cases, a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities. *Id.*, at 594–595, 607 (White, J.); *id.*, at 634 (Marshall, J., dissenting); *id.*, at 638 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). As this case involves just such an action, its result ought to follow naturally from *Guardians.*

As I read today's opinion, the majority declines to accord precedential value to *Guardians* because the five Justices in the majority were arguably divided over the mechanism through which private parties might seek such injunctive relief.[5] This argument inspires two responses. First, to the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U. S. C. § 1983

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[5] None of the relevant opinions was absolutely clear as to whether it envisioned such suits as being brought directly under the statute or under 42 U. S. C. § 1983. However, a close reading of the opinions leaves little doubt that all of the Justices making up the *Guardians* majority contemplated the availability of private actions brought directly under the statute. Justice White fairly explicitly rested his conclusion on *Cannon*'s holding that an implied right of action exists to enforce the terms of both Title VI and Title IX. *Guardians*, 463 U. S., at 594–595. Given that fact and the added consideration that his opinion appears to have equally contemplated suits against private and public parties, it is clear that he envisioned the availability of injunctive relief directly under the statute. Justice Marshall's opinion never mentions § 1983 and refers simply to "Title VI actions." *Id.*, at 625. In addition, his opinion can only be read as contemplating suits on equal terms against both public and private grantees, thus also suggesting that he assumed such suits could be brought directly under the statute. That leaves my opinion. Like Justice White, I made it quite clear that I believed the right to sue to enforce the disparate-impact regulations followed directly from *Cannon* and, hence, was built directly into the statute. 463 U. S., at 635–636, and n. 1. However, I did also note that, in the alternative, relief would be available in that particular case under § 1983.

in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of rechallenging Alabama's English-only policy in a complaint that invokes § 1983 even after today's decision.

More importantly, the majority's reading of *Guardians* is strained even in reference to the broader question whether injunctive relief is available to remedy violations of the Title VI regulations by nongovernmental grantees. As *Guardians* involved an action against a governmental entity, making § 1983 relief available, the Court might have discussed the availability of judicial relief without addressing the scope of the implied private right of action available directly under Title VI. See 463 U. S., at 638 (STEVENS, J.) ("Even if it were not settled by now that Title VI authorizes appropriate relief, both prospective and retroactive, to victims of racial discrimination at the hands of recipients of federal funds, the same result would follow in this case because the petitioners have sought relief under 42 U. S. C. § 1983" (emphasis deleted)). However, the analysis in each of the relevant opinions did not do so.[6] Rather than focusing on considerations

[6] The Court today cites one sentence in my final footnote in *Guardians* that it suggests is to the contrary. *Ante*, at 283 (citing 463 U. S., at 645, n. 18). However, the Court misreads that sentence. In his opinion in *Guardians*, Justice Powell had stated that he would affirm the judgment for the reasons stated in his dissent in *Cannon*, see 463 U. S., at 609–610 (opinion concurring in judgment), and that he would also hold that private actions asserting violations of Title VI could not be brought under § 1983, *id.*, at 610, and n. 3. One reason that he advanced in support of these conclusions was his view that the standard of proof in a § 1983 action against public officials would differ from the standard in an action against private defendants. *Id.*, at 608, n. 1. In a footnote at the end of my opinion, *id.*, at 645, n. 18, I responded (perhaps inartfully) to Justice

specific to § 1983, each of these opinions looked instead to our opinion in *Cannon*, to the intent of the Congress that adopted Title VI and the contemporaneous executive decisionmakers who crafted the disparate-impact regulations, and to general principles of remediation.[7]

In summary, there is clear precedent of this Court for the proposition that the plaintiffs in this case can seek injunctive relief either through an implied right of action or through § 1983. Though the holding in *Guardians* does not compel the conclusion that a private right of action exists to enforce the Title VI regulations against private parties, the rationales of the relevant opinions strongly imply that result. When that fact is coupled with our holding in *Cannon* and our unanimous decision in *Lau*, the answer to the question presented in this case is overdetermined.[8] Even absent my

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Powell. I noted that the fact that § 1983 authorizes a lawsuit against the police department based on its violation of the governing administrative regulations did not mean, as Justice Powell had suggested, "that a similar action would be unavailable against a similarly situated private party." *Ibid.* I added the sentence that the Court quotes today, *ante*, at 283, not to reserve a question, but rather to explain that the record did not support Justice Powell's hypothesis regarding the standard of proof. I thought then, as I do now, that a violation of regulations adopted pursuant to Title VI may be established by proof of discriminatory impact in a § 1983 action against state actors and also in an implied action against private parties. See n. 5, *supra*. Contrary to the Court's partial quotation of my opinion, see *ante*, at 283–284, n. 3, what I wrote amply reflected what I thought. See 463 U. S., at 635 ("a private action against recipients of federal funds"); *id.*, at 636 ("implied caus[e] of action"); *id.*, at 638 ("Title VI authorizes appropriate relief").

Justice Powell was quite correct in noting that it would be anomalous to assume that Congress would have intended to make it easier to recover from public officials than from private parties. That anomaly, however, does not seem to trouble the majority today.

[7] See n. 5, *supra*.

[8] See also *Bazemore* v. *Friday*, 478 U. S. 385 (1986) *(per curiam)* (adjudicating on the merits a claim brought under Title VI regulations).

continued belief that Congress intended a private right of action to enforce both Title VI and its implementing regulations, I would answer the question presented in the affirmative and affirm the decision of the Court of Appeals as a matter of *stare decisis*.[9]

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[9] The settled expectations the Court undercuts today derive not only from judicial decisions, but also from the consistent statements and actions of Congress. Congress' actions over the last two decades reflect a clear understanding of the existence of a private right of action to enforce Title VI and its implementing regulations. In addition to numerous other small-scale amendments, Congress has twice adopted legislation expanding the reach of Title VI. See Civil Rights Restoration Act of 1987, § 6, 102 Stat. 31 (codified at 42 U. S. C. § 2000d–4a) (expanding definition of "program"); Rehabilitation Act Amendments of 1986, § 1003, 100 Stat. 1845 (codified at 42 U. S. C. § 2000d–7) (explicitly abrogating States' Eleventh Amendment immunity in suits under Title VI).

Both of these bills were adopted after this Court's decisions in *Lau*, *Cannon*, and *Guardians*, and after most of the Courts of Appeals had affirmatively acknowledged an implied private right of action to enforce the disparate-impact regulations. Their legislative histories explicitly reflect the fact that both proponents and opponents of the bills assumed that the full breadth of Title VI (including the disparate-impact regulations promulgated pursuant to it) would be enforceable in private actions. See, *e. g.*, Civil Rights Act of 1984: Hearings on S. 2658 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess., 530 (1984) (memo from the Office of Management and Budget objecting to the Civil Rights Restoration Act of 1987 because it would bring more entities within the scope of Title VI, thereby subjecting them to "private lawsuits" to enforce the disparate-impact regulations); *id.*, at 532 (same memo warning of a proliferation of "discriminatory effects" suits by "members of the bar" acting as "private Attorneys General"); 134 Cong. Rec. 4257 (1988) (statement of Sen. Hatch) (arguing that the disparate-impact regulations go too far and noting that that is a particular problem because, "[o]f course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges"); see also Brief for United States 24, n. 16 (collecting testimony of academics advising Congress that private lawsuits were available to enforce the disparate-impact regulations under existing precedent).

Thus, this case goes well beyond the normal situation in which, "after a comprehensive reeaxmination and significant amendment," Congress "left intact the statutory provisions under which the federal courts had implied

II

Underlying the majority's dismissive treatment of our prior cases is a flawed understanding of the structure of Title VI and, more particularly, of the relationship between §§ 601 and 602. To some extent, confusion as to the relationship between the provisions is understandable, as Title VI is a deceptively simple statute. Section 601 of the Act lays out its straightforward commitment: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d. Section 602 "authorize[s] and direct[s]" all federal departments and agencies empowered to extend federal financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate" § 601's antidiscrimination mandate. 42 U. S. C. § 2000d–1.[10]

On the surface, the relationship between §§ 601 and 602 is unproblematic—§ 601 states a basic principle, § 602 authorizes agencies to develop detailed plans for defining the contours of the principle and ensuring its enforcement. In the context of federal civil rights law, however, nothing is ever so simple. As actions to enforce § 601's antidiscrimination principle have worked their way through the courts, we have developed a body of law giving content to § 601's broadly worded commitment. *E. g.*, *United States* v. *Fordice*, 505 U. S. 717, 732, n. 7 (1992); *Guardians Assn.* v. *Civil Serv.*

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a private cause of action." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382 (1982). Here, there is no need to rest on presumptions of knowledge and ratification, because the direct evidence of Congress' understanding is plentiful.

[10] The remainder of Title VI provides for judicial and administrative review of agency actions taken pursuant to the statute, 42 U. S. C. § 2000d–2; imposes certain limitations not at issue in this case, §§ 2000d–3 to 2000d–4; and defines some of the terms found in the other provisions of the statute, § 2000d–4a.

Comm'n of New York City, 463 U. S. 582 (1983); *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978). As the majority emphasizes today, the Judiciary's understanding of what conduct may be remedied in actions brought directly under § 601 is, in certain ways, more circumscribed than the conduct prohibited by the regulations. See, *e. g.*, *ante*, at 280–281.

Given that seeming peculiarity, it is necessary to examine closely the relationship between §§ 601 and 602, in order to understand the purpose and import of the regulations at issue in this case. For the most part, however, the majority ignores this task, assuming that the judicial decisions interpreting § 601 provide an authoritative interpretation of its true meaning and treating the regulations promulgated by the agencies charged with administering the statute as poor stepcousins—either parroting the text of § 601 (in the case of regulations that prohibit intentional discrimination) or forwarding an agenda untethered to § 601's mandate (in the case of disparate-impact regulations).

The majority's statutory analysis does violence to both the text and the structure of Title VI. Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601.[11] The majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute. Nor does Title VI anywhere suggest, let alone state, that for the purpose of determining their legal effect, the "rules, regulations, [and] orders of general applicability" adopted by the agencies are to be bifurcated by the Judiciary into two categories based on how closely the courts believe the regulations track the text of § 601.

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[11] See 42 U. S. C. § 2000d–1 (§ 602) ("Each Federal department and agency which is empowered to extend Federal financial assistance . . . is authorized and directed to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability").

What makes the Court's analysis even more troubling is that our cases have already adopted a simpler and more sensible model for understanding the relationship between the two sections. For three decades, we have treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited.

In *Lau*, our first Title VI case, the only three Justices whose understanding of § 601 required them to reach the question explicitly endorsed the power of the agencies to adopt broad prophylactic rules to enforce the aims of the statute. As Justice Stewart explained, regulations promulgated pursuant to § 602 may "go beyond . . . § 601" as long as they are "reasonably related" to its antidiscrimination mandate. 414 U. S., at 571 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in result). In *Guardians*, at least three Members of the Court adopted a similar understanding of the statute. See 463 U. S., at 643 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). Finally, just 16 years ago, our unanimous opinion in *Alexander* v. *Choate*, 469 U. S. 287 (1985), treated this understanding of Title VI's structure as settled law. Writing for the Court, Justice Marshall aptly explained the interpretation of § 602's grant of regulatory power that necessarily underlies our prior case law: "In essence, then, we [have] held that Title VI [has] delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that [have] produced those impacts." *Id.*, at 293–294.

This understanding is firmly rooted in the text of Title VI. As § 602 explicitly states, the agencies are authorized to adopt regulations to "effectuate" § 601's antidiscrimination mandate. 42 U. S. C. § 2000d–1. The plain meaning of the

text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality. So too does a lengthy, consistent, and impassioned legislative history.[12]

This legislative design reflects a reasonable—indeed inspired—model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms, the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures.[13]

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[12] See, *e. g.,* 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination"); *id.*, at 1520 (statement of Rep. Celler) (describing § 602 as requiring federal agencies to "reexamine" their programs "to make sure that adequate action has been taken to preclude . . . discrimination").

[13] It is important, in this context, to note that regulations prohibiting policies that have a disparate impact are not necessarily aimed only—or even primarily—at unintentional discrimination. Many policies whose very intent is to discriminate are framed in a race-neutral manner. It is often difficult to obtain direct evidence of this motivating animus. Therefore, an agency decision to adopt disparate-impact regulations may very well reflect a determination by that agency that substantial intentional discrimination pervades the industry it is charged with regulating but that such discrimination is difficult to prove directly. As I have stated before: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." *Washington* v. *Davis*, 426 U. S. 229, 253 (1976) (concurring opinion). On this reading, Title VI

Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.

The "effects" regulations at issue in this case represent the considered judgment of the relevant agencies that discrimination on the basis of race, ethnicity, and national origin by federal contractees are significant social problems that might be remedied, or at least ameliorated, by the application of a broad prophylactic rule. Given the judgment underlying them, the regulations are inspired by, at the service of, and inseparably intertwined with § 601's antidiscrimination mandate. Contrary to the majority's suggestion, they "appl[y]" § 601's prohibition on discrimination just as surely as the intentional discrimination regulations the majority concedes are privately enforceable. *Ante*, at 284.

To the extent that our prior cases mischaracterize the relationship between §§ 601 and 602, they err on the side of underestimating, not overestimating, the connection between the two provisions. While our cases have explicitly adopted an understanding of § 601's scope that is somewhat narrower than the reach of the regulations,[14] they have done so in an unorthodox and somewhat haphazard fashion.

Our conclusion that the legislation only encompasses intentional discrimination was never the subject of thorough consideration by a Court focused on that question. In *Bakke*, five Members of this Court concluded that § 601 only prohibits race-based affirmative-action programs in situations where the Equal Protection Clause would impose a similar ban. 438 U. S., at 287 (principal opinion of Powell, J.); *id.*, at

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simply accords the agencies the power to decide whether or not to credit such evidence.

[14] See, *e. g.*, *Alexander* v. *Choate*, 469 U. S. 287, 293 (1985) (stating, in dicta, "Title VI itself directly reach[es] only instances of intentional discrimination"); *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983) (in separate opinions, seven Justices indicate that § 601 on its face bars only intentional discrimination).

325, 328, 352 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).[15] In *Guardians*, the majority of the Court held that the analysis of those five Justices in *Bakke* compelled *as a matter of stare decisis* the conclusion that § 601 does not on its own terms reach disparate-impact cases. 463 U. S., at 610–611 (Powell, J., concurring in judgment); *id.*, at 612 (O'CONNOR, J., concurring in judgment); *id.*, at 642 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). However, the opinions adopting that conclusion did not engage in any independent analysis of the reach of § 601. Indeed, the only writing on this subject came from two of the five Members of the *Bakke* "majority," each of whom wrote separately to reject the remaining Justices' understanding of their opinions in *Bakke* and to insist that § 601 does in fact reach some instances of unintentional discrimination. 463 U. S., at 589–590 (White, J.); *id.*, at 623–624 (Marshall, J., dissenting).[16] The Court's occasional rote invocation of this *Guardians* majority in later cases ought not obscure the fact that the question whether § 601 applies to disparate-impact claims has never been analyzed by this Court on the merits.[17]

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[15] Of course, those five Justices divided over the application of the Equal Protection Clause—and by extension Title VI—to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI.

[16] The fact that Justices Marshall and White both felt that the opinion they coauthored in *Bakke* did not resolve the question whether Title VI on its face reaches disparate-impact claims belies the majority's assertion that *Bakke* "had drawn precisely that distinction," *ante*, at 283, n. 2, much less its implication that it would have been "absurd" to think otherwise, *ibid.*

[17] In this context, it is worth noting that in a variety of other settings the Court has interpreted similarly ambiguous civil rights provisions to prohibit some policies based on their disparate impact on a protected group. See, *e. g., Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971) (Title VII); *City of Rome* v. *United States*, 446 U. S. 156, 172–173 (1980) (§ 5 of the Voting Rights Act); cf. *Alexander* v. *Choate*, 469 U. S., at 292–296

In addition, these Title VI cases seemingly ignore the well-established principle of administrative law that is now most often described as the "*Chevron* doctrine." See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In most other contexts, when the agencies charged with administering a broadly worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling unless it presents an unreasonable construction of the statutory text. See *ibid.* While there may be some dispute as to the boundaries of *Chevron* deference, see, *e. g.*, *Christensen* v. *Harris County*, 529 U. S. 576 (2000), it is paradigmatically appropriate when Congress has clearly delegated agencies the power to issue regulations with the force of law and established formal procedures for the promulgation of such regulations.[18]

If we were writing on a blank slate, we might very well conclude that *Chevron* and similar cases decided both before and after *Guardians* provide the proper framework for understanding the structure of Title VI. Under such a reading there would be no incongruity between §§ 601 and 602. Instead, we would read § 602 as granting the federal agencies responsible for distributing federal funds the authority

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(explaining why the Rehabilitation Act of 1973, which was modeled after § 601, might be considered to reach some instances of disparate impact and then assuming that it does for purposes of deciding the case).

[18] In relying on the *Chevron* doctrine, I do not mean to suggest that our decision in *Chevron* stated a new rule that requires the wholesale reconsideration of our statutory interpretation precedents. Instead, I continue to adhere to my position in *Sullivan* v. *Everhart*, 494 U. S. 83, 103–104, n. 6 (1990) (stating that *Chevron* merely summarized "well-settled principles"). In suggesting that, with regard to Title VI, we might reconsider whether our prior decisions gave sufficient deference to the agencies' interpretation of the statute, I do no more than question whether in this particular instance we paid sufficient consideration to those "well-settled principles."

to issue regulations interpreting § 601 on the assumption that their construction will—if reasonable—be incorporated into our understanding of § 601's meaning.[19]

To resolve this case, however, it is unnecessary to answer the question whether our cases interpreting the reach of § 601 should be reinterpreted in light of *Chevron*. If one understands the relationship between §§ 601 and 602 through the prism of *either Chevron* or our prior Title VI cases, the question presented all but answers itself. If the regulations promulgated pursuant to § 602 are either an authoritative construction of § 601's meaning or prophylactic rules necessary to actualize the goals enunciated in § 601, then it makes no sense to differentiate between private actions to enforce § 601 and private actions to enforce § 602. There is but one private action to enforce Title VI, and we already know that such an action exists.[20] See *Cannon*, 441 U. S., at 703.

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[19] The legislative history strongly indicates that the Congress that adopted Title VI and the administration that proposed the statute intended that the agencies and departments would utilize the authority granted under § 602 to shape the substantive contours of § 601. For example, during the hearings that preceded the passage of the statute, Attorney General Kennedy agreed that the administrators of the various agencies would have the power to define "what constitutes discrimination" under Title VI and "what acts or omissions are to be forbidden." Civil Rights—The President's Program, 1963: Hearings before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 399–400 (1963); see also Civil Rights: Hearings before the House Committee on the Judiciary, 88th Cong., 1st Sess., pt. 4, p. 2740 (1963) (remarks of Attorney General Kennedy) (only after the agencies "establish the rules" will recipients "understand what they can and cannot do"). It was, in fact, concern for this broad delegation that inspired Congress to amend the pending bill to ensure that all regulations issued pursuant to Title VI would have to be approved by the President. See 42 U. S. C. § 2000d–1 (laying out the requirement); 110 Cong. Rec. 2499 (1964) (remarks of Rep. Lindsay introducing the amendment). For further discussion of this legislative history, see *Guardians*, 463 U. S., at 615–624 (Marshall, J., dissenting); Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 Geo. L. J. 1 (1981).

[20] The majority twice suggests that I "be[g] the question" whether a private right of action to enforce Title VI necessarily encompasses a right

III

The majority couples its flawed analysis of the structure of Title VI with an uncharitable understanding of the substance of the divide between those on this Court who are reluctant to interpret statutes to allow for private rights of action and those who are willing to do so if the claim of right survives a rigorous application of the criteria set forth in *Cort* v. *Ash*, 422 U. S. 66 (1975). As the majority narrates our implied right of action jurisprudence, *ante*, at 286–287, the Court's shift to a more skeptical approach represents the rejection of a common-law judicial activism in favor of a principled recognition of the limited role of a contemporary "federal tribuna[l]." *Ante*, at 287. According to its analysis, the recognition of an implied right of action when the text and structure of the statute do not absolutely compel such a conclusion is an act of judicial self-indulgence. As much as we would like to help those disadvantaged by discrimination, we must resist the temptation to pour ourselves "one last drink." *Ibid.* To do otherwise would be to "ventur[e] beyond Congress's intent." *Ibid.*

Overwrought imagery aside, it is the majority's approach that blinds itself to congressional intent. While it remains true that, if Congress intends a private right of action to support statutory rights, "the far better course is for it to specify as much when it creates those rights," *Cannon*, 441

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of action to enforce the regulations validly promulgated pursuant to the statute. *Ante*, at 283, n. 2, 293, n. 8. As the above analysis demonstrates, I do no such thing. On the contrary, I demonstrate that the disparate-impact regulations promulgated pursuant to § 602 are—and have always been considered to be—an important part of an integrated remedial scheme intended to promote the statute's antidiscrimination goals. Given that fact, there is simply no logical or legal justification for differentiating between actions to enforce the regulations and actions to enforce the statutory text. Furthermore, as my integrated approach reflects the longstanding practice of this Court, see n. 2, *supra*, it is the majority's largely unexplained assumption that a private right of action to enforce the disparate-impact regulations must be independently established that "begs the question."

U. S., at 717, its failure to do so does not absolve us of the responsibility to endeavor to discern its intent. In a series of cases since *Cort* v. *Ash*, we have laid out rules and developed strategies for this task.

The very existence of these rules and strategies assumes that we will sometimes find manifestations of an implicit intent to create such a right. Our decision in *Cannon* represents one such occasion. As the *Cannon* opinion iterated and reiterated, the question whether the plaintiff had a right of action that could be asserted in federal court was a "question of statutory construction," 441 U. S., at 688; see also *id.*, at 717 (REHNQUIST, J., concurring), not a question of policy for the Court to decide. Applying the *Cort* v. *Ash* factors, we examined the nature of the rights at issue, the text and structure of the statute, and the relevant legislative history.[21] Our conclusion was that Congress unmistakably intended a private right of action to enforce both Title IX and Title VI. Our reasoning—and, as I have demonstrated, our holding—was equally applicable to intentional discrimination and disparate-impact claims.[22]

Underlying today's opinion is the conviction that *Cannon* must be cabined because it exemplifies an "expansive rights-

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[21] The text of the statute contained "an unmistakable focus on the benefited class," 441 U. S., at 691; its legislative history "rather plainly indicates that Congress intended to create such a remedy," *id.*, at 694; the legislators' repeated references to private enforcement of Title VI reflected "their intent with respect to Title IX," *id.*, at 696–698; and the absence of legislative action to change the prevailing view with respect to Title VI left us with "no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of prohibited discrimination," *id.*, at 703.

[22] We should not overlook the fact that *Cannon* was decided after the *Bakke* majority had concluded that the coverage of Title VI was coextensive with the coverage of the Equal Protection Clause.

creating approach." *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 77 (1992) (SCALIA, J., concurring in judgment). But, as I have taken pains to explain, it was Congress, not the Court, that created the cause of action, and it was the Congress that later ratified the *Cannon* holding in 1986 and again in 1988. See 503 U. S., at 72–73.

In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent. It is one thing for the Court to ignore the import of our holding in *Cannon*, as the breadth of that precedent is a matter upon which reasonable jurists may differ. It is entirely another thing for the majority to ignore the reasoning of that opinion and the evidence contained therein, as those arguments and that evidence speak directly to the question at issue today. As I stated above, see n. 21, *supra*, *Cannon* carefully explained that both Title VI and Title IX were intended to benefit a particular class of individuals, that the purposes of the statutes would be furthered rather than frustrated by the implication of a private right of action, and that the legislative histories of the statutes support the conclusion that Congress intended such a right. See also Part IV, *infra*. Those conclusions and the evidence supporting them continue to have force today.

Similarly, if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. As the respondents and the Government suggest, and as we have held several times, the objective manifestations of congressional intent to create a private right of action must be measured in light of the enacting Congress' expectations as to how the judiciary might evaluate the question. See *Thompson* v. *Thompson*, 484 U. S. 174 (1988); *Merrill Lynch*,

Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U. S. 353, 378–379 (1982); *Cannon*, 441 U. S., at 698–699.[23]

At the time Congress was considering Title VI, it was normal practice for the courts to infer that Congress intended a private right of action whenever it passed a statute designed to protect a particular class that did not contain enforcement mechanisms which would be thwarted by a private remedy. See *Merrill Lynch*, 456 U. S., at 374–375 (discussing this history). Indeed, the very year Congress adopted Title VI, this Court specifically stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). Assuming, as we must, that Congress was fully informed as to the state of the law, the contemporary context presents important evidence as to Congress' intent—evidence the majority declines to consider.

Ultimately, respect for Congress' prerogatives is measured in deeds, not words. Today, the Court coins a new rule, holding that a private cause of action to enforce a statute does not encompass a substantive regulation issued to effectuate that statute unless the regulation does nothing more than "authoritatively construe the statute itself." *Ante*, at 284.[24] This rule might be proper if we were the kind of

[23] Like any other type of evidence, contextual evidence may be trumped by other more persuasive evidence. Thus, the fact that, when evaluating older statutes, we have at times reached the conclusion that Congress did not imply a private right of action does not have the significance the majority suggests. *Ante*, at 287–288.

[24] Only one of this Court's myriad private right of action cases even hints at such a rule. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994). Even that decision, however, does not fully support the majority's position for two important reasons. First, it is not at all clear that the majority opinion in that case simply held that the regulation in question could not be enforced by private action; the opinion also permits the reading, assumed by the dissent, that the majority was in effect invalidating the regulation in question. *Id.*, at 200 (STEVENS, J., dissenting) ("The majority leaves little doubt that the Exchange Act does not even permit the SEC to pursue aiders and

"common-law court" the majority decries, *ante*, at 287, inventing private rights of action never intended by Congress. For if we are not construing a statute, we certainly may refuse to create a remedy for violations of federal regulations. But if we are faithful to the commitment to discerning congressional intent that all Members of this Court profess, the distinction is untenable. There is simply no reason to assume that Congress contemplated, desired, or adopted a distinction between regulations that merely parrot statutory text and broader regulations that are authorized by statutory text.[25]

IV

Beyond its flawed structural analysis of Title VI and an evident antipathy toward implied rights of action, the majority offers little affirmative support for its conclusion that Congress did not intend to create a private remedy for violations of the Title VI regulations.[26] The Court offers essen-

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abettors in civil enforcement actions under § 10(b) and Rule 10b–5"). Second, that case involved a right of action that the Court has forthrightly acknowledged was judicially created in exactly the way the majority now condemns. See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975) (describing private actions under Rule 10b–5 as "a judicial oak which has grown from little more than a legislative acorn"). As the action in question was in effect a common-law right, the Court was more within its rights to limit that remedy than it would be in a case, such as this one, where we have held that Congress clearly intended such a right.

[25] See *Guardians*, 463 U. S., at 636 (STEVENS, J., dissenting) ("It is one thing to conclude, as the Court did in *Cannon*, that the 1964 Congress, legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification").

[26] The majority suggests that its failure to offer such support is irrelevant, because the burden is on the party seeking to establish the existence of an implied right of action. *Ante*, at 293, n. 8. That response confuses apples and oranges. Undoubtedly, anyone seeking to bring a lawsuit has the burden of establishing that private individuals have the right to bring

tially two reasons for its position. First, it attaches significance to the fact that the "rights-creating" language in § 601 that defines the classes protected by the statute is not repeated in § 602. *Ante,* at 288–289. But, of course, there was no reason to put that language in § 602 because it is perfectly obvious that the regulations authorized by § 602 must be designed to protect precisely the same people protected by § 601. Moreover, it is self-evident that, linguistic niceties notwithstanding, any statutory provision whose stated purpose is to "effectuate" the eradication of racial and ethnic discrimination has as its "focus" those individuals who, absent such legislation, would be subject to discrimination.

Second, the Court repeats the argument advanced and rejected in *Cannon* that the express provision of a fund cutoff remedy "suggests that Congress intended to preclude others." *Ante,* at 290. In *Cannon,* 441 U. S., at 704–708, we carefully explained why the presence of an explicit mechanism to achieve one of the statute's objectives (ensuring that federal funds are not used "to support discriminatory practices") does not preclude a conclusion that a private right of action was intended to achieve the statute's other principal objective ("to provide individual citizens effective protection against those practices"). In support of our analysis, we offered policy arguments, cited evidence from the legislative history, and noted the active support of the relevant agencies. *Ibid.* In today's decision, the Court does not grapple

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such a suit. However, once the courts have examined the statutory scheme under which the individual seeks to bring a suit and determined that a private right of action does exist, judges who seek to impose heretofore unrecognized limits on that right have a responsibility to offer reasoned arguments drawn from the text, structure, or history of that statute in order to justify such limitations. Moreover, in this case, the respondents *have* marshaled substantial affirmative evidence that a private right of action exists to enforce Title VI and the regulations validly promulgated thereunder. See *supra,* at 313. It strikes me that it aids rather than hinders their case that this evidence is already summarized in an opinion of this Court. See *Cannon,* 441 U. S., at 691–703.

with—indeed, barely acknowledges—our rejection of this argument in *Cannon*.

Like much else in its opinion, the present majority's unwillingness to explain its refusal to find the reasoning in *Cannon* persuasive suggests that today's decision is the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964. Its colorful disclaimer of any interest in "venturing beyond Congress's intent," *ante*, at 287, has a hollow ring.

V

The question the Court answers today was only an open question in the most technical sense. Given the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions. But most importantly, even if it were to ignore all of our post-1964 writing, the Court should have answered the question differently on the merits.

I respectfully dissent.

Syllabus

ATWATER ET AL. *v.* CITY OF LAGO VISTA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99–1408. Argued December 4, 2000—Decided April 24, 2001

Texas law makes it a misdemeanor, punishable only by a fine, either for a front-seat passenger in a car equipped with safety belts not to wear one or for the driver to fail to secure any small child riding in front. The warrantless arrest of anyone violating these provisions is expressly authorized by statute, but the police may issue citations in lieu of arrest. Petitioner Atwater drove her truck in Lago Vista, Texas, with her small children in the front seat. None of them was wearing a seatbelt. Respondent Turek, then a Lago Vista policeman, observed the seatbelt violations, pulled Atwater over, verbally berated her, handcuffed her, placed her in his squad car, and drove her to the local police station, where she was made to remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took her "mug shot" and placed her, alone, in a jail cell for about an hour, after which she was taken before a magistrate and released on bond. She was charged with, among other things, violating the seatbelt law. She pleaded no contest to the seatbelt misdemeanors and paid a $50 fine. She and her husband (collectively Atwater) filed suit under 42 U. S. C. § 1983, alleging, *inter alia*, that the actions of respondents (collectively City) had violated her Fourth Amendment right to be free from unreasonable seizure. Given her admission that she had violated the law and the absence of any allegation that she was harmed or detained in any way inconsistent with the law, the District Court ruled the Fourth Amendment claim meritless and granted the City summary judgment. Sitting en banc, the Fifth Circuit affirmed. Relying on *Whren* v. *United States*, 517 U. S. 806, 817–818, the court observed that, although the Fourth Amendment generally requires a balancing of individual and governmental interests, the result is rarely in doubt where an arrest is based on probable cause. Because no one disputed that Turek had probable cause to arrest Atwater, and there was no evidence the arrest was conducted in an extraordinary manner, unusually harmful to Atwater's privacy interests, the court held the arrest not unreasonable for Fourth Amendment purposes.

Held: The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. Pp. 326–355.

Syllabus

(a) In reading the Fourth Amendment, the Court is guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. *E. g.*, *Wilson* v. *Arkansas*, 514 U. S. 927, 931. Atwater contends that founding-era common-law rules forbade officers to make warrantless misdemeanor arrests except in cases of "breach of the peace," a category she claims was then understood narrowly as covering only those nonfelony offenses involving or tending toward violence. Although this argument is not insubstantial, it ultimately fails. Pp. 326–345.

(1) Even after making some allowance for variations in the pre-founding English common-law usage of "breach of the peace," the founding-era common-law rules were not nearly as clear as Atwater claims. Pp. 327–335.

(i) A review of the relevant English decisions, as well as English and colonial American legal treatises, legal dictionaries, and procedure manuals, demonstrates disagreement, not unanimity, with respect to officers' warrantless misdemeanor arrest power. On one side, eminent authorities support Atwater's position that the common law confined warrantless misdemeanor arrests to actual breaches of the peace. See, *e. g.*, *Queen* v. *Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352. However, there is also considerable evidence of a broader conception of common-law misdemeanor arrest authority unlimited by any breach-of-the-peace condition. See, *e. g.*, *Holyday* v. *Oxenbridge*, Cro. Car. 234, 79 Eng. Rep. 805, 805–806; 2 M. Hale, Pleas of the Crown 88. Thus, the Court is not convinced that Atwater's is the correct, or even necessarily the better, reading of the common-law history. Pp. 328–332.

(ii) A second, and equally serious, problem for Atwater's historical argument is posed by various statutes enacted by Parliament well before this Republic's founding that authorized peace officers (and even private persons) to make warrantless arrests for all sorts of relatively minor offenses unaccompanied by violence, including, among others, nightwalking, unlawful game playing, profane cursing, and negligent carriage driving. Pp. 333–335.

(2) An examination of specifically American evidence is to the same effect. Neither the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or has traditionally been read, to embrace Atwater's position. Pp. 336–345.

(i) Atwater has cited no particular evidence that those who framed and ratified the Fourth Amendment sought to limit peace officers' warrantless misdemeanor arrest authority to instances of actual breach of the peace, and the Court's review of framing-era documentary

history has likewise failed to reveal any such design. Nor is there in any of the modern historical accounts of the Fourth Amendment's adoption any substantial indication that the Framers intended such a restriction. Indeed, to the extent the modern histories address the issue, their conclusions are to the contrary. The evidence of actual practice also counsels against Atwater's position. During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, regularly authorized local officers to make warrantless misdemeanor arrests without a breach of the peace condition. That the Fourth Amendment did not originally apply to the States does not make state practice irrelevant in unearthing the Amendment's original meaning. A number of state constitutional search-and-seizure provisions served as models for the Fourth Amendment, and the fact that many of the original States with such constitutional limitations continued to grant their officers broad warrantless misdemeanor arrest authority undermines Atwater's position. Given the early state practice, it is likewise troublesome for Atwater's view that one year after the Fourth Amendment's ratification, Congress gave federal marshals the same powers to execute federal law as sheriffs had to execute state law. Pp. 336–340.

(ii) Nor is Atwater's argument from tradition aided by the historical record as it has unfolded since the framing, there being no indication that her claimed rule has ever become "woven . . . into the fabric" of American law. *E. g.*, *Wilson*, *supra*, at 933. The story, in fact, is to the contrary. First, what little this Court has said about warrantless misdemeanor arrest authority tends to cut against Atwater's argument. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411, 418. Second, this is not a case in which early American courts embraced an accepted common-law rule with anything approaching unanimity. See *Wilson*, *supra*, at 933. None of the 19th-century state-court decisions cited by Atwater is ultimately availing. More to the point are the numerous 19th-century state decisions expressly sustaining (often against constitutional challenge) state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace. Finally, legal commentary, for more than a century, has almost uniformly recognized the constitutionality of extending warrantless arrest power to misdemeanors without limitation to breaches of the peace. Small wonder, then, that today statutes in all 50 States and the District of Columbia permit such arrests by at least some (if not all) peace officers, as do a host of congressional enactments. Pp. 340–345.

(b) The Court rejects Atwater's request to mint a new rule of constitutional law forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and the government

can show no compelling need for immediate detention. She reasons that, when historical practice fails to speak conclusively to a Fourth Amendment claim, courts must strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness. See, *e. g.*, *Wyoming* v. *Houghton*, 526 U. S. 295, 299–300. Atwater might well prevail under a rule derived exclusively to address the uncontested facts of her case, since her claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her. However, the Court has traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. See, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218, 234–235. Complications arise the moment consideration is given the possible applications of the several criteria Atwater proposes for drawing a line between minor crimes with limited arrest authority and others not so restricted. The assertion that these difficulties could be alleviated simply by requiring police in doubt not to arrest is unavailing because, first, such a tie breaker would in practice amount to a constitutionally inappropriate least-restrictive-alternative limitation, see, *e. g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 629, n. 9, and, second, whatever guidance the tie breaker might give would come at the price of a systematic disincentive to arrest in situations where even Atwater concedes arresting would serve an important societal interest. That warrantless misdemeanor arrests do not demand the constitutional attention Atwater seeks is indicated by a number of factors, including that the law has never jelled the way Atwater would have it; that anyone arrested without formal process is entitled to a magistrate's review of probable cause within 48 hours, *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 55–58; that many jurisdictions have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses; that it is in the police's interest to limit such arrests, which carry costs too great to incur without good reason; and that, under current doctrine, the preference for categorical treatment of Fourth Amendment claims gives way to individualized review when a defendant makes a colorable argument that an arrest, with or without a warrant, was conducted in an extraordinary manner, unusually harmful to his privacy or physical interests, *e. g.*, *Whren*, 517 U. S., at 818. The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and peace officers, is a dearth of horribles demanding redress. Thus, the probable-cause standard applies to all arrests, without the

need to balance the interests and circumstances involved in particular situations. *Dunaway* v. *New York*, 442 U. S. 200, 208. An officer may arrest an individual without violating the Fourth Amendment if there is probable cause to believe that the offender has committed even a very minor criminal offense in the officer's presence. Pp. 345–354.

(c) Atwater's arrest satisfied constitutional requirements. It is undisputed that Turek had probable cause to believe that Atwater committed a crime in his presence. Because she admits that neither she nor her children were wearing seatbelts, Turek was authorized (though not required) to make a custodial arrest without balancing costs and benefits or determining whether Atwater's arrest was in some sense necessary. Nor was the arrest made in an extraordinary manner, unusually harmful to her privacy or physical interests. See *Whren*, 517 U. S., at 818. Whether a search or seizure is "extraordinary" turns, above all else, on the manner in which it is executed. See, *e. g.*, *ibid.* Atwater's arrest and subsequent booking, though surely humiliating, were no more harmful to her interests than the normal custodial arrest. Pp. 354–355.

195 F. 3d 242, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 360.

Robert C. DeCarli argued the cause for petitioners. With him on the briefs were *Debra Irwin*, *Pamela McGraw*, and *Michael F. Sturley.*

R. James George, Jr., argued the cause for respondents. With him on the brief were *William W. Krueger III* and *Joanna R. Lippman.*

Gregory S. Coleman, Solicitor General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging affirmance. With him on the brief were *John Cornyn*, Attorney General, *Andy Taylor*, First Assistant Attorney General, and *Lisa R. Eskow*, Assistant Attorney General, and the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Joseph P. Mazurek* of Montana,

W. A. Drew Edmondson of Oklahoma, *Charles M. Condon* of South Carolina, and *Mark L. Earley* of Virginia.*

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. We hold that it does not.

I

A

In Texas, if a car is equipped with safety belts, a front-seat passenger must wear one, Tex. Transp. Code Ann. § 545.413(a) (1999), and the driver must secure any small child riding in front, § 545.413(b). Violation of either provision is "a misdemeanor punishable by a fine not less than $25 or more than $50." § 545.413(d). Texas law expressly authorizes "[a]ny peace officer [to] arrest without warrant a person found committing a violation" of these seatbelt laws, § 543.001, although it permits police to issue citations in lieu of arrest, §§ 543.003–543.005.

In March 1997, petitioner Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of them was

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Susan N. Herman* and *Steven R. Shapiro;* for Americans for Effective Law Enforcement, Inc., by *Wayne W. Schmidt, James P. Manak,* and *Bernard J. Farber;* for the Cato Institute by *Timothy Lynch;* for the Institute on Criminal Justice at the University of Minnesota Law School et al. by *Richard S. Frase;* for the National Association of Criminal Defense Lawyers et al. by *Wesley MacNeil Oliver* and *Joshua Dratel;* and for the Texas Criminal Defense Lawyers Association by *Greg Westfall* and *William S. Harris.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Waxman, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben,* and *Patricia A. Millett;* for the National League of Cities et al. by *Richard Ruda* and *James I. Crowley;* and for the Texas Police Chiefs Association by *James McLaughlin, Jr.*

wearing a seatbelt. Respondent Bart Turek, a Lago Vista police officer at the time, observed the seatbelt violations and pulled Atwater over. According to Atwater's complaint (the allegations of which we assume to be true for present purposes), Turek approached the truck and "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." App. 20.[1] He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. Tex. Transp. Code Ann. §§ 521.025, 601.053 (1999). When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times." App. 21.

Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "[y]ou're not going anywhere." *Ibid.* As it turned out, Atwater's friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took Atwater's "mug shot" and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on $310 bond.

Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a $50 fine; the other charges were dismissed.

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[1] Turek had previously stopped Atwater for what he had thought was a seatbelt violation, but had realized that Atwater's son, although seated on the vehicle's armrest, was in fact belted in. Atwater acknowledged that her son's seating position was unsafe, and Turek issued a verbal warning. See Record 379.

B

Atwater and her husband, petitioner Michael Haas, filed suit in a Texas state court under 42 U. S. C. § 1983 against Turek and respondents City of Lago Vista and Chief of Police Frank Miller. So far as concerns us, petitioners (whom we will simply call Atwater) alleged that respondents (for simplicity, the City) had violated Atwater's Fourth Amendment "right to be free from unreasonable seizure," App. 23, and sought compensatory and punitive damages.

The City removed the suit to the United States District Court for the Western District of Texas. Given Atwater's admission that she had "violated the law" and the absence of any allegation "that she was harmed or detained in any way inconsistent with the law," the District Court ruled the Fourth Amendment claim "meritless" and granted the City's summary judgment motion. No. A–97 CA 679 SS (WD Tex., Feb. 13, 1999), App. to Pet. for Cert. 50a–63a. A panel of the United States Court of Appeals for the Fifth Circuit reversed. 165 F. 3d 380 (1999). It concluded that "an arrest for a first-time seat belt offense" was an unreasonable seizure within the meaning of the Fourth Amendment, *id.*, at 387, and held that Turek was not entitled to qualified immunity, *id.*, at 389.

Sitting en banc, the Court of Appeals vacated the panel's decision and affirmed the District Court's summary judgment for the City. 195 F. 3d 242 (CA5 1999). Relying on *Whren* v. *United States*, 517 U. S. 806 (1996), the en banc court observed that, although the Fourth Amendment generally requires a balancing of individual and governmental interests, where "an arrest is based on probable cause then 'with rare exceptions . . . the result of that balancing is not in doubt.'" 195 F. 3d, at 244 (quoting *Whren*, *supra*, at 817). Because "[n]either party dispute[d] that Officer Turek had probable cause to arrest Atwater," and because "there [was] no evidence in the record that Officer Turek conducted the arrest in an 'extraordinary manner, unusually harmful' to At-

water's privacy interests," the en banc court held that the arrest was not unreasonable for Fourth Amendment purposes. 195 F. 3d, at 245–246 (quoting *Whren*, *supra*, at 818).

Three judges issued dissenting opinions. On the understanding that citation is the "usual procedure" in a traffic stop situation, Judge Reynaldo Garza thought Atwater's arrest unreasonable, since there was no particular reason for taking her into custody. 195 F. 3d, at 246–247. Judge Weiner likewise believed that "even with probable cause, [an] officer must have a plausible, articulable reason" for making a custodial arrest. *Id.*, at 251. Judge Dennis understood the Fourth Amendment to have incorporated an earlier, common-law prohibition on warrantless arrests for misdemeanors that do not amount to or involve a "breach of the peace." *Ibid.*

We granted certiorari to consider whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses. 530 U. S. 1260 (2000). We now affirm.

II

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In reading the Amendment, we are guided by "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," *Wilson* v. *Arkansas*, 514 U. S. 927, 931 (1995), since "[a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable," *Payton* v. *New York*, 445 U. S. 573, 591 (1980) (footnote omitted). Thus, the first step here is to assess Atwater's claim that peace officers' authority to make warrantless arrests for misdemeanors was

restricted at common law (whether "common law" is understood strictly as law judicially derived or, instead, as the whole body of law extant at the time of the framing). Atwater's specific contention is that "founding-era common-law rules" forbade peace officers to make warrantless misdemeanor arrests except in cases of "breach of the peace," a category she claims was then understood narrowly as covering only those nonfelony offenses "involving or tending toward violence." Brief for Petitioners 13. Although her historical argument is by no means insubstantial, it ultimately fails.

A

We begin with the state of pre-founding English common law and find that, even after making some allowance for variations in the common-law usage of the term "breach of the peace,"[2] the "founding-era common-law rules" were not

[2] The term apparently meant very different things in different common-law contexts. For instance, under a statute enacted during the reign of Charles II forbidding service of any warrant or other court process on Sunday "except in cases of treason, felony or breach of the peace," 29 Car. II, ch. 7, § 6, 8 Statutes at Large 414 (1676), "it was held that every indictable offense was constructively a breach of the peace," Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 574 (1924); see also *Ex parte Whitchurch*, 1 Atk. 56, 58, 26 Eng. Rep. 37, 39 (Ch. 1749). The term carried a similarly broad meaning when employed to define the jurisdiction of justices of the peace, see 2 W. Hawkins, Pleas of the Crown, ch. 8, § 38, p. 60 (6th ed. 1787) (hereinafter Hawkins), or to delimit the scope of parliamentary privilege, see *Williamson* v. *United States*, 207 U. S. 425, 435–446 (1908) (discussing common-law origins of Arrest Clause, U. S. Const., Art. I, § 6, cl. 1).

Even when used to describe common-law arrest authority, the term's precise import is not altogether clear. See J. Turner, Kenny's Outlines of Criminal Law § 695, p. 537 (17th ed. 1958) ("Strangely enough what constitutes a 'breach of the peace' has not been authoritatively laid down"); G. Williams, Arrest for Breach of the Peace, 1954 Crim. L. Rev. 578, 578–579 ("The expression 'breach of the peace' seems clearer than it is and there is a surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law"); Wilgus, *supra*, at 573 ("What constitutes a *breach of peace* is not entirely certain"). More often

nearly as clear as Atwater claims; on the contrary, the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers' warrantless misdemeanor arrest power. Moreover, in the years leading up to American independence, Parliament repeatedly extended express warrantless arrest authority to cover misdemeanor-level offenses not amounting to or involving any violent breach of the peace.

1

Atwater's historical argument begins with our quotation from Halsbury in *Carroll* v. *United States*, 267 U. S. 132 (1925), that

> "'[i]n cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.'" *Id.*, at 157 (quoting 9 Halsbury, Laws of England § 612, p. 299 (1909)).

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than not, when used in reference to common-law arrest power, the term seemed to connote an element of violence. See, *e. g.*, M. Dalton, Country Justice, ch. 3, p. 9 (1727) ("The Breach of th[e] Peace seemeth to be any injurious Force or Violence moved against the Person of another, his Goods, Lands, or other Possessions, whether by threatening words, or by furious Gesture, or Force of the Body, or any other Force used *in terrorem*"). On occasion, however, common-law commentators included in their descriptions of breaches of the peace offenses that do not necessarily involve violence or a threat thereof. See M. Hale, A Methodical Summary of the Principal Matters Relating to the Pleas of the Crown *134 (7th ed. 1773) ("Barretries"); 4 W. Blackstone, Commentaries on the Laws of England 149 (1769) (hereinafter Blackstone) ("[s]preading false news"). For purposes of this case, it is unnecessary to reach a definitive resolution of the uncertainty. As stated in the text, we will assume that as used in the context of common-law arrest, the phrase "breach of the peace" was understood narrowly, as entailing at least a threat of violence.

But the isolated quotation tends to mislead. In *Carroll* itself we spoke of the common-law rule as only "sometimes expressed" that way, 267 U. S., at 157, and, indeed, in the very same paragraph, we conspicuously omitted any reference to a breach-of-the-peace limitation in stating that the "usual rule" at common law was that "a police officer [could] arrest without warrant . . . one guilty of a misdemeanor if committed in his presence." *Id.*, at 156–157. Thus, what *Carroll* illustrates, and what others have recognized, is that statements about the common law of warrantless misdemeanor arrest simply are not uniform. Rather, "[a]t common law there is a difference of opinion among the authorities as to whether this right to arrest [without a warrant] extends to all misdemeanors." American Law Institute, Code of Criminal Procedure, Commentary to § 21, p. 231 (1930).

On one side of the divide there are certainly eminent authorities supporting Atwater's position. In addition to Lord Halsbury, quoted in *Carroll*, James Fitzjames Stephen and Glanville Williams both seemed to indicate that the common law confined warrantless misdemeanor arrests to actual breaches of the peace. See 1 J. Stephen, A History of the Criminal Law of England 193 (1883) ("The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual"); G. Williams, Arrest for Breach of the Peace, 1954 Crim. L. Rev. 578, 578 ("Apart from arrest for felony . . . , the only power of arrest at common law is in respect of breach of the peace"). See also *Queen* v. *Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352 (Q. B. 1710) ("[A] constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest").

Sir William Blackstone and Sir Edward East might also be counted on Atwater's side, although they spoke only to the sufficiency of breach of the peace as a condition to warrant-

less misdemeanor arrest, not to its necessity. Blackstone recognized that at common law "[t]he constable . . . hath great original and inherent authority with regard to arrests," but with respect to nonfelony offenses said only that "[h]e may, without warrant, arrest any one for a breach of the peace, and carry him before a justice of the peace." 4 Blackstone 289. Not long after the framing of the Fourth Amendment, East characterized peace officers' common-law arrest power in much the same way: "A constable or other known conservator of the peace may lawfully interpose upon his own view to prevent a breach of the peace, or to quiet an affray . . . ." 1 E. East, Pleas of the Crown § 71, p. 303 (1803).

The great commentators were not unanimous, however, and there is also considerable evidence of a broader conception of common-law misdemeanor arrest authority unlimited by any breach-of-the-peace condition. Sir Matthew Hale, Chief Justice of King's Bench from 1671 to 1676,[3] wrote in his History of the Pleas of the Crown that, by his "original and inherent power," a constable could arrest without a warrant "for breach of the peace and some misdemeanors, less than felony." 2 M. Hale, Pleas of the Crown 88 (1736). Hale's view, posthumously published in 1736, reflected an understanding dating back at least 60 years before the appearance of his Pleas yet sufficiently authoritative to sustain a momentum extending well beyond the framing era in this country. See The Compleat Parish-Officer 11 (1744) ("[T]he Constable . . . may for Breach of the Peace, and some Misdemeanors less than Felony, imprison a Man"); R. Burn, The Justice of the Peace 271 (1837) ("A *constable* . . . may at common law, for treason, felony, breach of the peace, and some misdemeanors less than felony, *committed in his view*, apprehend the supposed offender without any warrant" (italics in original)); 1 J. Chitty, A Practical

[3] E. Foss, The Judges of England 113 (1864).

Treatise on the Criminal Law 20 (5th ed. 1847) ("[A constable] may for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his view, apprehend the supposed offender *virtiute officii*, without any warrant"); 1 W. Russell, Crimes and Misdemeanors 725 (7th ed. 1909) (officer "may arrest any person who in his presence commits a misdemeanor or breach of the peace").[4]

As will be seen later, the view of warrantless arrest authority as extending to at least "some misdemeanors" beyond breaches of the peace was undoubtedly informed by statutory provisions authorizing such arrests, but it reflected common law in the strict, judge-made sense as well, for such was the holding of at least one case reported before Hale had even become a judge but which, like Hale's own commentary, continued to be cited well after the ratification of the Fourth Amendment. In *Holyday* v. *Oxenbridge*, Cro. Car. 234, 79 Eng. Rep. 805 (1631), the Court of King's Bench held that even a private person (and thus *a fortiori* a peace officer[5]) needed no warrant to arrest a "common cheater" whom he discovered "cozen[ing] with false dice." The court expressly rejected the contention that warrantless arrests were improper "unless in felony," and said instead that "there was good cause [for] staying" the gambler and, more broadly, that "it is *pro bono publico* to stay such offenders." *Id.*, at 805–806. In the edition nearest to the date of the Constitution's framing, Sergeant William Hawkins's widely read Treatise of the Pleas of the Crown generalized from *Holyday* that "from the reason of this case it seems to follow,

[4] Cf. E. Trotter, Seventeenth Century Life in the Country Parish: With Special Reference to Local Government 88 (1919) (describing broad authority of local constables and concluding that, "[i]n short, the constable must apprehend, take charge of and present for trial all persons who broke the laws, written or unwritten, against the King's peace or against the statutes of the realm . . .").

[5] See 2 Hawkins, ch. 13, § 1, at 129 ("[W]herever any [warrantless] arrest may be justified by a private person, in every such case *à fortiori* it may be justified by any [peace] officer").

That the [warrantless] arrest of any other offenders . . . for offences in like manner scandalous and prejudicial to the public, may be justified." 2 Hawkins, ch. 12, § 20, at 122. A number of other common-law commentaries shared Hawkins's broad reading of *Holyday*. See The Law of Arrests 205 (2d ed. 1753) (In light of *Holyday*, "an Arrest of an Offender . . . for any Crime prejudicial to the Publick, seems to be justifiable"); 1 T. Cunningham, A New and Complete Law Dictionary (1771) (definition of "arrest") (same); 1 G. Jacob, The Law Dictionary 129 (1st Am. ed. 1811) (same). See generally C. Greaves, Law of Arrest Without a Warrant, in The Criminal Law Consolidation Acts, p. lxiii (1870) ("*[Holyday]* is rested upon the broad ground that 'it is *pro bono publico* to stay such offenders,' which is equally applicable to every case of misdemeanor . . . ").[6]

We thus find disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together and summarize accepted practice. Having reviewed the relevant English decisions, as well as English and colonial American legal treatises, legal dictionaries, and procedure manuals, we simply are not convinced that Atwater's is the correct, or even necessarily the better, reading of the common-law history.

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[6] *King* v. *Wilkes*, 2 Wils. K. B. 151, 95 Eng. Rep. 737 (1763), and *Money* v. *Leach*, 3 Burr. 1742, 97 Eng. Rep. 1075 (K. B. 1765), two of the decisions arising out of the controversy that generated *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (C. P. 1763), the "paradigm search and seizure case for Americans" of the founding generation, Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 772 (1994), also contain dicta suggesting a somewhat broader conception of common-law arrest power than the one Atwater advances. See, *e. g.*, *King* v. *Wilkes*, *supra*, at 158, 95 Eng. Rep., at 741 ("[I]f a crime be done in his sight," a justice of the peace "may commit the criminal upon the spot"); *Money* v. *Leach*, *supra*, at 1766, 97 Eng. Rep., at 1088 ("The common law, in many cases, gives authority to arrest without a warrant; more especially, where taken in the very act . . .").

A second, and equally serious, problem for Atwater's historical argument is posed by the "divers Statutes," M. Dalton, Country Justice, ch. 170, § 4, p. 582 (1727), enacted by Parliament well before this Republic's founding that authorized warrantless misdemeanor arrests without reference to violence or turmoil. Quite apart from Hale and Blackstone, the legal background of any conception of reasonableness the Fourth Amendment's Framers might have entertained would have included English statutes, some centuries old, authorizing peace officers (and even private persons) to make warrantless arrests for all sorts of relatively minor offenses unaccompanied by violence. The so-called "nightwalker" statutes are perhaps the most notable examples. From the enactment of the Statute of Winchester in 1285, through its various readoptions and until its repeal in 1827,[7] night watchmen were authorized and charged "as . . . in Times past" to "watch the Town continually all Night, from the Sun-setting unto the Sun-rising" and were directed that "if any Stranger do pass by them, he shall be arrested until Morning . . . ." 13 Edw. I, ch. 4, §§ 5–6, 1 Statutes at Large 232–233; see also 5 Edw. III, ch. 14, 1 Statutes at Large 448 (1331) (confirming and extending the powers of watchmen). Hawkins emphasized that the Statute of Winchester "was made" not in derogation but rather "in affirmance of the common law," for "every private person may by the common law arrest any suspicious night-walker, and detain him till he give good account of himself . . . ." 2 Hawkins, ch. 13, § 6, at 130. And according to Blackstone, these watchmen had virtually limitless warrantless nighttime arrest power: "Watchmen, either those appointed by the statute of Winchester . . . or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning." 4 Blackstone 289; see

[7] 7 & 8 Geo. IV, ch. 27, 67 Statutes at Large 153.

also 2 Hale, Pleas of the Crown, at 97 (describing broad arrest powers of watchmen even over and above those conferred by the Statute of Winchester).[8] The Statute of Winchester, moreover, empowered peace officers not only to deal with nightwalkers and other nighttime "offenders," but periodically to "make Inquiry of all Persons being lodged in the Suburbs, or in foreign Places of the Towns." On that score, the Statute provided that "if they do find any that have lodged or received any Strangers or suspicious Person, against the Peace, the Bailiffs shall do Righttherein," 13 Edw. I, ch. 4, §§ 3–4, 1 Statutes at Large 232–233, which Hawkins understood "surely" to mean that officers could "lawfully arrest and detain any such stranger[s]," 2 Hawkins, ch. 13, § 12, at 134.

Nor were the nightwalker statutes the only legislative sources of warrantless arrest authority absent real or threatened violence, as the parties and their *amici* here seem to have assumed. On the contrary, following the Edwardian legislation and throughout the period leading up to the framing, Parliament repeatedly extended warrantless arrest power to cover misdemeanor-level offenses not involving any breach of the peace. One 16th-century statute, for instance, authorized peace officers to arrest persons playing "unlawful game[s]" like bowling, tennis, dice, and cards, and for good measure extended the authority beyond players to include persons "haunting" the "houses, places and alleys where such games shall be suspected to be holden, exercised, used

[8] Atwater seeks to distinguish the nightwalker statutes by arguing that they "just reflected the reasonable notion that, in an age before lighting, finding a person walking about in the dead of night equaled probable suspicion that the person was a felon." Reply Brief for Petitioners 7, n. 6. Hale indicates, however, that nightwalkers and felons were not considered to be one and the same. 2 Hale, Pleas of the Crown, at 97 ("And such a watchman may apprehend night-walkers and commit them to custody till the morning, and also felons and persons suspected of felony").

or occupied." 33 Hen. VIII, ch. 9, §§ 11–16, 5 Statutes at Large 84–85 (1541). A 17th-century act empowered "any person . . . whatsoever to seize and detain any . . . hawker, pedlar, petty chapman, or other trading person" found selling without a license. 8 & 9 Wm. III, ch. 25, §§ 3, 8, 10 Statutes at Large 81–83 (1697). And 18th-century statutes authorized the warrantless arrest of "rogues, vagabonds, beggars, and other idle and disorderly persons" (defined broadly to include jugglers, palm readers, and unlicensed play actors), 17 Geo. II, ch. 5, §§ 1–2, 5, 18 Statutes at Large 144, 145–147 (1744); "horrid" persons who "profanely swear or curse," 19 Geo. II, ch. 21, § 3, 18 Statutes at Large 445 (1746); individuals obstructing "publick streets, lanes or open passages" with "pipes, butts, barrels, casks or other vessels" or an "empty cart, car, dray or other carriage," 30 Geo. II, ch. 22, §§ 5, 13, 22 Statutes at Large 107–108, 111 (1757); and, most significantly of all given the circumstances of the case before us, negligent carriage drivers, 27 Geo. II, ch. 16, § 7, 21 Statutes at Large 188 (1754). See generally S. Blackerby, The Justice of Peace: His Companion, or a Summary of all the Acts of Parliament (1723) (cataloguing statutes); S. Welch, An Essay on the Office of Constable 19–22 (1758) (describing same).

The significance of these early English statutes lies not in proving that any common-law rule barring warrantless misdemeanor arrests that might have existed would have been subject to statutory override; the sovereign Parliament could of course have wiped away any judge-made rule. The point is that the statutes riddle Atwater's supposed common-law rule with enough exceptions to unsettle any contention that the law of the mother country would have left the Fourth Amendment's Framers of a view that it would necessarily have been unreasonable to arrest without warrant for a misdemeanor unaccompanied by real or threatened violence.

B

An examination of specifically American evidence is to the same effect. Neither the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or has traditionally been read, to embrace Atwater's position.

1

To begin with, Atwater has cited no particular evidence that those who framed and ratified the Fourth Amendment sought to limit peace officers' warrantless misdemeanor arrest authority to instances of actual breach of the peace, and our own review of the recent and respected compilations of framing-era documentary history has likewise failed to reveal any such design. See The Complete Bill of Rights 223–263 (N. Cogan ed. 1997) (collecting original sources); 5 The Founders' Constitution 219–244 (P. Kurland & R. Lerner eds. 1987) (same). Nor have we found in any of the modern historical accounts of the Fourth Amendment's adoption any substantial indication that the Framers intended such a restriction. See, *e. g.*, L. Levy, Origins of the Bill of Rights 150–179 (1999); T. Taylor, Two Studies in Constitutional Interpretation 19–93 (1969); J. Landynski, Search and Seizure and the Supreme Court 19–48 (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 79–105 (1937); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547 (1999); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994); Bradley, Constitutional Theory of the Fourth Amendment, 38 DePaul L. Rev. 817 (1989). Indeed, to the extent these modern histories address the issue, their conclusions are to the contrary. See Landynski, *supra*, at 45 (Fourth Amendment arrest rules are "based on common-law practice," which "dispensed with" a warrant requirement for misdemeanors "committed in the presence of the arresting officer"); Davies, *supra*, at 551 ("[T]he Framers did not address

warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions; thus, they never anticipated that 'unreasonable' might be read as a standard for warrantless intrusions").

The evidence of actual practice also counsels against Atwater's position. During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, *supra*, at 333–335, regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace. See, *e. g.*, First Laws of the State of Connecticut 214–215 (Cushing ed. 1982) (1784 compilation; exact date of Act unknown) (authorizing warrantless arrests of "all Persons unnecessarily travelling on the Sabbath or Lord's Day"); *id.*, at 23 ("such as are guilty of Drunkenness, profane Swearing, Sabbath-breaking, also vagrant Persons [and] unseasonable Night-walkers"); Digest of the Laws of the State of Georgia 1755–1800, p. 411 (H. Marbury & W. Crawford eds. 1802) (1762 Act) (breakers of the Sabbath laws); *id.*, at 252 (1764 Act) (persons "gaming . . . in any licensed public house, or other house selling liquors"); Colonial Laws of Massachusetts 139 (1889) (1646 Act) ("such as are overtaken with drink, swearing, Sabbath breaking, Lying, vagrant persons, [and] night-walkers"); Laws of the State of New Hampshire 549 (1800) (1799 Act) (persons "travelling unnecessarily" on Sunday); Digest of the Laws of New Jersey 1709–1838, pp. 585–586 (L. Elmer ed. 1838) (1799 Act) ("vagrants or vagabonds, common drunkards, common night-walkers, and common prostitutes," as well as fortune-tellers and other practitioners of "crafty science"); Laws of the State of New York, 1777–1784, pp. 358–359 (1886) (1781 Act) ("hawker[s]" and "pedlar[s]"); Earliest Printed Laws of New York, 1665–1693, p. 133 (J. Cushing ed. 1978) (Duke of York's Laws, 1665–1675) ("such as are overtaken with Drink, Swearing, Sabbath breaking, Vagrant persons or night walkers"); 3 Laws of the Commonwealth of Pennsylvania 177–183

(1810) (1794 Act) (persons "profanely curs[ing]," drinking excessively, "cock-fighting," or "play[ing] at cards, dice, billiards, bowls, shuffle-boards, or any game of hazard or address, for money").[9]

What we have here, then, is just the opposite of what we had in *Wilson* v. *Arkansas*. There, we emphasized that during the founding era a number of States had "enacted statutes specifically embracing" the common-law knock-and-announce rule, 514 U. S., at 933; here, by contrast, those very same States passed laws extending warrantless arrest authority to a host of nonviolent misdemeanors, and in so doing acted very much inconsistently with Atwater's claims about the Fourth Amendment's object. Of course, the Fourth

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[9] Given these early colonial and state laws, the fact that a number of States that ratified the Fourth Amendment generally incorporated common-law principles into their own constitutions or statutes, see *Wilson* v. *Arkansas*, 514 U. S. 927, 934 (1995), cannot aid Atwater here. Founding-era receptions of common law, whether by state constitution or state statute, generally provided that common-law rules were subject to statutory alteration. See, *e. g.*, Del. Const., Art. 25 (1776), 2 W. Swindler, Sources and Documents of United States Constitutions 203 (1973) (hereinafter Swindler) ("The common law of England . . . shall remain in force, unless [it] shall be altered by a future law of the legislature"); N. J. Const., Art. XXII (1776), 6 Swindler 452 ("[T]he common law of England . . . shall still remain in force, until [it] shall be altered by a future law of the Legislature"); N. Y. Const., Art. XXXV (1777), 7 Swindler 177–178 ("[S]uch parts of the common law of England, and of the statute law of England and Great Britain . . . as together did form the law of [New York on April 19, 1775,] shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same"); N. C. Laws 1778, ch. V, in 1 First Laws of the State of North Carolina 353 (J. Cushing ed. 1984) ("[A]ll such . . . Parts of the Common Law, as were heretofore in Force and Use within this Territory . . . which have not been . . . abrogated [or] repealed . . . are hereby declared to be in full Force within this State"); Ordinances of May 1776, ch. 5, § 6, 9 Statutes at Large of Virginia 127 (W. Hening ed. 1821) ("[T]he common law of England . . . shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony").

Amendment did not originally apply to the States, see *Barron* v. *Mayor of Baltimore*, 7 Pet. 243 (1833), but that does not make state practice irrelevant in unearthing the Amendment's original meaning. A number of state constitutional search-and-seizure provisions served as models for the Fourth Amendment, see, *e. g.*, N. H. Const. of 1784, pt. I, Art. XIX; Pa. Const. of 1776 (Declaration of Rights), Art. X, and the fact that many of the original States with such constitutional limitations continued to grant their own peace officers broad warrantless misdemeanor arrest authority undermines Atwater's contention that the founding generation meant to bar federal law enforcement officers from exercising the same authority. Given the early state practice, it is likewise troublesome for Atwater's view that just one year after the ratification of the Fourth Amendment, Congress vested federal marshals with "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." Act of May 2, 1792, ch. 28, § 9, 1 Stat. 265. Thus, as we have said before in only slightly different circumstances, the Second Congress apparently "saw no inconsistency between the Fourth Amendment and legislation giving United States marshals the same power as local peace officers" to make warrantless arrests. *United States* v. *Watson*, 423 U. S. 411, 420 (1976).[10]

The record thus supports Justice Powell's observation that "[t]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at

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[10] Courts and commentators alike have read the 1792 Act as conferring broad warrantless arrest authority on federal officers, and, indeed, the Act's passage "so soon after the adoption of the Fourth Amendment itself underscores the probability that the constitutional provision was intended to restrict entirely different practices." *Watson*, 423 U. S., at 429 (Powell, J., concurring); see also Amar, Fourth Amendment First Principles, 107 Harv. L. Rev., at 764, and n. 14.

all concerned about warrantless arrests by local constables and other peace officers." *Id.*, at 429 (concurring opinion). We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.

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Nor does Atwater's argument from tradition pick up any steam from the historical record as it has unfolded since the framing, there being no indication that her claimed rule has ever become "woven . . . into the fabric" of American law. *Wilson*, *supra*, at 933; see also *Payton* v. *New York*, 445 U. S., at 590 (emphasizing "the clear consensus among the States adhering to [a] well-settled common-law rule"). The story, on the contrary, is of two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace.

First, there is no support for Atwater's position in this Court's cases (apart from the isolated sentence in *Carroll*, already explained). Although the Court has not had much to say about warrantless misdemeanor arrest authority, what little we have said tends to cut against Atwater's argument. In discussing this authority, we have focused on the circumstance that an offense was committed in an officer's presence, to the omission of any reference to a breach-of-the-peace limitation.[11] See, *e. g.*, *United States* v. *Watson*, *supra*, at 418 ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony

[11] We need not, and thus do not, speculate whether the Fourth Amendment entails an "in the presence" requirement for purposes of misdemeanor arrests. Cf. *Welsh* v. *Wisconsin*, 466 U. S. 740, 756 (1984) (White, J., dissenting) ("[T]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment").

committed in his presence . . .”); *Carroll*, 267 U. S., at 156–157 (“The usual rule is that a police officer may arrest without warrant one . . . guilty of a misdemeanor if committed in his presence”); *Bad Elk* v. *United States*, 177 U. S. 529, 534, 536, n. 1 (1900) (noting common-law pedigree of state statute permitting warrantless arrest “[f]or a public offense committed or attempted in [officer's] presence”); *Kurtz* v. *Moffitt*, 115 U. S. 487, 499 (1885) (common-law presence requirement); cf. also *Welsh* v. *Wisconsin*, 466 U. S. 740, 756 (1984) (White, J., dissenting) (“‘[A]uthority to arrest without a warrant in misdemeanor cases may be enlarged by statute’”).

Second, and again in contrast with *Wilson*, it is not the case here that “[e]arly American courts . . . embraced” an accepted common-law rule with anything approaching unanimity. *Wilson* v. *Arkansas*, 514 U. S., at 933. To be sure, Atwater has cited several 19th-century decisions that, at least at first glance, might seem to support her contention that “warrantless misdemeanor arrest was unlawful when not [for] a breach of the peace.” Brief for Petitioners 17 (citing *Pow* v. *Beckner*, 3 Ind. 475, 478 (1852), *Commonwealth* v. *Carey*, 66 Mass. 246, 250 (1853), and *Robison* v. *Miner*, 68 Mich. 549, 556–559, 37 N. W. 21, 25 (1888)). But none is ultimately availing. *Pow* is fundamentally a “presence” case; it stands only for the proposition, not at issue here, see n. 11, *supra*, that a nonfelony arrest should be made while the offense is “in [the officer's] view and . . . still continuing” and not subsequently “upon vague information communicated to him.” 3 Ind., at 478. The language Atwater attributes to *Carey* (“[E]ven if he were a constable, he had no power to arrest for any misdemeanor without a warrant, except to stay a breach of the peace, or to prevent the commission of such an offense”) is taken from the reporter's summary of one of the party's arguments, not from the opinion of the court. While the court in *Carey* (through Chief Justice Shaw) said that “the old established rule of the common law” was that “a constable or other peace officer could not

arrest one without a warrant . . . if such crime were not an offence amounting in law to felony," it said just as clearly that the common-law rule could be "altered by the legislature" (notwithstanding Massachusetts's own Fourth Amendment equivalent in its State Constitution). 66 Mass., at 252. *Miner*, the third and final case upon which Atwater relies, was expressly overruled just six years after it was decided. In *Burroughs* v. *Eastman*, 101 Mich. 419, 59 N. W. 817 (1894), the Supreme Court of Michigan held that the language from *Miner* upon which the plaintiff there (and presumably Atwater here) relied "should not be followed," and then went on to offer the following: "[T]he question has arisen in many of our sister states, and the power to authorize arrest on view for offenses not amounting to breaches of the peace has been affirmed. Our attention has been called to no case, nor have we in our research found one, in which the contrary doctrine has been asserted." 101 Mich., at 425, 59 N. W., at 819 (collecting cases from, *e. g.*, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Ohio, and Texas).

The reports may well contain early American cases more favorable to Atwater's position than the ones she has herself invoked. But more to the point, we think, are the numerous early- and mid-19th-century decisions expressly sustaining (often against constitutional challenge) state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace. See, *e. g.*, *Mayo* v. *Wilson*, 1 N. H. 53 (1817) (upholding statute authorizing warrantless arrests of those unnecessarily traveling on Sunday against challenge based on state due process and search-and-seizure provisions); *Holcomb* v. *Cornish*, 8 Conn. 375 (1831) (upholding statute permitting warrantless arrests for "drunkenness, profane swearing, cursing or sabbath-breaking" against argument that "[t]he power of a justice of the peace to arrest and detain a citizen without complaint or warrant against him, is surely not given by the

common law"); *Jones* v. *Root*, 72 Mass. 435 (1856) (rebuffing constitutional challenge to statute authorizing officers "without a warrant [to] arrest any person or persons whom they may find in the act of illegally selling, transporting, or distributing intoxicating liquors"); *Main* v. *McCarty*, 15 Ill. 441, 442 (1854) (concluding that a law expressly authorizing arrests for city-ordinance violations was "not repugnant to the constitution or the general provisions of law"); *White* v. *Kent*, 11 Ohio St. 550 (1860) (upholding municipal ordinance permitting warrantless arrest of any person found violating any city ordinance or state law); *Davis* v. *American Soc. for Prevention of Cruelty to Animals*, 75 N. Y. 362 (1878) (upholding statute permitting warrantless arrest for misdemeanor violation of cruelty-to-animals prohibition). See generally Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 550, and n. 54 (1924) (collecting cases and observing that "[t]he states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence"); *id.*, at 706, nn. 570, 571 (collecting cases); 1 J. Bishop, New Criminal Procedure §§ 181, 183, pp. 101, n. 2, 103, n. 5 (4th ed. 1895) (same); W. Clark, Handbook of Criminal Procedure § 12, p. 50, n. 8 (2d ed. 1918) (same).

Finally, both the legislative tradition of granting warrantless misdemeanor arrest authority and the judicial tradition of sustaining such statutes against constitutional attack are buttressed by legal commentary that, for more than a century now, has almost uniformly recognized the constitutionality of extending warrantless arrest power to misdemeanors without limitation to breaches of the peace. See, *e. g.*, E. Fisher, Laws of Arrest § 59, p. 130 (1967) ("[I]t is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by

statute, and this has been done in many of the states"); Wilgus, *supra*, at 705–706 ("Statutes and municipal charters have quite generally authorized an officer to arrest for any misdemeanor whether a breach of the peace or not, without a warrant, if committed in the officer's presence. Such statutes are valid" (footnote omitted)); Clark, *supra*, § 12, at 50 ("In most, if not all, the states there are statutes and city ordinances, which are clearly valid, authorizing officers to arrest for certain misdemeanors without a warrant, when committed in their presence"); J. Beale, Criminal Pleading and Practice § 21, p. 20, and n. 7 (1899) ("By statute the power of peace officers to arrest without a warrant is often extended to all misdemeanors committed in their presence." "Such a statute is constitutional"); 1 Bishop, *supra*, § 183, at 103 ("[T]he power of arrest extends, possibly, to any indictable wrong in [an officer's] presence. . . . And statutes and ordinances widely permit these arrests for violations of municipal by-laws"); J. Bassett, Criminal Pleading and Practice § 89, p. 104 (2d ed. 1885) ("[A]s to the lesser misdemeanors, except breaches of the peace, the power extends only so far as some statute gives it"). But cf. H. Vorhees, Law of Arrest § 131, pp. 78–79 (1904) (acknowledging that "by authority of statute, city charter, or ordinance, [an officer] may arrest without a warrant, one who . . . commits a misdemeanor other than a breach of the peace," but suggesting that courts look with "disfavor" on such legislative enactments "as interfering with the constitutional liberties of the subject").

Small wonder, then, that today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace,[12] as do a host of congressional enactments.[13] The American Law Institute

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[12] See Appendix, *infra*.

[13] See, *e. g.,* 18 U. S. C. § 3052 (Federal Bureau of Investigation agents authorized to "make arrests without warrant for any offense against the United States committed in their presence"); § 3053 (same, for United

has long endorsed the validity of such legislation, see American Law Institute, Code of Criminal Procedure §21(a), p. 28 (1930); American Law Institute, Model Code of Pre-Arraignment Procedure §120.1(1)(c), p. 13 (1975), and the consensus, as stated in the current literature, is that statutes "remov[ing] the breach of the peace limitation and thereby permit[ting] arrest without warrant for *any* misdemeanor committed in the arresting officer's presence" have "'never been successfully challenged and stan[d] as the law of the land.'" 3 W. LaFave, Search and Seizure §5.1(b), pp. 13–14, and n. 76 (1996) (quoting *Higbee* v. *San Diego*, 911 F. 2d 377, 379 (CA9 1990)) (emphasis in original; footnote omitted). This, therefore, simply is not a case in which the claimant can point to "a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since." *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 60 (1991) (SCALIA, J., dissenting).

III

While it is true here that history, if not unequivocal, has expressed a decided, majority view that the police need not obtain an arrest warrant merely because a misdemeanor stopped short of violence or a threat of it, Atwater does not wager all on history.[14] Instead, she asks us to mint a new

States marshals and deputies); §3056(c)(1)(C) (same, for Secret Service agents); §3061(a)(2) (same, for postal inspectors); §3063(a)(3) (same, for Environmental Protection Agency officers); 19 U. S. C. §1589a(3) (same, for customs officers); 21 U. S. C. §878(a)(3) (same, for Drug Enforcement Administration agents); 25 U. S. C. §2803(3)(A) (same, for Bureau of Indian Affairs officers).

[14] And, indeed, the dissent chooses not to deal with history at all. See *post*, p. 360 (opinion of O'CONNOR, J.). As is no doubt clear from the text, the historical record is not nearly as murky as the dissent suggests. See, *e. g.*, *supra*, at 333–335 (parliamentary statutes clearly authorizing warrantless arrests for misdemeanor-level offenses), 337–338 (colonial and founding-era state statutes clearly authorizing same). History, moreover, is not just "one of the tools" relevant to a Fourth Amendment inquiry, *post*, at 361. JUSTICE O'CONNOR herself has observed that courts must

rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness. See *Wyoming* v. *Houghton*, 526 U. S. 295, 299–300 (1999); *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653 (1995). Atwater accordingly argues for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.[15]

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising

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be "reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights and has continued to receive the support of many state legislatures," *Tennessee* v. *Garner*, 471 U. S. 1, 26 (1985) (dissenting opinion), as the practice of making warrantless misdemeanor arrests surely was and has, see *supra*, at 337–345. Because here the dissent "claim[s] that [a] practic[e] accepted when the Fourth Amendment was adopted [is] now constitutionally impermissible," the dissent bears the "heavy burden" of justifying a departure from the historical understanding. 471 U. S., at 26.

[15] Although it is unclear from Atwater's briefs whether the rule she proposes would bar custodial arrests for fine-only offenses even when made pursuant to a warrant, at oral argument Atwater's counsel "concede[d] that if a warrant were obtained, this arrest . . . would . . . be reasonable." Tr. of Oral Arg. 5.

extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. See, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218, 234–235 (1973). Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules. See *New York* v. *Belton*, 453 U. S. 454, 458 (1981) (Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and not "'qualified by all sorts of ifs, ands, and buts'").[16]

At first glance, Atwater's argument may seem to respect the values of clarity and simplicity, so far as she claims that the Fourth Amendment generally forbids warrantless arrests for minor crimes not accompanied by violence or some

[16] *Terry* v. *Ohio*, 392 U. S. 1 (1968), upon which the dissent relies, see *post*, at 366, is not to the contrary. *Terry* certainly supports a more finely tuned approach to the Fourth Amendment when police act without the traditional justification that either a warrant (in the case of a search) or probable cause (in the case of arrest) provides; but at least in the absence of "extraordinary" circumstances, *Whren* v. *United States*, 517 U. S. 806, 818 (1996), there is no comparable cause for finicking when police act with such justification.

demonstrable threat of it (whether "minor crime" be defined as a fine-only traffic offense, a fine-only offense more generally, or a misdemeanor[17]). But the claim is not ultimately so simple, nor could it be, for complications arise the moment we begin to think about the possible applications of the several criteria Atwater proposes for drawing a line between minor crimes with limited arrest authority and others not so restricted.

One line, she suggests, might be between "jailable" and "fine-only" offenses, between those for which conviction could result in commitment and those for which it could not. The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, see *Berkemer* v. *McCarty*, 468 U. S. 420, 431, n. 13 (1984) ("[O]fficers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person"), but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender?[18] Is the weight of the marijuana a gram above or a gram below

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[17] Compare, *e. g.*, Brief for Petitioners 46 ("fine-only") with, *e. g.*, Tr. of Oral Arg. 11 (misdemeanors). Because the difficulties attendant to any major crime-minor crime distinction are largely the same, we treat them together.

[18] See, *e. g.*, *Welsh*, 466 U. S., at 756 (first DUI offense subject to maximum fine of $200; subsequent offense punishable by one year's imprisonment); *Carroll* v. *United States*, 267 U. S. 132, 154 (1925) (first offense of smuggling liquor subject to maximum fine of $500; subsequent offense punishable by 90 days' imprisonment); 21 U. S. C. §§ 844a(a), (c) (first offense for possession of "personal use amount" of controlled substance subject to maximum $10,000 fine; subsequent offense punishable by imprisonment); Tex. Penal Code Ann. §§ 42.01, 49.02, 12.23, 12.43 (1994 and Supp. 2001) (first public drunkenness or disorderly conduct offense subject to maximum $500 fine; third offense punishable by 180 days' imprisonment).

the fine-only line?[19] Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge?[20] And so on.

But Atwater's refinements would not end there. She represents that if the line were drawn at nonjailable traffic offenses, her proposed limitation should be qualified by a proviso authorizing warrantless arrests where "necessary for enforcement of the traffic laws or when [an] offense would otherwise continue and pose a danger to others on the road." Brief for Petitioners 46 (internal quotation marks omitted). (Were the line drawn at misdemeanors generally, a comparable qualification would presumably apply.) The proviso only compounds the difficulties. Would, for instance, either exception apply to speeding? At oral argument, Atwater's counsel said that "it would not be reasonable to arrest a driver for speeding unless the speeding rose to the level of reckless driving." Tr. of Oral Arg. 16. But is it not fair to expect that the chronic speeder will speed again despite a citation in his pocket, and should that not qualify as showing that the "offense would . . . continue" under Atwater's rule? And why, as a constitutional matter, should we assume that only reckless driving will "pose a danger to others on the road" while speeding will not?

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[19] See, *e. g.*, 21 U. S. C. §§ 844, 844a (possession of "personal use amount" of a controlled substance subject to maximum $10,000 fine; possession of larger amount punishable by one year's imprisonment); Tex. Health & Safety Code Ann. § 481.121(b) (Supp. 2001) (possession of four ounces or less of marijuana a misdemeanor; possession of more than four ounces a felony). See generally National Survey of State Laws 151–188 (3d R. Leiter ed. 1999) (surveying state laws concerning drug possession).

[20] For instance, the act of allowing a small child to stand unrestrained in the front seat of a moving vehicle at least arguably constitutes child endangerment, which under Texas law is a state jail felony. Tex. Penal Code Ann. §§ 22.041(c), (f) (Supp. 2001). Cf. also 21 Am. Jur. 2d, Criminal Law § 28 (1998) ("[S]ome statutory schemes permit courts in their discretion to term certain offenses as felonies or as misdemeanors").

There is no need for more examples to show that Atwater's general rule and limiting proviso promise very little in the way of administrability. It is no answer that the police routinely make judgments on grounds like risk of immediate repetition; they surely do and should. But there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself. It is the difference between no basis for legal action challenging the discretionary judgment, on the one hand, and the prospect of evidentiary exclusion or (as here) personal § 1983 liability for the misapplication of a constitutional standard, on the other. Atwater's rule therefore would not only place police in an almost impossible spot but would guarantee increased litigation over many of the arrests that would occur.[21] For all these reasons, Atwater's various distinctions between permissible and impermissible arrests for minor crimes strike us as "very unsatisfactory line[s]" to require police officers to draw on a moment's notice. *Carroll* v. *United States*, 267 U. S., at 157.

One may ask, of course, why these difficulties may not be answered by a simple tie breaker for the police to follow in the field: if in doubt, do not arrest. The first answer is that in practice the tie breaker would boil down to something akin to a least-restrictive-alternative limitation, which is itself one of those "ifs, ands, and buts" rules, *New York* v. *Belton*, 453 U. S., at 458, generally thought inappropriate in working out Fourth Amendment protection. See, *e. g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602,

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[21] See *United States* v. *Watson*, 423 U. S. 411, 423–424 (1976) ("[T]he judgment of the Nation and Congress has . . . long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like").

629, n. 9 (1989) (collecting cases); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 557–558, n. 12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers"). Beyond that, whatever help the tie breaker might give would come at the price of a systematic disincentive to arrest in situations where even Atwater concedes that arresting would serve an important societal interest. An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect's risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial. Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked, as Atwater herself acknowledges.[22]

Just how easily the costs could outweigh the benefits may be shown by asking, as one Member of this Court did at oral argument, "how bad the problem is out there." Tr. of Oral Arg. 20. The very fact that the law has never jelled the way Atwater would have it leads one to wonder whether warrantless misdemeanor arrests need constitutional atten-

[22] The doctrine of qualified immunity is not the panacea the dissent believes it to be. See *post*, at 367–368. As the dissent itself rightly acknowledges, even where personal liability does not ultimately materialize, the mere "specter of liability" may inhibit public officials in the discharge of their duties, *post*, at 368, for even those officers with airtight qualified immunity defenses are forced to incur "the expenses of litigation" and to endure the "diversion of [their] official energy from pressing public issues," *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982). Further, and somewhat perversely, the disincentive to arrest produced by Atwater's opaque standard would be most pronounced in the very situations in which police officers can least afford to hesitate: when acting "on the spur (and in the heat) of the moment," *supra*, at 347. We could not seriously expect that when events were unfolding fast, an officer would be able to tell with much confidence whether a suspect's conduct qualified, or even "reasonably" qualified, under one of the exceptions to Atwater's general no-arrests rule.

tion, and there is cause to think the answer is no. So far as such arrests might be thought to pose a threat to the probable-cause requirement, anyone arrested for a crime without formal process, whether for felony or misdemeanor, is entitled to a magistrate's review of probable cause within 48 hours, *County of Riverside* v. *McLaughlin*, 500 U. S., at 55–58, and there is no reason to think the procedure in this case atypical in giving the suspect a prompt opportunity to request release, see Tex. Transp. Code Ann. § 543.002 (1999) (persons arrested for traffic offenses to be taken "immediately" before a magistrate). Many jurisdictions, moreover, have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. See, *e. g.*, Ala. Code § 32–1–4 (1999); Cal. Veh. Code Ann. § 40504 (West 2000); Ky. Rev. Stat. Ann. §§ 431.015(1), (2) (Michie 1999); La. Rev. Stat. Ann. § 32:391 (West 1989); Md. Transp. Code Ann. § 26–202(a)(2) (1999); S. D. Codified Laws § 32–33–2 (1998); Tenn. Code Ann. § 40–7–118(b)(1) (1997); Va. Code Ann. § 46.2–936 (Supp. 2000). It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation, for, as Atwater's own *amici* emphasize, it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. See Brief for Institute on Criminal Justice at the University of Minnesota Law School and Eleven Leading Experts on Law Enforcement and Corrections Administration and Policy as *Amici Curiae* 11 (the use of custodial arrests for minor offenses "[a]ctually [c]ontradicts [l]aw [e]nforcement [i]nterests"). Finally, and significantly, under current doctrine the preference for categorical treatment of Fourth Amendment claims gives way to individualized review when a defendant makes a colorable

argument that an arrest, with or without a warrant, was "conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests." *Whren* v. *United States*, 517 U. S., at 818; see also *Graham* v. *Connor*, 490 U. S. 386, 395–396 (1989) (excessive force actionable under § 1983).

The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress. Indeed, when Atwater's counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one.[23] We are sure that there are others,[24] but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests.[25] That fact caps the reasons for rejecting Atwater's request

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[23] He referred to a newspaper account of a girl taken into custody for eating french fries in a Washington, D. C., subway station. Tr. of Oral Arg. 20–21; see also Washington Post, Nov. 16, 2000, p. A1 (describing incident). Not surprisingly, given the practical and political considerations discussed in text, the Washington Metro Transit Police recently revised their "zero-tolerance" policy to provide for citation in lieu of custodial arrest of subway snackers. Washington Post, Feb. 27, 2001, at B1.

[24] One of Atwater's *amici* described a handful in its brief. Brief for American Civil Liberties Union et al. as *Amici Curiae* 7–8 (reporting arrests for littering, riding a bicycle without a bell or gong, operating a business without a license, and "walking as to create a hazard").

[25] The dissent insists that a minor traffic infraction "may often serve as an excuse" for harassment, and that fine-only misdemeanor prohibitions "may be enforced" in an arbitrary manner. *Post*, at 372. Thus, the dissent warns, the rule that we recognize today "has potentially serious consequences for the everyday lives of Americans" and "carries with it grave potential for abuse." *Post*, at 371, 372. But the dissent's own language (*e. g.*, "may," "potentially") betrays the speculative nature of its claims. Noticeably absent from the parade of horribles is any indication that the "potential for abuse" has ever ripened into a reality. In fact, as we have pointed out in text, there simply is no evidence of widespread abuse of minor-offense arrest authority.

for the development of a new and distinct body of constitutional law.

Accordingly, we confirm today what our prior cases have intimated: the standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Dunaway* v. *New York*, 442 U. S. 200, 208 (1979). If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.

IV

Atwater's arrest satisfied constitutional requirements. There is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. She admits that neither she nor her children were wearing seatbelts, as required by Tex. Transp. Code Ann. § 545.413 (1999). Turek was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not Atwater's arrest was in some sense necessary.

Nor was the arrest made in an "extraordinary manner, unusually harmful to [her] privacy or . . . physical interests." *Whren* v. *United States*, 517 U. S., at 818. As our citations in *Whren* make clear, the question whether a search or seizure is "extraordinary" turns, above all else, on the manner in which the search or seizure is executed. See *ibid.* (citing *Tennessee* v. *Garner*, 471 U. S. 1 (1985) ("seizure by means of deadly force"), *Wilson* v. *Arkansas*, 514 U. S. 927 (1995) ("unannounced entry into a home"), *Welsh* v. *Wisconsin*, 466 U. S. 740 (1984) ("entry into a home without a warrant"), and *Winston* v. *Lee*, 470 U. S. 753 (1985) ("physical penetration of the body")). Atwater's arrest was surely "humiliating," as she says in her brief, but it was no more "harmful to . . . privacy or . . . physical interests" than the normal custodial arrest. She was handcuffed, placed in a squad car, and

taken to the local police station, where officers asked her to remove her shoes, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone, for about an hour, after which she was taken before a magistrate, and released on $310 bond. The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.

The Court of Appeals's en banc judgment is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

State Statutes Authorizing Warrantless Misdemeanor Arrests

Ala. Code § 15–10–3(a)(1) (Supp. 2000) (authorizing warrantless arrest for any "public offense" committed in the presence of the officer);

Alaska Stat. Ann. § 12.25.030(a)(1) (2000) ("for a crime committed . . . in the presence of the person making the arrest");

Ariz. Rev. Stat. Ann. § 13–3883(a)(2) (Supp. 2000) (for a misdemeanor committed in the officer's presence);

Ark. Code Ann. § 16–81–106(b)(2)(a) (Supp. 1999) ("where a public offense is committed in [the officer's] presence");

Cal. Penal Code Ann. § 836(a)(1) (West Supp. 2001) (where "the person to be arrested has committed a public offense in the officer's presence");

Colo. Rev. Stat. § 16–3–102(1)(b) (2000) (when "[a]ny crime has been or is being committed" in the officer's presence);

Conn. Gen. Stat. § 54–1f(a) (Supp. 2000) (for "any offense" when arrestee is taken in the act);

Del. Code Ann., Tit. 11, § 1904(a)(1) (1995) (for any misdemeanor committed in the officer's presence);

D. C. Code Ann. § 23–581(a)(1)(B) (1996) (where officer has probable cause to believe a person has committed an offense in the officer's presence);

Fla. Stat. § 901.15(1) (Supp. 2001) (for misdemeanor or ordinance violation committed in presence of the officer);

Ga. Code Ann. § 17–4–20(a) (Supp. 1996) ("for a crime . . . if the offense is committed in [the] officer's presence");

Haw. Rev. Stat. § 803–5(a) (1999) ("when the officer has probable cause to believe that [a] person has committed any offense");

Idaho Code § 19–603(1) (1997) ("[f]or a public offense committed or attempted in [officer's] presence");

Ill. Comp. Stat., ch. 725, § 5/107–2(1)(c) (1992) (when the officer "has reasonable grounds to believe that the person is committing or has committed an offense");

Ind. Code § 35–33–1–1(a)(4) (Supp. 2000) (when the officer has probable cause to believe a person "is committing or attempting to commit a misdemeanor in the officer's presence");

Iowa Code § 804.7(1) (1994) ("[f]or a public offense committed or attempted in the peace officer's presence");

Kan. Stat. Ann. § 22–2401(d) (1999 Cum. Supp.) (for "[a]ny crime, except a traffic infraction or a cigarette or tobacco infraction," committed in the officer's view);

Ky. Rev. Stat. Ann. § 431.005(1)(d) (Michie 1999) (for any offense punishable by confinement committed in the officer's presence); § 431.015(2) (Supp. 2000) (officer should generally issue citation rather than arrest for certain minor "violations");

La. Code Crim. Proc. Ann., Art. 213(3) (West 1991) (where the officer "has reasonable cause to believe that the person to be arrested has committed an offense");

Me. Rev. Stat. Ann., Tit. 15, § 704 (1980) ("persons found violating any law of the State or any legal ordinance or bylaw

of a town"); Tit. 17–A, § 15(1)(B) (1983 and Supp. 2000) (for misdemeanors committed in the officer's presence);

Md. Ann. Code, Art. 27, § 594B(a) (1996 and 2000 Supp.) (any person who commits, or attempts to commit, "any felony or misdemeanor" in the presence of an officer);

Mass. Gen. Laws, ch. 276, § 28 (1997) (for designated misdemeanor offenses); ch. 272, § 60 (for littering offenses where identity of arrestee is not known to officer);

Mich. Comp. Laws Ann. § 764.15(1)(a) (West 2000) (for felony, misdemeanor, or ordinance violation committed in the officer's presence);

Minn. Stat. § 629.34(1)(c)(1) (Supp. 2001) ("when a public offense has been committed or attempted in the officer's presence");

Miss. Code Ann. § 99–3–7 (Supp. 1998) (for indictable offense committed in presence of officer); § 45–3–21(1)(a)(vi) (by Highway Safety Patrol Officers of "any person or persons committing or attempting to commit any misdemeanor, felony or breach of the peace within their presence or view");

Mo. Rev. Stat. § 479.110 (2000) (of "any person who commits an offense in [the officer's] presence");

Mont. Code Ann. § 46–6–311(1) (1997) (if "the officer has probable cause to believe that the person is committing an offense");

Neb. Rev. Stat. § 29–404.02(2)(d) (1995) (when the officer has probable cause to believe that the person has committed a misdemeanor in his presence);

Nev. Rev. Stat. § 171.172 (1997) (in fresh pursuit of a person who commits "any criminal offense" in the presence of the officer);

N. H. Rev. Stat. Ann. § 614:7 (Supp. 2000) (in fresh pursuit of any person who has committed "any criminal offense" in the presence of the officer); § 594:10(I)(a) (upon probable

cause for misdemeanor or violation committed in officer's presence);

N. J. Stat. Ann. § 53:2–1 (West Supp. 2000) ("for violations of the law committed in [the officers'] presence");

N. M. Stat. Ann. § 3–13–2(A)(4)(d) (1999) ("any person in the act of violating the laws of the state or the ordinances of the municipality"); § 30–16–16(B) (1994) (for falsely obtaining services or accommodations); § 30–16–23 (of any person officer has probable cause to believe has committed the crime of shoplifting);

N. Y. Crim. Proc. Law §§ 140.10(1)(a) and (2) (McKinney Supp. 2001) (when officer has probable cause to believe any offense has been committed in his presence and probable cause to believe person to be arrested committed the offense);

N. C. Gen. Stat. § 15A–401(b) (1999) (where an officer has probable cause to believe the person has committed "a criminal offense" in the officer's presence and for misdemeanors out of the officers presence in certain circumstances);

N. D. Cent. Code § 29–06–15(1)(a) (Supp. 1999) ("[f]or a public offense, committed or attempted in the officer's presence");

Ohio Rev. Code Ann. § 2935.03 (1997 and Supp. 2000) (of a person "found violating . . . a law of this state, an ordinance of a municipal corporation, or a resolution of a township"); but see § 2935.26 (1997) (providing that notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation, except in specified circumstances);

Okla. Stat., Tit. 22, § 196(1) (Supp. 2001) ("[f]or a public offense, committed or attempted in [the officer's] presence");

Ore. Rev. Stat. § 133.310(1) (1997) (upon probable cause for any felony, Class A misdemeanor, or any other offense in the

officer's presence except "traffic infractions" and minor "violations");

Pa. Stat. Ann., Tit. 71, § 252(a) (Purdon 1990) ("for all violations of the law, including laws regulating the use of the highways, which they may witness");

R. I. Gen. Laws § 12–7–3 (2000) (for misdemeanors and petty misdemeanors where "[t]he officer has reasonable grounds to believe that [the] person cannot be arrested later, or [m]ay cause injury to himself or herself or others or loss or damage to property unless immediately arrested");

S. C. Code Ann. § 17–13–30 (1985) (of persons who, in the presence of the officer, "violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter");

S. D. Codified Laws § 23A–3–2 (1998) ("[f]or a public offense, other than a petty offense, committed or attempted in [the officer's] presence");

Tenn. Code Ann. § 40–7–103(a)(1) (Supp. 2000) ("[f]or a public offense committed or a breach of the peace threatened in the officer's presence"); see also § 40–7–118(b)(1) (1997) (officer who has arrested a person for the commission of a misdemeanor should generally issue a citation to such arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate);

Tex. Code Crim. Proc. Ann., Art. 14.01 (Vernon 1977) ("for any offense committed in his presence or within his view");

Utah Code Ann. § 10–3–915 (1999) (for "any offense directly prohibited by the laws of this state or by ordinance"); § 77–7–2 (for any public offense committed in presence of officer);

Vt. Rule Crim. Proc. 3(a) (2000) (where officer has probable cause to believe that "a crime" is committed in his presence); see also Rule 3(c) (law enforcement officer acting without warrant who is authorized to arrest a person for a misdemeanor should generally issue a citation to appear before a judicial officer in lieu of arrest);

Va. Code Ann. § 19.2–81 (2000) (of "any person who commits any crime in the presence of [an] officer");

Wash. Rev. Code § 10.31.100 (Supp. 2001), as amended by 2000 Wash. Laws 119, § 4 (for misdemeanors committed in the presence of the officer);

W. Va. Code § 62–10–9 (2000) ("for all violations of any of the criminal laws of the United States, or of this state, when committed in [an officer's] presence");

Wis. Stat. § 968.07(1)(d) (1998) (when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime"); and

Wyo. Stat. Ann. § 7–2–102(b)(i) (1999) (when "[a]ny criminal offense" is committed "in the officer's presence").

JUSTICE O'CONNOR, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures." The Court recognizes that the arrest of Gail Atwater was a "pointless indignity" that served no discernible state interest, *ante*, at 347, and yet holds that her arrest was constitutionally permissible. Because the Court's position is inconsistent with the explicit guarantee of the Fourth Amendment, I dissent.

I

A full custodial arrest, such as the one to which Ms. Atwater was subjected, is the quintessential seizure. See *Payton* v. *New York*, 445 U. S. 573, 585 (1980). When a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable. See *ibid.* It is beyond cavil that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania* v. *Mimms,* 434 U. S. 106, 108–109 (1977) *(per curiam)* (quoting *Terry* v. *Ohio,* 392 U. S. 1, 19

(1968)). See also, *e. g., United States* v. *Ramirez*, 523 U. S. 65, 71 (1998); *Maryland* v. *Wilson*, 519 U. S. 408, 411 (1997); *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996); *Florida* v. *Jimeno*, 500 U. S. 248, 250 (1991); *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977).

We have "often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity." *Tennessee* v. *Garner*, 471 U. S. 1, 13 (1985). But history is just one of the tools we use in conducting the reasonableness inquiry. See *id.*, at 13–19; see also *Wilson* v. *Arkansas*, 514 U. S. 927, 929 (1995); *Wyoming* v. *Houghton*, 526 U. S. 295, 307 (1999) (BREYER, J., concurring). And when history is inconclusive, as the majority amply demonstrates it is in this case, see *ante*, at 326–345, we will "evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, *supra*, at 300. See also, *e. g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989); *Tennessee* v. *Garner*, *supra*, at 8; *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *Pennsylvania* v. *Mimms*, *supra*, at 109. In other words, in determining reasonableness, "[e]ach case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931).

The majority gives a brief nod to this bedrock principle of our Fourth Amendment jurisprudence, and even acknowledges that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case." *Ante*, at 347. But instead of remedying this imbalance, the majority allows itself to be swayed by the worry that "every discretionary judgment in the field [will] be converted into an occasion for constitutional review." *Ibid.* It therefore mints a new rule that "[i]f an officer has probable cause to believe that an indi-

vidual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Ante*, at 354. This rule is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment.

As the majority tacitly acknowledges, we have never considered the precise question presented here, namely, the constitutionality of a warrantless arrest for an offense punishable only by fine. Cf. *ibid.* Indeed, on the rare occasions that Members of this Court have contemplated such an arrest, they have indicated disapproval. See, *e. g.*, *Gustafson* v. *Florida*, 414 U. S. 260, 266–267 (1973) (Stewart, J., concurring) ("[A] persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made"); *United States* v. *Robinson*, 414 U. S. 218, 238, n. 2 (1973) (Powell, J., concurring) (the validity of a custodial arrest for a minor traffic offense is not "self-evident").

To be sure, we have held that the existence of probable cause is a necessary condition for an arrest. See *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979). And in the case of felonies punishable by a term of imprisonment, we have held that the existence of probable cause is also a sufficient condition for an arrest. See *United States* v. *Watson*, 423 U. S. 411, 416–417 (1976). In *Watson*, however, there was a clear and consistently applied common law rule permitting warrantless felony arrests. See *id.*, at 417–422. Accordingly, our inquiry ended there and we had no need to assess the reasonableness of such arrests by weighing individual liberty interests against state interests. Cf. *Wyoming* v. *Houghton*, *supra*, at 299–300; *Tennessee* v. *Garner*, *supra*, at 26 (O'CONNOR, J., dissenting) (criticizing majority for disregarding undisputed common law rule).

Here, however, we have no such luxury. The Court's thorough exegesis makes it abundantly clear that warrantless

misdemeanor arrests were not the subject of a clear and consistently applied rule at common law. See, *e. g.*, *ante*, at 332 (finding "disagreement, not unanimity, among both the common-law jurists and the text writers"); *ante*, at 335 (acknowledging that certain early English statutes serve only to "riddle Atwater's supposed common-law rule with enough exceptions to unsettle any contention [that there was a clear common-law rule barring warrantless arrests for misdemeanors that were not breaches of the peace]"). We therefore must engage in the balancing test required by the Fourth Amendment. See *Wyoming* v. *Houghton*, *supra*, at 299–300. While probable cause is surely a necessary condition for warrantless arrests for fine-only offenses, see *Dunaway* v. *New York*, *supra*, at 213–214, any realistic assessment of the interests implicated by such arrests demonstrates that probable cause alone is not a sufficient condition. See *infra*, at 364–366.

Our decision in *Whren* v. *United States*, 517 U. S. 806 (1996), is not to the contrary. The specific question presented there was whether, in evaluating the Fourth Amendment reasonableness of a traffic stop, the subjective intent of the police officer is a relevant consideration. *Id.*, at 808, 814. We held that it is not, and stated that "[t]he making of a traffic stop . . . is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." *Id.*, at 818.

We of course did not have occasion in *Whren* to consider the constitutional preconditions for warrantless arrests for fine-only offenses. Nor should our words be taken beyond their context. There are significant qualitative differences between a traffic stop and a full custodial arrest. While both are seizures that fall within the ambit of the Fourth Amendment, the latter entails a much greater intrusion on an individual's liberty and privacy interests. As we have said, "[a] motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend

a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way." *Berkemer* v. *McCarty*, 468 U. S. 420, 437 (1984). Thus, when there is probable cause to believe that a person has violated a minor traffic law, there can be little question that the state interest in law enforcement will justify the relatively limited intrusion of a traffic stop. It is by no means certain, however, that where the offense is punishable only by fine, "probable cause to believe the law has been broken [will] 'outbalanc[e]' private interest in avoiding" a full custodial arrest. *Whren* v. *United States*, *supra*, at 818. Justifying a full arrest by the same quantum of evidence that justifies a traffic stop—even though the offender cannot ultimately be imprisoned for her conduct—defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures.

A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. *United States* v. *Robinson*, *supra*. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well. See *New York* v. *Belton*, 453 U. S. 454 (1981). The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. See *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991). Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. Rosazza & Cook, Jail Intake: Managing A Critical Function—Part One: Resources, 13 American Jails 35 (Mar./Apr. 1999). And once the period of custody is over, the fact of the arrest is a per-

manent part of the public record. Cf. *Paul* v. *Davis*, 424 U. S. 693 (1976).

We have said that "the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." *Welsh* v. *Wisconsin*, 466 U. S. 740, 754, n. 14 (1984). If the State has decided that a fine, and not imprisonment, is the appropriate punishment for an offense, the State's interest in taking a person suspected of committing that offense into custody is surely limited, at best. This is not to say that the State will never have such an interest. A full custodial arrest may on occasion vindicate legitimate state interests, even if the crime is punishable only by fine. Arrest is the surest way to abate criminal conduct. It may also allow the police to verify the offender's identity and, if the offender poses a flight risk, to ensure her appearance at trial. But when such considerations are not present, a citation or summons may serve the State's remaining law enforcement interests every bit as effectively as an arrest. Cf. Lodging for State of Texas et al. as *Amici Curiae* (Texas Department of Public Safety, Student Handout, Traffic Law Enforcement 1 (1999)) ("Citations. . . . Definition—a means of getting violators to court without physical arrest. A citation should be used when it will serve this purpose except when by issuing a citation and releasing the violator, the safety of the public and/or the violator might be imperiled as in the case of D. W. I.").

Because a full custodial arrest is such a severe intrusion on an individual's liberty, its reasonableness hinges on "the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S., at 300. In light of the availability of citations to promote a State's interests when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. Giving police

officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable. Instead, I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest. *Terry* v. *Ohio*, 392 U. S., at 21.

The majority insists that a bright-line rule focused on probable cause is necessary to vindicate the State's interest in easily administrable law enforcement rules. See *ante*, at 347–351. Probable cause itself, however, is not a model of precision. "The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a [crime] has been committed—must be measured by the facts of the particular case." *Wong Sun* v. *United States*, 371 U. S. 471, 479 (1963) (citation omitted). The rule I propose—which merely requires a legitimate reason for the decision to escalate the seizure into a full custodial arrest—thus does not undermine an otherwise "clear and simple" rule. Cf. *ante*, at 347.

While clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections. What the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment. Over the past 30 years, it appears that the *Terry* rule has been workable and easily applied by officers on the street.

At bottom, the majority offers two related reasons why a bright-line rule is necessary: the fear that officers who arrest for fine-only offenses will be subject to "personal [42 U. S. C.]

§ 1983 liability for the misapplication of a constitutional standard," *ante,* at 350, and the resulting "systematic disincentive to arrest . . . where . . . arresting would serve an important societal interest," *ante,* at 351. These concerns are certainly valid, but they are more than adequately resolved by the doctrine of qualified immunity.

Qualified immunity was created to shield government officials from civil liability for the performance of discretionary functions so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Harlow* v. *Fitzgerald,* 457 U. S. 800, 818 (1982). This doctrine is "the best attainable accommodation of competing values," namely, the obligation to enforce constitutional guarantees and the need to protect officials who are required to exercise their discretion. *Id.,* at 814.

In *Anderson* v. *Creighton,* 483 U. S. 635 (1987), we made clear that the standard of reasonableness for a search or seizure under the Fourth Amendment is distinct from the standard of reasonableness for qualified immunity purposes. *Id.,* at 641. If a law enforcement officer "reasonably but mistakenly conclude[s]" that the constitutional predicate for a search or seizure is present, he "should not be held personally liable." *Ibid.*

This doctrine thus allays any concerns about liability or disincentives to arrest. If, for example, an officer reasonably thinks that a suspect poses a flight risk or might be a danger to the community if released, cf. *ante,* at 351, he may arrest without fear of the legal consequences. Similarly, if an officer reasonably concludes that a suspect may possess more than four ounces of marijuana and thus might be guilty of a felony, cf. *ante,* at 348–349, and n. 19, 351, the officer will be insulated from liability for arresting the suspect even if the initial assessment turns out to be factually incorrect. As we have said, "officials will not be liable for mere mistakes in judgment." *Butz* v. *Economou,* 438 U. S. 478, 507

(1978). Of course, even the specter of liability can entail substantial social costs, such as inhibiting public officials in the discharge of their duties. See, *e. g.*, *Harlow* v. *Fitzgerald*, *supra*, at 814. We may not ignore the central command of the Fourth Amendment, however, to avoid these costs.

II

The record in this case makes it abundantly clear that Ms. Atwater's arrest was constitutionally unreasonable. Atwater readily admits—as she did when Officer Turek pulled her over—that she violated Texas' seatbelt law. Brief for Petitioners 2–3; Record 381, 384. While Turek was justified in stopping Atwater, see *Whren* v. *United States*, 517 U. S., at 819, neither law nor reason supports his decision to arrest her instead of simply giving her a citation. The officer's actions cannot sensibly be viewed as a permissible means of balancing Atwater's Fourth Amendment interests with the State's own legitimate interests.

There is no question that Officer Turek's actions severely infringed Atwater's liberty and privacy. Turek was loud and accusatory from the moment he approached Atwater's car. Atwater's young children were terrified and hysterical. Yet when Atwater asked Turek to lower his voice because he was scaring the children, he responded by jabbing his finger in Atwater's face and saying, "You're going to jail." Record 382, 384. Having made the decision to arrest, Turek did not inform Atwater of her right to remain silent. *Id.*, at 390, 704. He instead asked for her license and insurance information. *Id.*, at 382. But cf. *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Atwater asked if she could at least take her children to a friend's house down the street before going to the police station. Record 384. But Turek—who had just castigated Atwater for not caring for her children—refused and said he would take the children into custody as well. *Id.*, at 384, 427, 704–705. Only the intervention of neighborhood

children who had witnessed the scene and summoned one of Atwater's friends saved the children from being hauled to jail with their mother. *Id.*, at 382, 385–386.

With the children gone, Officer Turek handcuffed Ms. Atwater with her hands behind her back, placed her in the police car, and drove her to the police station. *Id.*, at 386–387. Ironically, Turek did not secure Atwater in a seatbelt for the drive. *Id.*, at 386. At the station, Atwater was forced to remove her shoes, relinquish her possessions, and wait in a holding cell for about an hour. *Id.*, at 387, 706. A judge finally informed Atwater of her rights and the charges against her, and released her when she posted bond. *Id.*, at 387–388, 706. Atwater returned to the scene of the arrest, only to find that her car had been towed. *Id.*, at 389.

Ms. Atwater ultimately pleaded no contest to violating the seatbelt law and was fined $50. *Id.*, at 403. Even though that fine was the maximum penalty for her crime, Tex. Transp. Code Ann. § 545.413(d) (1999), and even though Officer Turek has never articulated any justification for his actions, the city contends that arresting Atwater was constitutionally reasonable because it advanced two legitimate interests: "the enforcement of child safety laws and encouraging [Atwater] to appear for trial." Brief for Respondents 15.

It is difficult to see how arresting Atwater served either of these goals any more effectively than the issuance of a citation. With respect to the goal of law enforcement generally, Atwater did not pose a great danger to the community. She had been driving very slowly—approximately 15 miles per hour—in broad daylight on a residential street that had no other traffic. Record 380. Nor was she a repeat offender; until that day, she had received one traffic citation in her life—a ticket, more than 10 years earlier, for failure to signal a lane change. *Id.*, at 378. Although Officer Turek had stopped Atwater approximately three months earlier because he thought that Atwater's son was not wearing a seatbelt, *id.*, at 420, Turek had been mistaken, *id.*, at 379, 703.

Moreover, Atwater immediately accepted responsibility and apologized for her conduct. *Id.*, at 381, 384, 420. Thus, there was every indication that Atwater would have buckled herself and her children in had she been cited and allowed to leave.

With respect to the related goal of child welfare, the decision to arrest Atwater was nothing short of counterproductive. Atwater's children witnessed Officer Turek yell at their mother and threaten to take them all into custody. Ultimately, they were forced to leave her behind with Turek, knowing that she was being taken to jail. Understandably, the 3-year-old boy was "very, very, very traumatized." *Id.*, at 393. After the incident, he had to see a child psychologist regularly, who reported that the boy "felt very guilty that he couldn't stop this horrible thing . . . he was powerless to help his mother or sister." *Id.*, at 396. Both of Atwater's children are now terrified at the sight of any police car. *Id.*, at 393, 395. According to Atwater, the arrest "just never leaves us. It's a conversation we have every other day, once a week, and it's—it raises its head constantly in our lives." *Id.*, at 395.

Citing Atwater surely would have served the children's interests well. It would have taught Atwater to ensure that her children were buckled up in the future. It also would have taught the children an important lesson in accepting responsibility and obeying the law. Arresting Atwater, though, taught the children an entirely different lesson: that "the bad person could just as easily be the policeman as it could be the most horrible person they could imagine." *Ibid.*

Respondents also contend that the arrest was necessary to ensure Atwater's appearance in court. Atwater, however, was far from a flight risk. A 16-year resident of Lago Vista, population 2,486, Atwater was not likely to abscond. See Record 376; Texas State Data Center, 1997 Total Population Estimates for Texas Places 15 (Sept. 1998). Although she

was unable to produce her driver's license because it had been stolen, she gave Officer Turek her license number and address. Record 386. In addition, Officer Turek knew from their previous encounter that Atwater was a local resident.

The city's justifications fall far short of rationalizing the extraordinary intrusion on Gail Atwater and her children. Measuring "the degree to which [Atwater's custodial arrest was] needed for the promotion of legitimate governmental interests," against "the degree to which it intrud[ed] upon [her] privacy," *Wyoming* v. *Houghton*, 526 U. S., at 300, it can hardly be doubted that Turek's actions were disproportionate to Atwater's crime. The majority's assessment that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case," *ante,* at 347, is quite correct. In my view, the Fourth Amendment inquiry ends there.

III

The Court's error, however, does not merely affect the disposition of this case. The *per se* rule that the Court creates has potentially serious consequences for the everyday lives of Americans. A broad range of conduct falls into the category of fine-only misdemeanors. In Texas alone, for example, disobeying any sort of traffic warning sign is a misdemeanor punishable only by fine, see Tex. Transp. Code Ann. § 472.022 (1999 and Supp. 2000–2001), as is failing to pay a highway toll, see § 284.070, and driving with expired license plates, see § 502.407. Nor are fine-only crimes limited to the traffic context. In several States, for example, littering is a criminal offense punishable only by fine. See, *e. g.*, Cal. Penal Code Ann. § 374.7 (West 1999); Ga. Code Ann. § 16–7–43 (1996); Iowa Code §§ 321.369, 805.8(2)(af) (Supp. 2001).

To be sure, such laws are valid and wise exercises of the States' power to protect the public health and welfare. My concern lies not with the decision to enact or enforce these

laws, but rather with the manner in which they may be enforced. Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way. Cf. *Whren* v. *United States*, 517 U. S., at 806. Or, if a traffic violation, the officer may stop the car, arrest the driver, see *ante*, at 354, search the driver, see *United States* v. *Robinson*, 414 U. S., at 235, search the entire passenger compartment of the car including any purse or package inside, see *New York* v. *Belton*, 453 U. S., at 460, and impound the car and inventory all of its contents, see *Colorado* v. *Bertine*, 479 U. S. 367, 374 (1987); *Florida* v. *Wells*, 495 U. S. 1, 4–5 (1990). Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate.

Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of "an epidemic of unnecessary minor-offense arrests." *Ante*, at 353, and n. 25. But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. See *Whren* v. *United States*, *supra*, at 813. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.

* * *

The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness. I respectfully dissent.

Syllabus

DANIELS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–9136. Argued January 8, 2001—Decided April 25, 2001

Petitioner was convicted of being a felon in possession of a firearm in violation of 18 U. S. C. § 922(g)(1), and his sentence was enhanced under the Armed Career Criminal Act of 1984 (ACCA), 18 U. S. C. § 924(e), which imposes a mandatory minimum sentence on anyone who violates § 922(g)(1) and has three previous convictions for, *inter alia,* a violent felony. Petitioner had four such prior state convictions. After an unsuccessful direct appeal, petitioner filed a motion to vacate, set aside, or correct his federal sentence pursuant to 28 U. S. C. § 2255. He asserted that his sentence violated the Constitution because it was based in part on two prior convictions that were themselves unconstitutional. Both prior convictions, he claimed, were based on inadequate guilty pleas and one was the product of ineffective assistance of counsel. The District Court denied the motion, and the Ninth Circuit affirmed.

Held: The judgment is affirmed.

195 F. 3d 501, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court in part, concluding that petitioner, having failed to pursue remedies that were otherwise available to him to challenge his prior convictions while he was in custody on those convictions, may not now use a § 2255 motion directed at his federal sentence to collaterally attack those convictions. Pp. 378–383, 384.

(a) In *Custis* v. *United States,* 511 U. S. 485, 490–497, this Court held that with the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right under the ACCA or the Constitution to collaterally attack prior convictions at his federal sentencing proceeding. The considerations supporting that conclusion—ease of administration and the interest in promoting the finality of judgments—are also present in the § 2255 context. A district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction. Moreover, States retain a strong interest in preserving convictions they have obtained, as they impose a wide range of disabilities on those who have been convicted, even after their release. Pp. 378–380.

Syllabus

(b) Although defendants may challenge their convictions for constitutional infirmity, it does not necessarily follow that a § 2255 motion is an appropriate vehicle for determining whether a conviction later used to enhance a federal sentence was unconstitutionally obtained. A defendant convicted in state court has numerous opportunities to challenge the constitutionality of that conviction, but those vehicles for review are not available indefinitely and without limitation. Procedural barriers limit access to review on the merits of constitutional claims, vindicating the presumption of regularity that attaches to final judgments, even when the question is waiver of constitutional rights. *Parke* v. *Raley*, 506 U. S. 20, 29. Thus, if, by the time of sentencing under the ACCA, a prior conviction has not been set aside on direct or collateral review, it is presumptively valid and may be used to enhance the federal sentence, with the exception of convictions obtained in violation of the right to counsel. *Custis*, *supra*, at 496–497. After an enhanced federal sentence has been imposed under the ACCA, the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction. If, however, a prior conviction used to enhance a federal sentence is no longer open to attack in its own right because the defendant failed to pursue those remedies while they were available (or because he did so unsuccessfully), then he is without recourse. The defendant may not collaterally attack his prior conviction through a motion under § 2255, unless he claims that conviction was obtained in violation of the right to counsel and he raised that claim at his federal sentencing proceeding. A contrary rule would effectively permit challenges far too stale to be brought in their own right, and sanction an end run around statutes of limitation and other procedural barriers that would preclude the movant from attacking the prior conviction directly. Nothing in the Constitution or this Court's precedent requires such a result. Pp. 380–383.

O'Connor, J., delivered the opinion of the Court in part, in which Rehnquist, C. J., and Kennedy and Thomas, JJ., joined, and in which Scalia, J., joined, except for that portion of the opinion recognizing that § 2255 may be available in rare circumstances. Scalia, J., filed an opinion concurring in part, *post*, p. 385. Souter, J., filed a dissenting opinion, in which Stevens and Ginsburg, JJ., joined, *post*, p. 387. Breyer, J., filed a dissenting opinion, *post*, p. 392.

G. Michael Tanaka argued the cause for petitioner. With him on the briefs was *Maria E. Stratton.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor*

General Waxman, *Assistant Attorney General Robinson*, *James A. Feldman*, and *Kathleen A. Felton*.*

JUSTICE O'CONNOR delivered the opinion of the Court in part.

In *Custis* v. *United States*, 511 U. S. 485 (1994), we addressed whether a defendant sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U. S. C. § 924(e), could collaterally attack the validity of previous state convictions used to enhance his federal sentence. We held that, with the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to bring such a challenge in his federal sentencing proceeding. 511 U. S., at 487. We now consider whether, after the sentencing proceeding has concluded, the individual who was sentenced may challenge his federal sentence through a motion under 28 U. S. C. § 2255 (1994 ed., Supp. V) on the ground that his prior convictions were unconstitutionally obtained. We hold that, as a general rule, he may not. There may be rare circumstances in which § 2255 would be available, but we need not address the issue here.

I

In 1994, petitioner Earthy D. Daniels, Jr., was tried and convicted of being a felon in possession of a firearm in violation of 18 U. S. C. § 922(g)(1). The Government then sought to enhance his sentence under the ACCA. App. 4–5. The ACCA imposes a mandatory minimum 15-year sentence on anyone who violates § 922(g)(1) and who has three previous convictions for a violent felony or a serious drug offense. § 924(e)(1). Petitioner had been convicted in California in 1978 and 1981 for robbery, and in 1977 and 1979 for first degree burglary. *Id.*, at 14. The District Court found petitioner to be an armed career criminal within the meaning of

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**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

the ACCA and, after granting a downward departure, the District Court sentenced petitioner to 176 months. *Id.*, at 14, 18. Had petitioner not been adjudged an armed career criminal, he would have received at most a 120-month sentence. 18 U. S. C. § 924(a)(2). On direct appeal, petitioner argued unsuccessfully that his two burglary convictions did not qualify as predicate offenses under the ACCA. See 86 F. 3d 1164 (CA9 1996) (table).

Petitioner then filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U. S. C. § 2255 in the United States District Court for the Central District of California. Section 2255, a postconviction remedy for federal prisoners, permits "[a] prisoner in custody under sentence of a [federal] court" to "move the court which imposed the sentence to vacate, set aside or correct the sentence" upon the ground that "the sentence was imposed in violation of the Constitution or laws of the United States." Petitioner asserted that his current federal sentence was imposed in violation of the Constitution because it was based in part on his 1978 and 1981 robbery convictions. Those prior convictions, he alleged, were themselves unconstitutional because they both were based on guilty pleas that were not knowing and voluntary, and because the 1981 conviction was also the product of ineffective assistance of counsel. App. 51–52. He did not contend that § 2255 relief was appropriate because his current sentence was imposed in violation of the ACCA. Cf. Brief for Petitioner 13.

The District Court denied the § 2255 motion, App. 58–67, and a panel of the Ninth Circuit Court of Appeals affirmed, 195 F. 3d 501 (1999). The court held that our decision in *Custis* "bar[s] federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a . . . claim [under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)]." 195 F. 3d, at 503 (internal quotation marks and citation omitted). Because the Courts of Appeals are divided as to whether *Custis* bars relief under

§ 2255 as well as in federal sentencing proceedings, we granted certiorari. 530 U. S. 1299 (2000).

II

The petitioner in *Custis* attempted, during his federal sentencing proceeding, to attack prior state convictions used to enhance his sentence under the ACCA. Like petitioner here, Custis challenged his prior convictions as the product of allegedly faulty guilty pleas and ineffective assistance of counsel. 511 U. S., at 488. We held that with the sole exception of convictions obtained in violation of the right to counsel, Custis had no right under the ACCA or the Constitution "to collaterally attack prior convictions" in the course of his federal sentencing proceeding. *Id.*, at 490–497. While the "failure to appoint counsel for an indigent defendant was a unique constitutional defect" that justified the exception for challenges concerning *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), 511 U. S., at 496, challenges of the type Custis sought to bring did not "ris[e] to the level of a jurisdictional defect," *ibid.*

Two considerations supported our constitutional conclusion in *Custis:* ease of administration and the interest in promoting the finality of judgments. With respect to the former, we noted that resolving non-*Gideon*-type constitutional attacks on prior convictions "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records." 511 U. S., at 496. With respect to the latter, we observed that allowing collateral attacks would "inevitably delay and impair the orderly administration of justice" and "deprive the state-court judgment of its normal force and effect." *Id.*, at 497 (internal quotation marks and brackets omitted).

A

Petitioner contends that the *Custis* rule should not extend to § 2255 proceedings because the concerns we articulated

in *Custis* are not present in the § 2255 context. Brief for Petitioner 22–26. We disagree. First, a district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction. While petitioner is quite right that federal district courts are capable of evaluating fact-intensive constitutional claims raised by way of a habeas petition, *id.*, at 22–23, institutional competence does not make decades-old state court records and transcripts any easier to locate.

The facts of this case only reinforce our concern. For example, petitioner contends that he entered his 1978 and 1981 guilty pleas without a full understanding of the essential elements of the crimes with which he was charged, and therefore the resulting convictions violated due process. App. 40–42, 50–51. These claims by their nature require close scrutiny of the record below. Yet petitioner has not placed the transcript from either plea colloquy in the record. In fact, he has admitted that the 1978 transcript is missing from the state court file. Cf. *id.*, at 38, n. 3. Under these circumstances, it would be an almost futile exercise for a district court to attempt to determine accurately what was communicated to petitioner more than two decades ago.

With respect to the concern for finality, petitioner argues that because he has served the complete sentences for his 1978 and 1981 convictions, the State would suffer little, if any, prejudice if those convictions were invalidated through a collateral challenge under § 2255. Brief for Petitioner 24–26. To the contrary, even after a defendant has served the full measure of his sentence, a State retains a strong interest in preserving the convictions it has obtained. States impose a wide range of disabilities on those who have been convicted of crimes, even after their release. For example, in California, where petitioner committed his crimes, persons convicted of a felony may be disqualified from holding public office, subjected to restrictions on professional licensing, and

barred from possessing firearms. See U. S. Dept. of Justice, Office of the Pardon Attorney, Civil Disabilities of Convicted Felons: A State-By-State Survey 29–32 (Oct. 1996). Further, each of the 50 States has a statute authorizing enhanced sentences for recidivist offenders. *E. g.*, Cal. Penal Code Ann. § 667 (West 1999). See also *Parke* v. *Raley*, 506 U. S. 20, 26–27 (1992).

At oral argument, petitioner suggested that invalidating a prior conviction on constitutional grounds for purposes of its use under the ACCA would have no effect beyond the federal proceeding. Tr. of Oral Arg. 8–10. Although that question is not squarely presented here, if a state conviction were determined to be sufficiently unreliable that it could not be used to enhance a federal sentence, the State's ability to use that judgment subsequently for its own purposes would be, at the very least, greatly undermined. Thus, the State does have a real and continuing interest in the integrity of its judgments.

B

On the most fundamental level, petitioner attempts to distinguish *Custis* as a decision only about the appropriate forum in which a defendant may challenge prior convictions used to enhance a federal sentence. The issue in *Custis*, according to petitioner, was "'where, not whether, the defendant could attack a prior conviction for constitutional infirmity.'" Brief for Petitioner 14 (quoting *Nichols* v. *United States*, 511 U. S. 738, 765 (1994) (GINSBURG, J., dissenting) (original emphasis deleted)). The appropriate forum for such a challenge, petitioner argues, at least where no other forum is available, is a federal proceeding under § 2255. Brief for Petitioner 16.

The premise underlying petitioner's argument—that defendants may challenge their convictions for constitutional infirmity—is quite correct. It is beyond dispute that convictions must be obtained in a manner that comports with the Federal Constitution. But it does not necessarily follow

that a § 2255 motion is an appropriate vehicle for determining whether a conviction later used to enhance a federal sentence was unconstitutionally obtained.

Our system affords a defendant convicted in state court numerous opportunities to challenge the constitutionality of his conviction. He may raise constitutional claims on direct appeal, in postconviction proceedings available under state law, and in a petition for a writ of habeas corpus brought pursuant to 28 U. S. C. § 2254 (1994 ed. and Supp. V). See generally 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 5.1.a (3d ed. 1998).[1] These vehicles for review, however, are not available indefinitely and without limitation. Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim. See, *e. g.*, *United States* v. *Olano*, 507 U. S. 725, 731 (1993) (" 'No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it' " (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944))). One of the principles vindicated by these limitations is a "presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Parke*, *supra*, at 29.

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[1] JUSTICE SOUTER is concerned that a defendant may forgo "direct challenge because the penalty was not practically worth challenging, and . . . collateral attack because he had no counsel to speak for him." *Post*, at 391 (dissenting opinion). Whatever incentives may exist at the time of conviction, the fact remains that avenues of redress are generally available if sought in a timely manner. If a person chooses not to pursue those remedies, he does so with the knowledge that the conviction will stay on his record. This knowledge should serve as an incentive not to commit a subsequent crime and risk having the sentence for that crime enhanced under a recidivist sentencing statute.

Thus, we have held that if, by the time of sentencing under the ACCA, a prior conviction has not been set aside on direct or collateral review, that conviction is presumptively valid and may be used to enhance the federal sentence. See *Custis*, 511 U. S., at 497. This rule is subject to only one exception: If an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel, the defendant may challenge the validity of his prior conviction during his federal sentencing proceedings. *Id.*, at 496. No other constitutional challenge to a prior conviction may be raised in the sentencing forum. *Id.*, at 497.

After an enhanced federal sentence has been imposed pursuant to the ACCA, the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction. In *Custis*, we noted the possibility that the petitioner there, who was still in custody on his prior convictions, could "attack his state sentences [in state court] or through federal habeas review." *Ibid.* If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence. As in *Custis*, we express no opinion on the appropriate disposition of such an application. Cf. *ibid.*

If, however, a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse. The presumption of validity that attached to the prior conviction at the time of sentencing is conclusive, and the defendant may not collaterally attack his prior conviction through a motion under § 2255. A defendant may challenge a prior conviction as the product of a *Gideon* violation in a § 2255 motion, but generally only if he raised that claim at his federal sentencing proceeding. See *United States* v. *Frady*, 456 U. S. 152, 167–168 (1982) (holding that procedural default rules developed in the habeas corpus context apply

in § 2255 cases); see also *Reed* v. *Farley,* 512 U. S. 339, 354–355 (1994).

Justice Souter says that our holding here "rul[es] out the application of § 2255 when the choice is relief under § 2255 or no relief at all." *Post,* at 390 (dissenting opinion). This all-or-nothing characterization of the problem misses the point. As we have said, a defendant generally has ample opportunity to obtain constitutional review of a state conviction. *Supra,* at 381. But once the "door" to such review "has been closed," *post,* at 388, by the defendant *himself*—either because he failed to pursue otherwise available remedies or because he failed to prove a constitutional violation—the conviction becomes final and the defendant is not entitled to another bite at the apple simply because that conviction is later used to enhance another sentence.

To be sure, the text of § 2255 is broad enough to cover a claim that an enhanced federal sentence violates due process. See *ibid.* See also n. 2, *infra.* But when such a due process claim is predicated on the consideration at sentencing of a fully expired prior conviction, we think that the goals of easy administration and finality have ample "horsepower" to justify foreclosing relief under § 2255. Were we to allow defendants sentenced under the ACCA to collaterally attack prior convictions through a § 2255 motion, we would effectively permit challenges far too stale to be brought in their own right, and sanction an end run around statutes of limitations and other procedural barriers that would preclude the movant from attacking the prior conviction directly. Nothing in the Constitution or our precedent requires such a result.

C

We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own. The circumstances of this case do not require us to determine whether a defendant could use a motion under § 2255 to chal-

lenge a federal sentence based on such a conviction.[2] Cf., *e. g.*, 28 U. S. C. § 2255 (1994 ed., Supp. V) (allowing a second or successive § 2255 motion if there is "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"); *ibid.* (tolling 1-year limitation period while movant is prevented from making a § 2255 motion by an "impediment . . . created by governmental action in violation of the Constitution or laws of the United States").

III

No such claim is made here. The sole basis on which petitioner Daniels challenges his current federal sentence is that two of his prior state convictions were the products of inadequate guilty pleas and ineffective assistance of counsel. Petitioner could have pursued his claims while he was in custody on those convictions. As his counsel conceded at oral argument, there is no indication that petitioner did so or that he was prevented from doing so by some external force. Tr. of Oral Arg. 3–4, 6.

Petitioner's federal sentence was properly enhanced pursuant to the ACCA based on his four facially valid prior state convictions. Because petitioner failed to pursue remedies that were otherwise available to him to challenge his 1978 and 1981 convictions, he may not now use a § 2255 motion to collaterally attack those convictions. The judgment of the United States Court of Appeals for the Ninth Circuit is therefore affirmed.

It is so ordered.

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[2] After comparing the text of §§ 2254 and 2255, JUSTICE SCALIA concludes that "Congress did not expect challenges to state convictions (used to enhance federal convictions) to be brought under § 2255." *Post*, at 386 (opinion concurring in part). This is, of course, true. But it is also beside the point, as the subject of the § 2255 motion in this circumstance is the enhanced federal sentence, not the prior state conviction.

JUSTICE SCALIA, concurring in part.

I agree with the Court that 28 U. S. C. § 2255 (1994 ed., Supp. V) does not (with the *Gideon* exception, see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)) permit inquiry into whether a conviction later used to enhance a federal sentence was unconstitutionally obtained, and I agree with the Court's reasoning so far as it goes. I have another reason for reaching that result, however, and one that prevents me from joining that portion of the Court's opinion which speculates that "[t]here may be rare circumstances in which § 2255 would be available," such as when "no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own," *ante*, at 376, 383. Simply put, "the text of § 2255 is" *not* "broad enough to cover a claim that an enhanced federal sentence violates due process," *ante*, at 383, if the enhancement is based on prior convictions.

In addition to the practical reasons JUSTICE O'CONNOR identifies as counseling against petitioner's interpretation of § 2255, there stands the very text of that provision. "[W]e have long recognized that 'the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law,'" *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996), quoting *Ex parte Bollman*, 4 Cranch 75, 94 (1807). Section 2255 authorizes a challenge by "[a] prisoner in custody under *sentence of a court established by Act of Congress* claiming the right to be released upon the ground that *the sentence* was *imposed* in violation of the Constitution or laws of the United States." (Emphases added.) We have already determined, in *Custis* v. *United States*, 511 U. S. 485 (1994), that a sentencing court does not violate the Due Process Clause by imposing a sentence enhanced by prior, purportedly tainted, convictions, unless the taint is the result of a *Gideon* violation.* It follows ineluctably that

*JUSTICE SOUTER asserts that *Custis* "merely held (with [the] exception [of *Gideon* violations]) that neither the ACCA nor the Constitution provides a forum at the sentencing hearing for challenges to the underlying

§ 2255 does not establish any right to challenge federal sentences based on their enhancement by stale, non-*Gideon*-tainted, convictions.

This conclusion is reinforced (if reinforcement is possible) by comparing the text of § 2255 with that of § 2254. The latter, governing habeas challenges to state convictions, provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings shall not be a ground for relief in a proceeding arising under § 2254." 28 U. S. C. § 2254(i) (1994 ed., Supp. V). There is no conceivable reason why this bar would be placed upon challenges to state convictions under § 2254, but not upon challenges to state convictions under § 2255. Congress did not expect challenges to state convictions (used to enhance federal convictions) to be brought under § 2255.

Perhaps precepts of fundamental fairness inherent in "due process" suggest that a forum to litigate challenges like petitioner's must be made available *somewhere* for the odd case in which the challenge could not have been brought earlier. But it would not follow from this that federal sentencing must provide the remedy; much less that federal sentencing need not provide the remedy but § 2255 (which is entirely dependent upon the impropriety of prior federal sentencing)

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conviction." *Post*, at 388, n. 1 (dissenting opinion). But the Constitution *would* "provide a forum" at the sentencing hearing if it were *unconstitutional* to sentence on the basis of invalid but nonetheless outstanding prior convictions. (Assuredly the Constitution does not permit unconstitutional acts.) *Custis* necessarily held, therefore, that it is not unconstitutional (with the *Gideon* exception) to sentence on the basis of invalid but nonetheless outstanding prior convictions. JUSTICE SOUTER apparently understood this at the time *Custis* was decided. His dissent began: "The Court answers a difficult constitutional question that I believe the underlying statute does not pose," 511 U. S., at 498, which question turns out to be "whether the Constitution permits courts to enhance a defendant's sentence on the basis of a prior conviction the defendant can show was obtained in violation of his right to effective assistance of counsel," *id.*, at 505.

must do so. Fundamental fairness could be achieved just as well—indeed, better—by holding that the rendering jurisdiction must provide a means for challenge when enhancement is threatened or has been imposed. Such a constitutional rule, combined with a rule that any sentence already imposed must be adjusted accordingly, would prevent sentencing hearings from being routinely complicated by inquiries into prior convictions, and would locate those inquiries where they can best be conducted: in the rendering jurisdiction. It would also avoid a possible gap in protection that would result from using § 2255 (and in state-court cases, § 2254) for this inappropriate purpose—arising from the fact that, as discussed above, § 2254 *cannot* be used to remedy ineffective assistance of postconviction counsel. (We have left open the question whether such ineffective assistance can establish a constitutional violation, see *Coleman* v. *Thompson*, 501 U. S. 722, 755 (1991).) But § 2255 cannot possibly be the means of relief.

For these reasons, I join the opinion of the Court only in part.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In *Custis* v. *United States*, 511 U. S. 485 (1994), we held that a federal defendant facing an enhanced sentence on the basis of prior state convictions under the Armed Career Criminal Act of 1984 (ACCA), 18 U. S. C. § 924(e), could not, with one exception, challenge the constitutionality of the underlying state convictions at his federal sentencing proceeding. *Custis* was thus a precursor of the case before us now; *Custis* is not, however, compelling authority for today's disposition. Although the Court's opinion in *Custis* struck me as portending more than it strictly held, a reading of the case free of portent was in fact the understanding of one Member of the *Custis* majority: "*Custis* presented a forum question. The issue was *where*, not *whether*, the defendant could attack

a prior conviction for constitutional infirmity." *Nichols* v. *United States*, 511 U. S. 738, 765 (1994) (GINSBURG, J., dissenting) (emphasis in original). The door in *Custis* remained open to an attack on the prior state convictions, through a state or federal habeas challenge to the underlying convictions themselves. See *Custis*, *supra*, at 497 (Custis "was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e)," and could thus "attack his state sentences in Maryland or through federal habeas review"). This case presents the distinct question of what happens when that door has been closed.

The Court's reasons for reading 28 U. S. C. § 2255 (1994 ed., Supp. V) as restrictively as it read the ACCA sentencing provisions have nothing to do either with the text of § 2255 or with any extension of rules governing habeas review of state convictions under 28 U. S. C. § 2254 (1994 ed. and Supp. V). The language of § 2255 providing a federal prisoner with the right to relief because a sentence "was imposed in violation of the Constitution or laws of the United States" is obviously broad enough to include a claim that a prior conviction used anew to mandate sentence enhancement under the ACCA was obtained unconstitutionally, so that the new sentence itself violates the terms of the ACCA or the Constitution.[1] Nor does the Court rest its exclusion of such claims

[1] The Government argues, citing *Custis* v. *United States*, 511 U. S. 485 (1994), that 28 U. S. C. § 2255 (1994 ed., Supp. V) does not provide a remedy here because "the Constitution is not violated when a conviction that is facially valid is used to enhance a sentence for committing another crime." Brief for United States 12. This misstates the holding of *Custis*, which merely held (with one exception discussed below) that neither the ACCA nor the Constitution provides a forum at the sentencing hearing for challenges to the underlying conviction. 511 U. S., at 487. The constitutional holding was necessarily limited to the statutory scheme considered. And, in any event, § 2255 provides an explicit remedy for a sentence that violates federal law, not solely the Constitution. Cf. *Hill* v. *United States*, 368 U. S. 424, 428 (1962) (describing types of fundamental errors that are

from § 2255 review on the theory that a § 2255 petitioner who challenges underlying state convictions should be required, like a § 2254 petitioner, to exhaust state remedies and to comply with state procedural rules. Cf. 28 U. S. C. §§ 2254(b)–(c) (1994 ed. and Supp. V); *Rose* v. *Lundy*, 455 U. S. 509 (1982); *Coleman* v. *Thompson*, 501 U. S. 722 (1991). It is not clear, after all, that such requirements, premised largely on comity concerns and the State's interest in the finality of its own judgments, see, *e. g.*, *id.*, at 731–732, 750, should be imported into this context of a federal sentence imposed when a petitioner who has completed his state sentence seeks only to avoid a sentence enhancement under federal law. In any event, the Court does not purport to apply these specific requirements (which in the § 2254 setting can be waived by the State, see 28 U. S. C. § 2254(b)(3) (1994 ed., Supp. V); *Gray* v. *Netherland*, 518 U. S. 152, 165–166 (1996), and which are subject to explicit exceptions). Instead it imposes a flat ban on § 2255 relief (subject, maybe, to narrow exceptions).[2]

Having no textual basis or related precedent in habeas law, the Court rules out challenges to ACCA sentencing predicates under § 2255 on the same grounds invoked earlier to bar such challenges under the sentencing provisions of the

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cognizable under § 2255). Neither the *Custis* Court nor today's Court takes the position that the ACCA properly applies, as a statutory matter, to underlying sentences that are in fact invalid. See *Custis*, *supra*, at 497; *ante*, at 382. The language of § 2255 invites a petitioner to establish such a statutory violation.

[2] The Court continues to leave the door open (but with no promises) to a motion to revise an ACCA sentence if a defendant has first obtained an order vacating the predicate conviction through a state collateral proceeding or federal habeas review of the state judgment under 28 U. S. C. § 2254 (1994 ed. and Supp. V). See *ante*, at 382; *Custis*, *supra*, at 497. The plurality adds the possibility of an exception to today's rule if a petitioner can show newly discovered evidence or legal disability during the period of state custody. See *ante*, at 383–384. These exceptions will not eclipse the rule.

ACCA itself: the ACCA ought to be easy to administer and state convictions ought to carry finality, *ante*, at 378–380. But whatever force these reasons might have if alternative avenues of challenge were open, they do not even come close to the horsepower needed to rule out the application of § 2255 when the choice is relief under § 2255 or no relief at all. Why should it be easy to subject a person to a higher sentencing range and commit him for nearly nine extra years (as here) when the prisoner has a colorable claim that the extended commitment rests on a conviction the Constitution would condemn? If the answer is the value of finality in state convictions, why is finality valuable when state law itself does not demand it, and why is finality a one-way street? Why should a prisoner like Daniels suddenly be barred from returning to challenge the validity of a conviction, when the Government is free to reach back to it to impose extended imprisonment under a sentence enhancement law unheard of at the time of the earlier convictions (1978 and 1981 in this case)? Daniels could not have been expected in 1978 to anticipate the federal enhancement statute enacted in 1984; and even if he had been blessed with statutory clairvoyance, the practice in 1978 would have told him he could challenge the convictions when and if the Government sought to rely on them under the future enhancement statute. The ACCA was enacted against the backdrop of a pervasive federal practice of entertaining constitutional challenges to prior convictions when used anew for sentence enhancement, a practice on which Congress threw no cold water when it enacted the ACCA. See *Custis*, 511 U. S., at 499–501 (SOUTER, J., dissenting). Indeed, even the Court seems to find something disquieting in the historical practice, as it shows by recognizing a textually untethered exception to its own rule, one allowing for collateral attacks on prior convictions if based on violations of the right to counsel under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See *ante*, at 382. I sup-

pose I should not begrudge the Court's concession, but the *Gideon* exception, first announced in *Custis*, is inexplicable here. One might have argued in *Custis* that a *Gideon* violation was egregious enough to excuse the defendant's failure to resort to other forums still open; but there is no excuse for picking and choosing among constitutional violations here, when other forums are closed. The need to address *Gideon* is no reason to ignore *Moore* v. *Dempsey*, 261 U. S. 86 (1923), or *Mooney* v. *Holohan*, 294 U. S. 103 (1935) *(per curiam)*, or *Brown* v. *Mississippi*, 297 U. S. 278 (1936), or *Strickland* v. *Washington*, 466 U. S. 668 (1984), or *Miranda* v. *Arizona*, 384 U. S. 436 (1966), or *Brady* v. *Maryland*, 373 U. S. 83 (1963), or any other recognized violations of the Constitution.

None of this is to say that the Court is wrong to recognize that collateral review of old state convictions can be very cumbersome. See *ante*, at 379. But that is not the only practical consideration in the real world we confront (or ought to confront) here. A defendant under the ACCA has generally paid whatever penalty the old conviction entailed; he may well have forgone direct challenge because the penalty was not practically worth challenging, and may well have passed up collateral attack because he had no counsel to speak for him. But when faced with the ACCA's 15-year mandatory minimum the old conviction is suddenly well worth challenging and counsel may be available under 18 U. S. C. § 3006A(a)(2)(B). In denying him any right to attack convictions later when attacks are worth the trouble, the Court adopts a policy of promoting challenges earlier when they may not justify the effort and perhaps never will. That is a very odd incentive for a court to create, and the eccentricity is hardly softened by the likelihood that most defendants will not notice before it is too late.

Today's decision is devoid of support in either statutory language or congressional intention. I respectfully dissent.

JUSTICE BREYER, dissenting.

I believe that Congress intended courts to read the silences in federal sentencing statutes as permitting defendants to challenge the validity of an earlier sentence-enhancing conviction *at the time of sentencing.* See *United States* v. *Paleo*, 967 F. 2d 7, 11–13 (CA1 1992), implicitly overruled by *Custis* v. *United States*, 511 U. S. 485 (1994). That was the practice typically followed in the lower courts before *Custis.* See *id.*, at 498–499, and n. 2, 511 (SOUTER, J., dissenting). The courts now follow a comparable practice in respect to other sentence-enhancing factors. See, *e. g.*, *United States* v. *Dunnigan*, 507 U. S. 87, 95–97 (1993) (perjured testimony enhancement). And, given appropriate burden of proof rules, see, *e. g.*, *United States* v. *Gilbert*, 20 F. 3d 94, 100 (CA3 1994); *United States* v. *Wicks*, 995 F. 2d 964, 978 (CA10), cert. denied, 510 U. S. 982 (1993); *Paleo*, *supra*, at 13 (citing *United States* v. *Henry*, 933 F. 2d 553, 559 (CA7 1991), cert. denied, 503 U. S. 997 (1992); *United States* v. *Gallman*, 907 F. 2d 639, 643 (CA7 1990), cert. denied, 499 U. S. 908 (1991); and *United States* v. *Taylor*, 882 F. 2d 1018, 1031 (CA6 1989), cert. denied, 496 U. S. 907 (1990)), that practice need not prove unusually burdensome, see *Custis*, *supra*, at 511 (SOUTER, J., dissenting).

Having rejected that procedural approach in *Custis*, *supra*, at 496–497, the Court now must face the alternative—a later challenge to the earlier convictions in a collateral proceeding that attacks the present conviction or sentence. To resolve that challenge the plurality has devised a broad rule immunizing the earlier conviction with a possible exception for "rare" circumstances. See *ante*, at 383. The rule may well prove unduly "restrictiv[e]," *ante*, at 388 (SOUTER, J., dissenting). Or, through exceptions, it may well bring about additional delay, still greater litigation complexity, and (insofar as the plurality ties Congress' hands by resting its exception upon constitutional grounds) legal inflexibility. And, given the restrictions *Custis* placed on sentencing courts, the

inclination to grant a 28 U. S. C. § 2255 (1994 ed., Supp. V) hearing in the rare circumstances hypothesized by the majority is subject to JUSTICE SCALIA's criticism that § 2255 may be an inappropriate forum for such a challenge. See *ante*, at 387 (opinion concurring in part).

The legal problem lies at the source. While we do not often overturn a recently decided case, in this instance the Court's earlier decision will lead to ever-increasing complexity, for it blocks the simpler procedural approach that Congress intended.

Consequently, I believe this is one of those rare instances in which the Court should reconsider an earlier case, namely, *Custis*, and adopt the dissenters' views. For that reason, I dissent.

Syllabus

LACKAWANNA COUNTY DISTRICT ATTORNEY ET AL. *v.* COSS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99–1884. Argued February 20, 2001—Decided April 25, 2001

In 1986, respondent Coss was convicted in Pennsylvania state court of simple assault, institutional vandalism, and criminal mischief. Coss filed a petition for state postconviction relief with respect to these convictions, alleging ineffective assistance of counsel, but the Pennsylvania courts have never ruled on the petition. In 1990, after Coss had served the full sentences for his 1986 convictions, he was convicted in state court of aggravated assault. He successfully challenged his 6 to 12 year sentence on direct appeal. On remand, the court did not consider Coss' 1986 convictions in determining his eligible sentencing range. In choosing a sentence within the applicable range, the court considered several factors including Coss' extensive criminal record, and reimposed a 6 to 12 year sentence. Coss filed a petition for a writ of habeas corpus, claiming that his 1986 convictions were constitutionally invalid, and that he was "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). The Federal District Court held that it could properly exercise § 2254 jurisdiction because, in sentencing Coss for his 1990 conviction, the sentencing judge made reference to the 1986 convictions. The District Court denied the petition because Coss had not been prejudiced by his 1986 counsel's ineffectiveness. The Third Circuit remanded, agreeing that the District Court had jurisdiction, but finding a "reasonable probability" that but for his counsel's ineffectiveness, Coss would not have been convicted in 1986.

Held: The judgment is reversed, and the case is remanded.

204 F. 3d 453, reversed and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, concluding that § 2254 does not provide a remedy when a state prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody. Pp. 401–405, 408.

(a) A § 2254 petitioner must first show that he is "in custody pursuant to the judgment of a State court." § 2254(a). Because Coss is no longer serving the sentences for his 1986 convictions, he cannot bring a federal habeas action directed solely at those convictions. However, his

Syllabus

§ 2254 petition can be (and has been) construed as asserting a challenge to the 1990 sentence he is currently serving, as enhanced by the allegedly invalid 1986 convictions. See *Maleng* v. *Cook*, 490 U. S. 488, 493. Thus, he satisfies § 2254's "in custody" requirement. Pp. 401–402.

(b) The more important question here is the one left unanswered in *Maleng:* the extent to which a prior expired conviction may be subject to challenge in an attack upon a current sentence it was used to enhance. In *Daniels* v. *United States*, *ante*, p. 374, this Court held that a federal prisoner who has failed to pursue available remedies to challenge a prior conviction (or has done so unsuccessfully) may not collaterally attack that conviction through a motion under 28 U. S. C. § 2255 directed at the enhanced federal sentence. That holding is now extended to cover § 2254 petitions directed at enhanced state sentences. The considerations on which the *Daniels* holding was grounded—finality of convictions and ease of administration—are equally present in the § 2254 context. See *Daniels*, *ante*, at 379–380. Pp. 402–404.

(c) As in *Daniels*, an exception exists to the general rule for § 2254 petitions that challenge an enhanced sentence on the basis that the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon* v. *Wainwright*, 372 U. S. 335. The failure to appoint counsel is a unique constitutional defect, rising to the level of a jurisdictional defect, which therefore warrants special treatment among alleged constitutional violations. Moreover, an exception for *Gideon* claims does not implicate this Court's concerns about administrative ease. As with any § 2254 petition, a petitioner making a *Gideon* challenge must satisfy the procedural prerequisites for relief, including exhaustion of remedies. Pp. 404–405.

O'Connor, J., delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which Rehnquist, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, an opinion with respect to Part III–C, in which Rehnquist, C. J., and Kennedy and Thomas, JJ., joined, and an opinion with respect to Part III–B, in which Rehnquist, C. J., and Kennedy, J., joined. Souter, J., filed a dissenting opinion, in which Stevens and Ginsburg, JJ., joined, *post*, p. 408. Breyer, J., filed a dissenting opinion, *post*, p. 410.

William P. O'Malley argued the cause for petitioners. With him on the brief were *Eugene M. Talerico* and *Andrew J. Jarbola III.*

Robert M. Russel, Assistant Solicitor General of Colorado, argued the cause for the State of Colorado et al. as *amici curiae* urging reversal. With him on the brief were *Ken Salazar,* Attorney General of Colorado, *Dan Schweitzer,* and the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *M. Jane Brady* of Delaware, *Carla J. Stovall* of Kansas, *Tom Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Mark L. Earley* of Virginia, and *Christine O. Gregoire* of Washington.

James V. Wade argued the cause for respondent. With him on the brief was *Daniel I. Siegel.**

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Parts III–B and III–C.†

For the second time this Term, we are faced with the question whether federal postconviction relief is available when a prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody. In *Daniels* v. *United States*, *ante*, p. 374, we held that such relief is generally not available to a federal prisoner through a motion to vacate the sentence under 28 U. S. C. § 2255 (1994 ed., Supp. V), but left open the possibility that relief might be appropriate in rare circumstances. We now hold that relief is similarly unavailable to state prisoners through a peti-

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**Edward M. Chikofsky* and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

†JUSTICE SCALIA joins all but Parts III–B and III–C of this opinion. JUSTICE THOMAS joins all but Part III–B.

tion for a writ of habeas corpus under 28 U. S. C. § 2254 (1994 ed. and Supp. V).

I

Respondent Edward R. Coss, Jr., has an extensive criminal record. By the age of 16, he had been adjudged a juvenile delinquent on five separate occasions for offenses including theft, disorderly conduct, assault, and burglary. See Record Doc. No. 101 (Pl. Exh. 5, pp. 4–6). By the time he turned 23, Coss had been convicted in adult court of assault, institutional vandalism, criminal mischief, disorderly conduct, and possession of a controlled substance. See *id.*, at 6–7. His record also reveals arrests for assault, making terroristic threats, delivery of controlled substances, reckless endangerment, disorderly conduct, resisting arrest, retail theft, and criminal conspiracy, although each of those charges was later dropped. See *ibid.* A report generated by the Lackawanna County Adult Probation Office sums up the "one consistent factor in this defendant's life: criminal behavior, much of it being aggressive." *Id.*, at 8.

This case revolves around two of the many entries on Coss' criminal record. In October 1986, Coss was convicted in Pennsylvania state court of simple assault, institutional vandalism, and criminal mischief. He was then sentenced to two consecutive prison terms of six months to one year. He did not file a direct appeal. See App. 54a; see also Tr. of Oral Arg. 28–29.

In June 1987, Coss filed a petition for relief from the 1986 convictions under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541 *et seq.* (1998), alleging that his trial attorney had been constitutionally ineffective. See App. 50a–53a. The Lackawanna County Court of Common Pleas promptly appointed counsel for Coss, *id.*, at 57a, and the district attorney filed an answer to the petition, *id.*, at 59a. The court, however, took no further action on the petition for the remainder of Coss' time in custody. Indeed, it appears that Coss' state postconviction petition has now

been pending for almost 14 years, and has never been the subject of a judicial ruling. Neither petitioners nor respondent is able to explain this lapse. Tr. of Oral Arg. 4, 29.

In 1990, after he had served the full sentences for his 1986 convictions, Coss was again convicted in Pennsylvania state court, this time of aggravated assault. He was sentenced to 6 to 12 years in prison, but successfully challenged this sentence on direct appeal because of a possible inaccuracy in the presentence report. App. 62a.

On remand, the court's first task was to determine the range of sentences for which Coss was eligible. In calculating Coss' "prior record score"—one of two determinants of the applicable sentencing range, see 42 Pa. Cons. Stat. § 9721 (1998) (reproducing 204 Pa. Code § 303.9(a) (1998))—the new presentence report took account of Coss' most serious juvenile adjudication and Coss' 1986 misdemeanor convictions, counting the latter as separate offenses. See Record Doc. No. 101 (Pl. Exh. 3, at 10). Coss objected, claiming that his 1986 convictions should be counted as one misdemeanor offense because they arose from the same transaction. See *ibid.* (Pl. Exh. 5, at 3–4). The trial court sustained Coss' objection, finding that the convictions should be "view[ed] . . . as being one transaction, one incident, one conviction." *Id.*, at 5. Under the Pennsylvania Sentencing Guidelines, one prior misdemeanor does not affect the prior record score. See *id.*, at 10 (displaying grid for calculating prior record score). Thus, the practical effect of the court's decision was to eliminate the 1986 convictions from Coss' prior record score entirely. See *ibid.;* see also 204 F. 3d 453, 467–468 (CA3 2000) (en banc) (Nygaard, J., dissenting). Consequently, Coss' 1986 convictions played no part in determining the range of sentences to which Coss was exposed.

The court's next task was to choose a sentence within that range. In doing so, the trial court considered a number of factors, including "the seriousness and nature of the crime involved here, the well being and protection of the people

who live in our community, your criminal disposition, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard." Record Doc. No. 101 (Pl. Exh. 3, at 26). The court concluded that "it's indicative that from your actions that you will continue to break the law unless given a period of incarceration." *Ibid.* The court then reimposed a 6 to 12 year sentence. Because Coss' 1986 convictions are a part of his prior criminal record, the Court of Appeals concluded that the state court took those convictions "into consideration" in sentencing Coss. See 204 F. 3d, at 459.

In September 1994, Coss filed a petition for a writ of habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the Middle District of Pennsylvania. That provision, a postconviction remedy in federal court for state prisoners, provides that a writ of habeas corpus is available to "a person in custody pursuant to the judgment of a State court" if that person "is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). In his petition, Coss contended that his 1986 assault conviction was the product of ineffective assistance of counsel. App. 73a–74a.

In answer to Coss' § 2254 petition, the Lackawanna County District Attorney argued that the District Court could not review the constitutionality of Coss' 1986 convictions because Coss was no longer in custody on those convictions. Record Doc. No. 55, p. 2. The district attorney, however, indicated his understanding that the crux of Coss' claim was that his 1986 convictions "may have impact *[sic]* upon the sentences which have been imposed . . . upon [Coss] for criminal convictions rendered against him" for his 1990 convictions. *Ibid.* See also Brief for Petitioners 4 ("[R]espondent argues that the sentence for his 1990 conviction was adversely and unconstitutionally affected by the 1986 simple assault conviction").

The District Court stated that Coss was arguing "that his current sentence [for the 1990 conviction] was adversely affected by the 1986 convictions because the sentencing judge considered these allegedly unconstitutional convictions in computing Coss's present sentence." App. to Pet. for Cert. 105a–106a. Finding that "the sentencing judge . . . did make reference to the 1986 convictions in sentencing Coss," *id.*, at 107a, the court held that it could properly exercise jurisdiction under § 2254, *id.*, at 108a; see also Record Doc. No. 87, p. 3, n. 2. After an evidentiary hearing, the court denied the petition, holding that Coss' 1986 trial counsel had been ineffective, but that Coss had not been prejudiced by the ineffectiveness. App. to Pet. for Cert. 113a, 116a, 120a.

The Court of Appeals for the Third Circuit, sitting en banc, agreed that "the sentencing court for the 1990 conviction took into consideration [Coss' 1986] conviction[s]," and therefore that the District Court had jurisdiction over Coss' § 2254 petition. 204 F. 3d, at 459. Citing Circuit precedent and our decisions in *Maleng* v. *Cook*, 490 U. S. 488 (1989) *(per curiam)*, and *United States* v. *Tucker*, 404 U. S. 443 (1972), the court concluded that § 2254 provided a remedy for "an allegedly unconstitutional conviction, even if [the § 2254 petitioner] has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence." 204 F. 3d, at 459–460.

The court then found that Coss had received ineffective assistance during his 1986 trial, and that there was "a reasonable probability" that but for the ineffective assistance, Coss "would not have been found guilty of assau[lt]." *Id.*, at 462. The court remanded the case to the District Court, ordering that the Commonwealth be allowed either to retry Coss for the 1986 assault or to resentence him for the 1990 assault without consideration of the 1986 conviction. *Id.*, at 467.

We granted certiorari to consider the threshold question that the District Court and Court of Appeals both resolved

in Coss' favor: whether § 2254 provides a remedy where a current sentence was enhanced on the basis of an allegedly unconstitutional prior conviction for which the sentence has fully expired. 531 U. S. 923 (2000).

II

A

The first showing a § 2254 petitioner must make is that he is "in custody pursuant to the judgment of a State court." 28 U. S. C. § 2254(a). In *Maleng* v. *Cook*, *supra*, we considered a situation quite similar to the one presented here. In that case, the respondent had filed a § 2254 petition listing as the "'conviction under attack'" a 1958 state conviction for which he had already served the entirety of his sentence. 490 U. S., at 489–490. He also alleged that the 1958 conviction had been "used illegally to enhance his 1978 state sentences" which he had not yet begun to serve because he was at that time in federal custody on an unrelated matter. *Ibid.* We determined that the respondent was "in custody" on his 1978 sentences because the State had lodged a detainer against him with the federal authorities. *Id.*, at 493.

We held that the respondent was not "in custody" on his 1958 conviction merely because that conviction had been used to enhance a subsequent sentence. *Id.*, at 492. We acknowledged, however, that because his § 2254 petition "[could] be read as asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction, . . . respondent . . . satisfied the 'in custody' requirement for federal habeas jurisdiction." *Id.*, at 493–494.

Similarly, Coss is no longer serving the sentences imposed pursuant to his 1986 convictions, and therefore cannot bring a federal habeas petition directed solely at those convictions. Coss is, however, currently serving the sentence for his 1990 conviction. Like the respondent in *Maleng*, Coss' § 2254 petition can be (and has been) construed as "asserting a challenge to the [1990] senten[ce], as enhanced by the alleg-

edly invalid prior [1986] conviction." *Id.*, at 493. See also *supra*, at 399–400. Accordingly, Coss satisfies § 2254's "in custody" requirement. Cf. *Daniels*, *ante*, at 383, 384, n. 2 (stating that the text of § 2255, which also contains an "in custody" requirement, is broad enough to cover a claim that a current sentence enhanced by an allegedly unconstitutional prior conviction violates due process).

B

More important for our purposes here is the question we explicitly left unanswered in *Maleng:* "the extent to which the [prior expired] conviction itself may be subject to challenge in the attack upon the [current] senten[ce] which it was used to enhance." 490 U. S., at 494. We encountered this same question in the § 2255 context in *Daniels* v. *United States*, *ante*, p. 374. We held there that "[i]f . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant . . . may not collaterally attack his prior conviction through a motion under § 2255." *Ante*, at 382. We now extend this holding to cover § 2254 petitions directed at enhanced state sentences.

We grounded our holding in *Daniels* on considerations relating to the need for finality of convictions and ease of administration. Those concerns are equally present in the § 2254 context. The first and most compelling interest is in the finality of convictions. Once a judgment of conviction is entered in state court, it is subject to review in multiple forums. Specifically, each State has created mechanisms for both direct appeal and state postconviction review, see L. Yackle, Postconviction Remedies §§ 1, 13 (1981 and Supp. 2000), even though there is no constitutional mandate that they do so, see *Pennsylvania* v. *Finley*, 481 U. S. 551, 557 (1987) (no constitutional right to state postconviction

review); *Abney* v. *United States*, 431 U. S. 651, 656 (1977) (no constitutional right to direct appeal). Moreover, § 2254 makes federal courts available to review state criminal proceedings for compliance with federal constitutional mandates.

As we said in *Daniels*, "[t]hese vehicles for review . . . are not available indefinitely and without limitation." *Ante*, at 381. A defendant may choose not to seek review of his conviction within the prescribed time. Or he may seek review and not prevail, either because he did not comply with procedural rules or because he failed to prove a constitutional violation. In each of these situations, the defendant's conviction becomes final and the State that secured the conviction obtains a strong interest in preserving the integrity of the judgment. See *ante*, at 379–380. Other jurisdictions acquire an interest as well, as they may then use that conviction for their own recidivist sentencing purposes, relying on "the 'presumption of regularity' that attaches to final judgments." *Parke* v. *Raley*, 506 U. S. 20, 29 (1992); see also *Daniels*, *ante*, at 380.

An additional concern is ease of administration of challenges to expired state convictions. Federal courts sitting in habeas jurisdiction must consult state court records and transcripts to ensure that challenged convictions were obtained in a manner consistent with constitutional demands. As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially. See *Daniels*, *ante*, at 379.

Accordingly, as in *Daniels*, we hold that once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. See *Daniels*, *ante*, at 382. If that conviction is later used to enhance a criminal sentence, the defendant

generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

III

A

As in *Daniels*, we recognize an exception to the general rule for § 2254 petitions that challenge an enhanced sentence on the basis that the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). The special status of *Gideon* claims in this context is well established in our case law. See, *e. g.*, *Custis* v. *United States*, 511 U. S. 485, 496–497 (1994); *United States* v. *Tucker*, 404 U. S., at 449; *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). Cf. *Daniels*, *ante*, at 382.

As we recognized in *Custis*, the "failure to appoint counsel for an indigent [is] a unique constitutional defect . . . ris[ing] to the level of a jurisdictional defect," which therefore warrants special treatment among alleged constitutional violations. See 511 U. S., at 496. Moreover, allowing an exception for *Gideon* challenges does not implicate our concern about administrative ease, as the "failure to appoint counsel . . . will generally appear from the judgment roll itself, or from an accompanying minute order." 511 U. S., at 496.

As with any § 2254 petition, the petitioner must satisfy the procedural prerequisites for relief including, for example, exhaustion of remedies. See 28 U. S. C. § 2254(b) (1994 ed., Supp. V). When an otherwise qualified § 2254 petitioner can demonstrate that his current sentence was enhanced on the basis of a prior conviction that was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, the current sentence cannot stand and habeas relief is appropriate. Cf. *United States* v. *Tucker*, *supra*, at

449 (affirming vacatur of sentence that was based in part on prior uncounseled state convictions).

B

We stated in *Daniels* that another exception to the general rule precluding habeas relief might be available, although the circumstances of that case did not require us to resolve the issue. See *ante*, at 383–384. We note a similar situation here.

The general rule we have adopted here and in *Daniels* reflects the notion that a defendant properly bears the consequences of either forgoing otherwise available review of a conviction or failing to successfully demonstrate constitutional error. See *supra*, at 403–404; *Daniels*, *ante*, at 381–383. It is not always the case, however, that a defendant can be faulted for failing to obtain timely review of a constitutional claim. For example, a state court may, without justification, refuse to rule on a constitutional claim that has been properly presented to it. Cf. 28 U. S. C. § 2244(d)(1)(B) (1994 ed., Supp. V) (tolling 1-year limitations period while petitioner is prevented from filing application by an "impediment . . . created by State action in violation of the Constitution or laws of the United States"). Alternatively, after the time for direct or collateral review has expired, a defendant may obtain compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner. Cf. *Brady* v. *Maryland*, 373 U. S. 83 (1963); 28 U. S. C. § 2244(b)(2)(B) (1994 ed., Supp. V) (allowing a second or successive habeas corpus application if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and . . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

In such situations, a habeas petition directed at the enhanced sentence may effectively be the first and only forum available for review of the prior conviction. As in *Daniels*, this case does not require us to determine whether, or under what precise circumstances, a petitioner might be able to use a § 2254 petition in this manner.

Whatever such a petitioner must show to be eligible for review, the challenged prior conviction must have adversely affected the sentence that is the subject of the habeas petition. This question was adequately raised and considered below. As the District Court stated, Coss contended "that his current sentence [for the 1990 conviction] was *adversely affected* by the 1986 convictions because the sentencing judge considered these allegedly unconstitutional convictions in computing Coss's present sentence." App. to Pet. for Cert. 105a–106a (emphasis added). The District Court and majority of the Court of Appeals agreed with Coss on this point. See *id.*, at 107a; 204 F. 3d, at 459. Judge Nygaard, joined by Judge Roth, dissented to dispute the conclusion that the 1986 convictions had any effect whatsoever on Coss' sentence for the 1990 conviction. *Id.*, at 467–469.

C

After a careful examination of the record here, we are satisfied that the findings of the lower courts on this threshold factual point are clearly erroneous. Cf. *Neil* v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972). We therefore conclude that respondent Coss does not qualify to have his § 2254 petition reviewed, even assuming the existence of a limited exception to the general rule barring review of an expired prior conviction. Specifically, it is clear that any "consideration" the trial court may have given to Coss' 1986 convictions in reimposing sentence for his 1990 conviction did not actually affect that sentence.

As we explain above, see *supra*, at 398–399, when Coss was resentenced on his 1990 conviction, he objected to the

presentence report's calculation of his prior record score. The court sustained that objection and, in effect, eliminated Coss' 1986 convictions from the prior record score entirely. Because the prior record score is one of two determinants of the applicable sentencing range, see 42 Pa. Cons. Stat. § 9721 (1998) (reproducing 204 Pa. Code § 303.9(a) (1998)), it is clear that Coss' 1986 convictions had no role in determining the range of sentences to which Coss was exposed.

In choosing a sentence for Coss within that range, the trial court considered several factors, including "the seriousness and nature of the crime involved here, the well being and protection of the people who live in our community, your criminal disposition, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard." Record Doc. No. 101 (Pl. Exh. 3, at 26). Coss' 1986 convictions are, of course, a portion of his criminal record. Thus, it is technically correct to say that the court "considered" those convictions before sentencing Coss. Cf. 204 F. 3d, at 459.

But it is a different thing entirely to say that the 1986 convictions actually increased the length of the sentence the court ultimately imposed. As the sentencing court told Coss, "I think that it's indicative that from your actions that you will continue to break the law unless given a period of incarceration." Record Doc. No. 101 (Pl. Exh. 3, at 26). The "actions" to which the judge referred were obviously not limited to Coss' criminal conduct in 1986, but Coss' extensive and violent criminal record as a whole. We conclude, as Judge Nygaard did below, that the 1986 convictions are "such a minor component of [Coss'] record that there is no question that the sentencing court, given its concerns, would have imposed exactly the same sentence" had those convictions been omitted from Coss' record. 204 F. 3d, at 468 (dissenting opinion).

We note that the record does not explain why Coss' ineffective assistance claim did not receive a timely adjudication

in the Pennsylvania courts. While the reason might have been that Coss' petition "slipped through the cracks," due to no fault of his own, Tr. of Oral Arg. 4, it might also have been that Coss was responsible for "request[ing] that the matter be brought up for a hearing," *id.*, at 5. But even if Coss cannot be faulted for that lapse, he would not qualify to have his current § 2254 petition reviewed because the 1990 sentence he is challenging was not actually affected by the 1986 convictions.

IV

The judgment of the United States Court of Appeals for the Third Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The error of *Daniels* v. *United States*, *ante*, p. 374, is repeated once more, and I respectfully dissent for reasons set out in my dissenting opinion in that case. There is a further reason to disagree with the majority here.

Although state law theoretically provided a procedure for respondent Coss to challenge his 1986 convictions, the provision has proven to be a mirage; Coss's challenge was filed and answered by the district attorney, only to disappear in the state-court system for almost 14 years, so far. This failure of state process leads the plurality to qualify its general rule against attacking predicates to enhanced sentences, by raising the possibility of such a challenge when the opportunity for attack under provisions of state law, timely invoked, has proven to be imaginary. *Ante*, at 405. The plurality then goes on to deny Coss the benefit of this exception on the ground that he cannot demonstrate that "the challenged prior conviction . . . adversely affected the sentence that is

the subject of the habeas petition." *Ante*, at 406. This conclusion is premature.

The issue of adverse effect was by no means adequately raised and considered by the Court of Appeals. The earlier convictions could have affected the later sentence in either of two ways: by subjecting Coss to a higher sentencing range or by being considered as a reason to give him a higher sentence than he would otherwise have received within a given range. It appears that the sentencing court did not treat the convictions as subjecting Coss to a higher range of potential sentence, but the District Court expressly found that the sentencing court considered the challenged convictions in sentencing Coss to the maximum sentence within the applicable range. App. to Pet. for Cert. 107a ("The sentencing judge, however, did make reference to the 1986 convictions in sentencing Coss to the top of the standard range for his 1990 aggravated assault conviction"). This finding was never challenged in the Court of Appeals,* which appeared to accept the District Court's finding as a matter of course. *Id.*, at 11a ("We are satisfied that the sentencing judge . . . took into consideration [Coss's 1986 conviction]").

In holding the District Court's finding to be clearly erroneous, the majority is thus ruling on a matter in the first instance in derogation of this Court's proper role as a court of review. *E. g.*, *Glover* v. *United States*, 531 U. S. 198 (2001);

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*The district attorney made no mention of the causal connection between the 1986 conviction and the 1990 sentence either in his brief before the Third Circuit panel, or in his petition for rehearing. That petition claimed only that the panel had improperly applied the principle of *United States* v. *Tucker*, 404 U. S. 443 (1972), to the facts of this case.

Even the so-called "Epilogue" included in the district attorney's brief before the en banc Court of Appeals argued only that the 1986 conviction did not subject Coss to a higher sentencing range in 1990. Supplemental Brief [on Rehearing] for Appellee in No. 98–7416 (CA3), pp. 15–18. It did not challenge the District Court's finding that the 1990 sentencing court considered the challenged convictions in sentencing Coss to the maximum sentence within the applicable range.

National Collegiate Athletic Assn. v. *Smith*, 525 U. S. 459 (1999); *United States* v. *Bestfoods*, 524 U. S. 51, 72–73 (1998). The only responsible course for the majority would be to remand to the Court of Appeals, which could determine whether the district attorney may challenge the District Court's finding of a causal link between the unconstitutional convictions and the later, maximum sentence, or whether this issue has already been waived.

JUSTICE BREYER, dissenting.

Because the Commonwealth has failed to argue in this Court that the trial court's consideration of respondent's 1986 convictions was harmless, and consequently, the issue has not been briefed, I would not overturn the Court of Appeals' finding that respondent's sentence was enhanced based on the purportedly defective 1986 convictions. The Court of Appeals, however, operated under the belief that the Constitution generally requires 28 U. S. C. § 2254 (1994 ed., Supp. V) petitioners to be able to attack prior convictions that enhanced their sentences. It did not focus on whether the § 2254 proceeding was "the first and only forum available for review of [respondent's] prior conviction[s]." *Ante*, at 406. Accordingly, I would vacate the decision below and remand for consideration of that issue. As respondent has not yet shown that he was denied a forum in which to raise his ineffective-assistance-of-counsel claim, any discussion of a constitutionally based exception is premature.

Syllabus

C & L ENTERPRISES, INC. *v.* CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA

No. 00–292. Argued March 19, 2001—Decided April 30, 2001

Respondent, a federally recognized Indian Tribe, proposed and entered into a standard form construction contract with petitioner C & L Enterprises, Inc. (C & L), for the installation of a roof on a Tribe-owned commercial building in Oklahoma. The property in question lies outside the Tribe's reservation and is not held by the Federal Government in trust for the Tribe. The contract contains two key provisions. First, a clause provides that "[a]ll . . . disputes . . . arising out of . . . the Contract . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . . The award rendered by the arbitrator . . . shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." The referenced American Arbitration Association Rules provide: "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." Second, the contract includes a choice-of-law clause that reads: "The contract shall be governed by the law of the place where the Project is located." Oklahoma has adopted a Uniform Arbitration Act, which instructs that "[t]he making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." The Act defines "court" as "any court of competent jurisdiction of this state." After execution of the contract but before C & L commenced performance, the Tribe decided to change the roofing material specified in the contract. The Tribe solicited new bids and retained another company to install the roof. C & L, claiming that the Tribe had dishonored the contract, submitted an arbitration demand. The Tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. It notified the arbitrator, however, that it had several substantive defenses to C & L's claim. The arbitrator received evidence and rendered an award in favor of C & L. The contractor filed suit to enforce the award in the District Court of Oklahoma County, a state court of general, first instance, jurisdiction. The Tribe appeared in court for the limited purpose of moving to dismiss the action on the ground that, as a sovereign, it was immune from suit. The District

Court denied the motion and entered a judgment confirming the award. The Oklahoma Court of Civil Appeals affirmed. While the Tribe's certiorari petition was pending here, this Court decided *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, holding that an Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless "Congress has authorized the suit or the tribe has waived its immunity," *id.*, at 754, 760. On remand for reconsideration in light of *Kiowa*, the Court of Civil Appeals held that the Tribe here was immune from suit on its contract with C & L. Although noting that the arbitration agreement and the contract language as to judicial enforcement seem to indicate the Tribe's willingness to expose itself to suit on the contract, the court concluded that the Tribe had not waived its suit immunity with the requisite clarity. The court therefore instructed the trial court to dismiss the case.

Held: By the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of C & L. Like *Kiowa*, this case arises out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe. C & L does not contend that Congress has abrogated tribal immunity in this setting. The question presented is whether the Tribe has waived its immunity. To relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509. The construction contract's arbitration provision and related prescriptions lead to the conclusion that the Tribe in this case has waived its immunity with the requisite clarity. The arbitration clause requires resolution of all contract-related disputes between the parties by binding arbitration; ensuing arbitral awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof." For governance of arbitral proceedings, the clause specifies American Arbitration Association Rules, under which "the arbitration award may be entered in any federal or state court having jurisdiction thereof." The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma state court in which C & L filed suit. By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act, which prescribes that, when "an agreement . . . provid[es] for arbitration in" Oklahoma, jurisdiction to enforce the agreement vests in "any court of competent jurisdiction of this state." On any sensible reading of the Act, the District Court of Oklahoma County,

a local court of general jurisdiction, fits that statutory description. This Court rejects the Tribe's contention that an arbitration clause is not a waiver of immunity from suit, but simply a waiver of the parties' rights to a court trial of contractual disputes. Under the clause, the Tribe recognizes, the parties must arbitrate. The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. Also rejected is the Tribe's assertion that a form contract, designed principally for private parties who have no immunity to waive, cannot establish a clear waiver of tribal suit immunity. In appropriate cases, this Court applies the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. That rule is inapposite here for two evident reasons. First, the contract is not ambiguous. Second, the Tribe did not find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on the Tribe. Pp. 418–423.

Reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

John D. Mashburn argued the cause for petitioner. With him on the briefs was *James W. Carlton, Jr.*

Gregory S. Coleman, Solicitor General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging reversal. With him on the brief were *John Cornyn*, Attorney General, *Andy Taylor*, First Assistant Attorney General, *Rick Thompson*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Mark Pryor* of Arkansas, *Carla J. Stovall* of Kansas, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, and *Mark Barnett* of South Dakota.

Michael Minnis argued the cause for respondent. With him on the brief were *David McCullough* and *David J. Bederman.*

Gregory G. Garre argued the cause for the United States as *amicus curiae* in support of respondent. With him on

the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, and *Deputy Solicitor General Kneedler*.

JUSTICE GINSBURG delivered the opinion of the Court.

In *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751 (1998), this Court held that an Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless "Congress has authorized the suit or the tribe has waived its immunity." *Id.*, at 754. This case concerns the impact of an arbitration agreement on a tribe's plea of suit immunity. The document on which the case centers is a standard form construction contract signed by the parties to govern the installation of a foam roof on a building, the First Oklahoma Bank, in Shawnee, Oklahoma. The building and land are owned by an Indian Tribe, the Citizen Potawatomi Nation (Tribe). The building is commercial, and the land is off-reservation, nontrust property. The form contract, which was proposed by the Tribe and accepted by the contractor, C & L Enterprises, Inc. (C & L), contains an arbitration clause.

The question presented is whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards "in any court having jurisdiction thereof." We hold that, by the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of contractor C & L.

I

Respondent Citizen Potawatomi Nation is a federally recognized Indian Tribe. In 1993, it entered into a contract with petitioner C & L for the installation of a roof on a Shawnee, Oklahoma, building owned by the Tribe. The building,

which housed the First Oklahoma Bank, is not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe.

The contract at issue is a standard form agreement copyrighted by the American Institute of Architects. The Tribe proposed the contract; details not set out in the form were inserted by the Tribe and its architect. Two provisions of the contract are key to this case. First, the contract contains an arbitration clause:

> "All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise . . . . The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." App. to Pet. for Cert. 46.

The American Arbitration Association Rules to which the clause refers provide: "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." American Arbitration Association, Construction Industry Dispute Resolution Procedures, R–48(c) (Sept. 1, 2000).

Second, the contract includes a choice-of-law clause that reads: "The contract shall be governed by the law of the place where the Project is located." App. to Pet. for Cert. 56. Oklahoma has adopted a Uniform Arbitration Act, which instructs that "[t]he making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." Okla. Stat., Tit. 15,

§ 802.B (1993). The Act defines "court" as "any court of competent jurisdiction of this state." *Ibid.*

After execution of the contract but before C & L commenced performance, the Tribe decided to change the roofing material from foam (the material specified in the contract) to rubber guard. The Tribe solicited new bids and retained another company to install the roof. C & L, claiming that the Tribe had dishonored the contract, submitted an arbitration demand. The Tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. It notified the arbitrator, however, that it had several substantive defenses to C & L's claim. On consideration of C & L's evidence, the arbitrator rendered an award in favor of C & L for $25,400 in damages (close to 30% of the contract price), plus attorney's fees and costs.

Several weeks later, C & L filed suit to enforce the arbitration award in the District Court of Oklahoma County, a state court of general, first instance, jurisdiction. The Tribe appeared specially for the limited purpose of moving to dismiss the action on the ground that the Tribe was immune from suit. The District Court denied the motion and entered a judgment confirming the award.

The Oklahoma Court of Civil Appeals affirmed, holding that the Tribe lacked immunity because the contract giving rise to the suit was "between an Indian tribe and a non-Indian" and was "executed outside of Indian Country." App. to Pet. for Cert. 14 (citation omitted). The Oklahoma Supreme Court denied review, and the Tribe petitioned for certiorari in this Court.

While the Tribe's petition was pending here, the Court decided *Kiowa*, holding: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." 523 U. S., at 760. *Kiowa* reconfirmed: "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

Id., at 754. Thereafter, we granted the Tribe's petition in this case, vacated the judgment of the Court of Civil Appeals, and remanded for reconsideration in light of *Kiowa*. 524 U. S. 901 (1998).

On remand, the Court of Civil Appeals changed course. It held that, under *Kiowa*, the Tribe here was immune from suit on its contract with C & L, despite the contract's off-reservation subject matter. App. to Pet. for Cert. 4–5. The court then addressed whether the Tribe had waived its immunity. "The agreement of [the] Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction," the court observed, "seem to indicate a willingness on [the] Tribe's part to expose itself to suit on the contract." *Id.*, at 7. But, the court quickly added, "the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *Ibid.* Concluding that the Tribe had not waived its suit immunity with the requisite clarity, the appeals court instructed the trial court to dismiss the case. The Oklahoma Supreme Court denied C & L's petition for review.

Conflicting with the Oklahoma Court of Civil Appeals' current decision, several state and federal courts have held that an arbitration clause, kin to the one now before us, expressly waives tribal immunity from a suit arising out of the contract. See *Sokaogon Gaming Enterprise Corp.* v. *Tushie-Montgomery Associates, Inc.*, 86 F. 3d 656, 661 (CA7 1996) (clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived Tribe's immunity); *Native Village of Eyak* v. *GC Contractors*, 658 P. 2d 756 (Alaska 1983) (same); *Val/Del, Inc.* v. *Superior Court*, 145 Ariz. 558, 703 P. 2d 502 (Ct. App. 1985) (same). But cf. *Pan American Co.* v. *Sycuan Band of Mission Indians*, 884 F. 2d 416 (CA9 1989) (clause requiring arbitration of contractual disputes did not expressly waive Tribe's immu-

nity). We granted certiorari to resolve this conflict, 531 U. S. 956 (2000), and now reverse.

II

Kiowa, in which we reaffirmed the doctrine of tribal immunity, involved an off-reservation, commercial agreement (a stock purchase) by a federally recognized Tribe. The Tribe signed a promissory note agreeing to pay the seller $285,000 plus interest. The note recited: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." 523 U. S., at 753–754. The Tribe defaulted, the seller sued on the note in state court, and the Tribe asserted sovereign immunity. We upheld the plea. Tribal immunity, we ruled in *Kiowa,* extends to suits on off-reservation commercial contracts. *Id.,* at 754–760. The Kiowa Tribe was immune from suit for defaulting on the promissory note, we held, because "Congress ha[d] not abrogated [the Tribe's] immunity, nor ha[d] petitioner waived it." *Id.,* at 760.

Like *Kiowa,* this case arises out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe. The petitioning contractor, C & L, does not contend that Congress has abrogated tribal immunity in this setting. The question presented is whether the Tribe has waived its immunity.

To abrogate tribal immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49, 58 (1978) (citing *United States* v. *Testan,* 424 U. S. 392, 399 (1976)). Similarly, to relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.,* 498 U. S. 505, 509 (1991). We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.

The construction contract's provision for arbitration and related prescriptions lead us to this conclusion. The arbitra-

tion clause requires resolution of all contract-related disputes between C & L and the Tribe by binding arbitration; ensuing arbitral awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof." App. to Pet. for Cert. 46. For governance of arbitral proceedings, the arbitration clause specifies American Arbitration Association Rules for the construction industry, *ibid.*, and under those Rules, "the arbitration award may be entered in any federal or state court having jurisdiction thereof," American Arbitration Association, Construction Industry Dispute Resolution Procedures, R–48(c) (Sept. 1, 2000).

The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma state court in which C & L filed suit. By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, App. to Pet. for Cert. 56, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act, *id.*, at 46 ("judgment may be entered upon [the arbitration award] in accordance with applicable law"); Okla. Stat., Tit. 15, § 802.A (1993) ("This act shall apply to . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties.").[1]

The Uniform Act in force in Oklahoma prescribes that, when "an agreement . . . provid[es] for arbitration in this state," *i. e.*, in Oklahoma, jurisdiction to enforce the agreement vests in "any court of competent jurisdiction of this

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[1] The United States, as *amicus* supporting the Tribe, urges us to remain within the "four corners of the contract" and refrain from reliance on "secondary sources." Brief for United States as *Amicus Curiae* 19, and n. 7. The American Arbitration Association Rules and the Uniform Arbitration Act, however, are not secondary interpretive aides that supplement our reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself.

state." § 802.B. On any sensible reading of the Act, the District Court of Oklahoma County, a local court of general jurisdiction, fits that statutory description.[2]

In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures. The regime to which the Tribe subscribed includes entry of judgment upon an arbitration award in accordance with the Oklahoma Uniform Arbitration Act. That Act concerns arbitration in Oklahoma and correspondingly designates as enforcement forums "court[s] of competent jurisdiction of [Oklahoma]." *Ibid.* C & L selected for its enforcement suit just such a forum. In a case involving an arbitration clause essentially indistinguishable from the one to which the Tribe and C & L agreed, the Seventh Circuit stated:

> "There is nothing ambiguous about th[e] language [of the arbitration clause]. The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law.
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> . . . . . .
>
> . . . "The [tribal immunity] waiver . . . is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that." *Sokaogon*, 86 F. 3d, at 659–660.

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[2] The United States argues that the Oklahoma Uniform Arbitration Act is inapplicable in this case because it does not reach all arbitrations properly held in Oklahoma, but only those in which the agreement explicitly "provide[s] for arbitration in [Oklahoma]." Tr. of Oral Arg. 47–48 (referring to § 802.B). No Oklahoma authority is cited for this constricted reading of an Act that expressly "appl[ies] to . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties." § 802.A. We decline to attribute to the Oklahoma lawmakers and interpreters a construction that so severely shrinks the Act's domain.

That cogent observation holds as well for the case we confront.[3]

The Tribe strenuously urges, however, that an arbitration clause simply "is not a waiver of immunity from suit." Brief for Respondent 13. The phrase in the clause providing for enforcement of arbitration awards "in any court having jurisdiction thereof," the Tribe maintains, "begs the question of what court has jurisdiction." *Id.*, at 22. As counsel for the Tribe clarified at oral argument, the Tribe's answer is "no court," on earth or even on the moon. Tr. of Oral Arg. 32–33. No court—federal, state, or even tribal—has jurisdiction over C & L's suit, the Tribe insists, because it has not expressly waived its sovereign immunity in any judicial forum. *Ibid.;* cf. *Sokaogon*, 86 F. 3d, at 660 (facing a similar argument, Seventh Circuit gleaned that counsel meant only a statement to this effect will do: "The tribe will not assert the defense of sovereign immunity if sued for breach of contract.").[4]

[3] Instructive here is the law governing waivers of immunity by foreign sovereigns. Cf. *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 759 (1998) ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries."). "Under the law of the United States . . . an agreement to arbitrate is a waiver of immunity from jurisdiction in . . . an action to enforce an arbitral award rendered pursuant to the agreement . . . ." Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b)(ii) (1987).

[4] Relying on our state sovereign immunity jurisprudence, the United States maintains that "courts must be especially reluctant to construe ambiguous expressions as consent by a Tribe to be sued in state court." Brief for United States as *Amicus Curiae* 23; see also *id.*, at 25 (arguing that a State's generalized consent to suit, without an express selection of the forum in which suit may proceed, "should be construed narrowly as the State's consent to be sued in its *own* courts of competent jurisdiction, and not its consent to be subjected to suits in *another* sovereign's courts") (citing, *e. g.*, *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946) (State statute authorizing suits against State in "any court of competent jurisdiction" did not waive State's immunity from suit in federal court)). But in this case, as we explained *supra*, at 419–420, the Tribe has plainly consented to suit in Oklahoma state court. We therefore have

Instead of waiving suit immunity in any court, the Tribe argues, the arbitration clause waives simply and only the parties' rights to a court trial of contractual disputes; under the clause, the Tribe recognizes, the parties must instead arbitrate. Brief for Respondent 21 ("An arbitration clause is what it is: a clause submitting contractual disputes to arbitration."). The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. See *Eyak*, 658 P. 2d, at 760 ("[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. . . . The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed."); *Val/Del*, 145 Ariz., at 565, 703 P. 2d, at 509 (because the Tribe has "agree[d] that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity"); cf. *Rosebud Sioux Tribe* v. *Val-U Constr. Co.*, 50 F. 3d 560, 562 (CA8 1995) (agreement to arbitrate contractual disputes did not contain provision for court enforcement; court nonetheless observed that "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense").[5]

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no occasion to decide whether parallel principles govern state and tribal waivers of immunity.

[5] The Tribe's apparent concession—that the arbitration clause embodies the parties' agreement to resolve disputes through arbitration—is not altogether consistent with the Tribe's refusal to participate in the arbitration proceedings.

The Tribe also asserts that a form contract, designed principally for private parties who have no immunity to waive, cannot establish a clear waiver of tribal suit immunity. Brief for Respondent 20; Tr. of Oral Arg. 27–28. In appropriate cases, we apply "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 62 (1995) (construing form contract containing arbitration clause). That rule, however, is inapposite here. The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe. Cf. *United States* v. *Bankers Ins. Co.*, 245 F. 3d 315, 319–320 (CA4 2001) (where federal agency prepared agreement, including its arbitration provision, sovereign immunity does not shield the agency from engaging in the arbitration process).[6]

* * *

For the reasons stated, we conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit. The judgment of the Oklahoma Court of Civil Appeals is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[6] The Tribe alternatively urges affirmance on the grounds that the contract is void under 25 U. S. C. § 81 and that the members of the Tribe who executed the contract lacked the authority to do so on the Tribe's behalf. These issues were not aired in the Oklahoma courts and are not within the scope of the questions on which we granted review. We therefore decline to address them.

Syllabus

COOPER INDUSTRIES, INC. *v.* LEATHERMAN TOOL GROUP, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–2035. Argued February 26, 2001—Decided May 14, 2001

Respondent Leatherman Tool Group, Inc., manufactures a multifunction tool which improves on the classic Swiss army knife. When petitioner Cooper Industries, Inc., used photographs of a modified version of Leatherman's tool in posters, packaging, and advertising materials introducing a competing tool, Leatherman filed this action asserting, *inter alia*, violations of the Trademark Act of 1946 (Lanham Act). Ultimately, a trial jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages. Rejecting Cooper's arguments that the punitive damages were grossly excessive under *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, the District Court entered judgment. As relevant here, the Ninth Circuit affirmed the punitive damages award, concluding that the District Court did not abuse its discretion in declining to reduce that award.

Held: Courts of Appeals should apply a *de novo* standard when reviewing district court determinations of the constitutionality of punitive damages awards. The Ninth Circuit erred in applying the less demanding abuse-of-discretion standard in this case. Pp. 432–443.

(a) Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendant's wrongful conduct, but punitive damages are private fines intended to punish the defendant and deter future wrongdoing. A jury's assessment of the former is essentially a factual determination, but its imposition of the latter is an expression of its moral condemnation. States have broad discretion in imposing criminal penalties and punitive damages. Thus, when no constitutional issue is raised, a federal appellate court reviews the trial court's determination under an abuse-of-discretion standard. *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 279. However, the Fourteenth Amendment's Due Process Clause imposes substantive limits on the States' discretion, making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States, *Furman* v. *Georgia*, 408 U. S. 238, and prohibiting States from imposing "grossly excessive" punishments on tortfeasors, *e. g., Gore*, 517 U. S., at 562. The cases in which such limits

were enforced involved constitutional violations predicated on judicial determinations that the punishments were grossly disproportional to the gravity of the offense. *E. g.*, *United States* v. *Bajakajian*, 524 U. S. 321, 334. The relevant constitutional line is inherently imprecise, *id.*, at 336, but, in deciding whether that line has been crossed, this Court has focused on the same three criteria: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct. See, *e. g.*, *Gore*, 517 U. S., at 575–585; *Bajakajian*, 524 U. S., at 337, 339, 340–343. Moreover, and of greatest relevance for the instant issue, in each case the Court has engaged in an independent examination of the relevant criteria. See, *e. g.*, *id.*, at 337–344; *Gore*, 517 U. S., at 575–586. The reasons supporting the Court's holding in *Ornelas* v. *United States*, 517 U. S. 690, that trial judges' reasonable suspicion and probable cause determinations should be reviewed *de novo*—that "reasonable suspicion" and "probable cause" are fluid concepts that take their substantive content from the particular contexts in which the standards are being expressed; that, because such concepts acquire content only through case-by-case application, independent review is necessary if appellate courts are to maintain control of, and clarify, legal principles; and that *de novo* review tends to unify precedent and stabilize the law—are equally applicable when passing on district court determinations of the constitutionality of punitive damages awards. Pp. 432–436.

(b) Because a jury's award of punitive damages is not a finding of "fact," appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by Leatherman and its *amici*. Pp. 437–440.

(c) It seems likely in this case that a thorough, independent review of the District Court's rejection of Cooper's due process objections to the punitive damages award might have led the Ninth Circuit to reach a different result. In fact, this Court's own consideration of the three *Gore* factors reveals questionable conclusions by the District Court that may not survive *de novo* review and illustrates why the Ninth Circuit's answer to the constitutional question may depend on the standard of review. Pp. 441–443.

205 F. 3d 1351, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 443. SCALIA, J.,

filed an opinion concurring in the judgment, *post,* p. 443. GINSBURG, J., filed a dissenting opinion, *post,* p. 444.

William Bradford Reynolds argued the cause for petitioner. With him on the briefs was *Bradley J. Schlozman.*

Jonathan S. Massey argued the cause for respondent. With him on the brief were *Laurence H. Tribe*, *J. Peter Staples*, and *Thomas C. Goldstein.**

JUSTICE STEVENS delivered the opinion of the Court.

A jury found petitioner guilty of unfair competition and awarded respondent $50,000 in compensatory damages and $4.5 million in punitive damages. The District Court held that the punitive damages award did not violate the Federal Constitution. The Court of Appeals concluded that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." App. to Pet. for Cert. 4a. The issue in this case is whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award.

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*Briefs of *amici curiae* urging reversal were filed for American Home Products Corp. et al. by *Walter E. Dellinger* and *John F. Daum;* for General Dynamics Corp. by *S. Thomas Todd;* and for the Product Liability Advisory Council, Inc., by *Griffin B. Bell*, *Chilton Davis Varner*, *Paul D. Clement*, and *Jeffrey S. Bucholtz.*

Jeffrey Robert White and *Frederick M. Baron* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Alliance of American Insurers et al. by *Richard Hodyl, Jr.;* for the American Tort Reform Association et al. by *Victor E. Schwartz*, *Mark A. Behrens*, *Leah Lorber*, *Jan S. Amundson*, *J. V. Schwan*, *David F. Zoll*, *Donald D. Evans*, *Jeffrey L. Gabardi*, and *Louis Saccoccio;* for the Association of American Railroads by *Carter G. Phillips*, *Gene C. Schaerr*, *Stephen B. Kinnaird*, and *Daniel Saphire;* for the California Employment Law Council et al. by *William J. Kilberg* and *Thomas G. Hungar;* for the Chamber of Commerce of the United States by *Andrew L. Frey*, *Evan M. Tager*, and *Robin S. Conrad;* for the Washington Legal Foundation et al. by *Arvin Maskin*, *Daniel J. Popeo*, and *Paul D. Kamenar;* and for Arthur F. McEvoy by *Kenneth Chesebro* and *Mr. McEvoy, pro se.*

I

The parties are competing tool manufacturers. In the 1980's, Leatherman Tool Group, Inc. (Leatherman or respondent), introduced its Pocket Survival Tool (PST). The Court of Appeals described the PST as an

> "ingenious multi-function pocket tool which improves on the classic 'Swiss army knife' in a number of respects. Not the least of the improvements was the inclusion of pliers, which, when unfolded, are nearly equivalent to regular full-sized pliers. . . . Leatherman apparently largely created and undisputedly now dominates the market for multi-function pocket tools which generally resemble the PST." *Leatherman Tool Group, Inc.* v. *Cooper Industries*, 199 F. 3d 1009, 1010 (CA9 1999).

In 1995, Cooper Industries, Inc. (Cooper or petitioner), decided to design and market a competing multifunction tool. Cooper planned to copy the basic features of the PST, add a few features of its own, and sell the new tool under the name "ToolZall." Cooper hoped to capture about 5% of the multifunction tool market. The first ToolZall was designed to be virtually identical to the PST,[1] but the design was ultimately modified in response to this litigation. The controversy to be resolved in this case involves Cooper's improper advertising of its original ToolZall design.

Cooper introduced the original ToolZall in August 1996 at the National Hardware Show in Chicago. At that show, it used photographs in its posters, packaging, and advertising materials that purported to be of a ToolZall but were actually of a modified PST. When those materials were prepared, the first of the ToolZalls had not yet been manufac-

[1] The ToolZall was marked with a different name than the PST, was held together with different fasteners, and, in the words of the Court of Appeals, "included a serrated blade and certain other small but not particularly visible differences." *Leatherman Tool Group, Inc.* v. *Cooper Industries*, 199 F. 3d 1009, 1010 (CA9 1999).

tured. A Cooper employee created a ToolZall "mock-up" by grinding the Leatherman trademark from handles and pliers of a PST and substituting the unique fastenings that were to be used on the ToolZall. At least one of the photographs was retouched to remove a curved indentation where the Leatherman trademark had been. The photographs were used, not only at the trade show, which normally draws an audience of over 70,000 people, but also in the marketing materials and catalogs used by Cooper's sales force throughout the United States. Cooper also distributed a touched-up line drawing of a PST to its international sales representatives.[2]

Shortly after the trade show, Leatherman filed this action asserting claims of trade-dress infringement, unfair competition, and false advertising under § 43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, as amended, 15 U. S. C. § 1125(a) (1994 ed. and Supp. V), and a common-law claim of unfair competition for advertising and selling an "imitation" of the PST. In December 1996, the District Court entered a preliminary injunction prohibiting Cooper from marketing the ToolZall and from using pictures of the modified PST in its advertising. Cooper withdrew the original ToolZall from the market and developed a new model with plastic coated handles that differed from the PST. In November 1996, it had anticipatorily sent a notice to its sales personnel ordering a recall of all promotional materials containing pictures of the PST, but it did not attempt to retrieve the materials it had sent to its customers until the following April. As a result, the offending promotional materials continued to appear in catalogs and advertisements well into 1997.

After a trial conducted in October 1997, the jury returned a verdict that answered several special interrogato-

[2] To "create" the drawing, a Cooper manager photocopied a line-art drawing of a PST and then "whited out" Leatherman's trademark. App. 43–47.

ries. With respect to the Lanham Act infringement claims, the jury found that Leatherman had trademark rights in the overall appearance of the PST and that the original ToolZall infringed those rights but that the infringement had not damaged Leatherman. It then found that the modified ToolZall did not infringe Leatherman's trademark rights in the PST. With respect to the advertising claims, it found Cooper guilty of passing off, false advertising, and unfair competition and assessed aggregate damages of $50,000 on those claims. It then answered "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" App. 18.

Because it answered this question in the affirmative, the jury was instructed to determine the "amount of punitive damages [that] should be awarded to Leatherman." *Ibid.* The jury awarded $4.5 million. *Ibid.*

After the jury returned its verdict, the District Court considered, and rejected, arguments that the punitive damages were "grossly excessive" under our decision in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996). See App. to Pet. for Cert. 24a. It then entered its judgment, which provided that 60% of the punitive damages would be paid to the Criminal Injuries Compensation Account of the State of Oregon. The judgment also permanently enjoined Cooper from marketing its original ToolZall in the United States or in 22 designated foreign countries.

On appeal, Cooper challenged both the District Court's injunction against copying the PST and the punitive damages award. The Court of Appeals issued two opinions. In its published opinion it set aside the injunction. *Leather-*

man Tool Group, Inc. v. *Cooper Industries, Inc., supra.* It held that the overall appearance of the PST was not protected under the trademark laws because its distinguishing features, and the combination of those features, were functional. Accordingly, even though Cooper had deliberately copied the PST, it acted lawfully in doing so.[3]

In its unpublished opinion, the Court of Appeals affirmed the punitive damages award. It first rejected Cooper's argument that the Oregon Constitution, which has been interpreted to prohibit awards of punitive damages for torts that impose liability for speech, precluded the jury's award of such damages in this case. It then reviewed the District Court's finding that the award "was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size" and concluded "that the award did not violate Cooper's due process rights" under the Federal Constitution. App. to Pet. for Cert. 3a, judgt. order reported at 205 F. 3d 1351 (CA9 1999). It noted that the "passing off" in this case was "very unusual" because "even assuming PST is a superior product," no superior features of the PST were perceivable in the photographs. App. to Pet. for Cert. 3a. "Any customer who bought based on what the photographs *showed* would have received essentially that for which he or she paid." *Ibid.* Thus, Cooper's use of the photographs of the PST did not involve "the

[3] Because this holding removed the predicate for the award of fees under the Lanham Act, see n. 2, *supra*, the Court of Appeals set aside that award and directed the District Court, on remand, to consider whether the evidence of passing off, standing alone, was sufficient to warrant a fee award. The Court of Appeals noted that the jury verdict form did not distinguish between passing off as a Lanham Act claim and passing off as a matter of state law. Although a fee award under § 35(a) could not be supported unless the federal statute was violated, there is no reason to believe that any possible difference between federal and state passing off would affect the constitutionality of the punitive damages award.

same sort of potential harm to Leatherman or to customers as that which may arise from traditional passing off." *Id.*, at 4a. The Court of Appeals made clear, however, that it did not condone the passing off. "[A]t a minimum," it observed, "[the passing off] gave Cooper an unfair advantage" by allowing it to use Leatherman's work product "to obtain a 'mock-up' more cheaply, easily, and quickly" than if it had waited until its own product was ready. *Ibid.* Accordingly, the Court of Appeals concluded, "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." *Ibid.*

Cooper's petition for a writ of certiorari asked us to decide whether the Court of Appeals reviewed the constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria we articulated in *Gore*. We granted the petition to resolve confusion among the Courts of Appeals on the first question.[4] 531 U. S. 923 (2000). We now conclude that the constitutional issue merits *de novo* review. Because the Court of Appeals applied an "abuse of discretion" standard, we remand the case for determination of the second question under the proper standard.

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[4] Respondent and its *amicus* at times appear to conflate the question of the proper standard for reviewing the District Court's due process determination with the question of the substantive standard for determining the jury award's conformity with due process in the first instance. See Brief for Arthur F. McEvoy as *Amicus Curiae* 13 ("[O]n appeal the litigant's objection to the *substance* of the jury's holding—whether on liability or damages—should be evaluated under a 'rational factfinder' standard . . ."); Brief for Respondent 13. The former is the question we agreed to review. The latter question has already been answered in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996). Thus, our rejection in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443 (1993), of "heightened scrutiny" of punitive damages awards, see *id.*, at 456, is not only wholly consistent with our decision today, it is irrelevant to our resolution of the question presented.

II

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. See Restatement (Second) of Torts § 903, pp. 453–454 (1979); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 54 (1991) (O'Connor, J., dissenting). The latter, which have been described as "quasi-criminal," *id.*, at 19, operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Haslip*, 499 U. S., at 54 (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").[5]

Legislatures have extremely broad discretion in defining criminal offenses, *Schall* v. *Martin*, 467 U. S. 253, 268–269, n. 18 (1984), and in setting the range of permissible punishments for each offense, *ibid.*; *Solem* v. *Helm*, 463 U. S. 277, 290 (1983). Judicial decisions that operate *within* these legislatively enacted guidelines are typically reviewed for abuse of discretion. See, *e. g.*, *Koon* v. *United States*, 518 U. S. 81, 96, 99–100 (1996); cf. *Apprendi* v. *New Jersey*, 530 U. S. 466, 481 (2000) (it is permissible "for judges to exercise dis-

[5] See also Sunstein, Kahneman, & Schkade, Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 Yale L. J. 2071, 2074 (1998) ("[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers").

cretion . . . in imposing a judgment *within the range* prescribed by statute").

As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. Cf. *Gore*, 517 U. S., at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case"). A good many States have enacted statutes that place limits on the permissible size of punitive damages awards.[6] When juries make particular awards within those limits, the role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 279 (1989). If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's "determination under an abuse-of-discretion standard." *Ibid.*[7]

Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and

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[6] See *Gore*, 517 U. S., at 614–619 (GINSBURG, J., dissenting). Since our decision in *Gore*, four additional States have added punitive damages caps: Alabama, Alaska, North Carolina, and Ohio. See Ala. Code § 6–11–21 (Supp. 2000); Alaska Stat. Ann. § 09.17.020 (2000); N. C. Gen. Stat. § 1D–25 (1999); Ohio Rev. Code Ann. § 2315.21 (Supp. 2000).

[7] In *Browning-Ferris*, the petitioner did argue that the award violated the Excessive Fines Clause of the Eighth Amendment, but we held the Clause inapplicable to punitive damages. The petitioner's reliance on the Due Process Clause of the Fourteenth Amendment was unavailing because that argument had not been raised in the District Court, the Court of Appeals, or the certiorari petition. See 492 U. S., at 276–277.

unusual punishments applicable to the States. *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*. The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors, *Gore*, 517 U. S., at 562; *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 453–455 (1993) (plurality opinion).

The Court has enforced those limits in cases involving deprivations of life, *Enmund* v. *Florida*, 458 U. S. 782, 787, 801 (1982) (death is not "a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (opinion of White, J.) (sentence of death is "grossly disproportionate" and excessive punishment for the crime of rape);[8] deprivations of liberty, *Solem* v. *Helm*, 463 U. S., at 279, 303 (life imprisonment without the possibility of parole for nonviolent felonies is "significantly disproportionate"); and deprivations of property, *United States* v. *Bajakajian*, 524 U. S. 321, 324 (1998) (punitive forfeiture of $357,144 for violating reporting requirement was "grossly disporportional" to the gravity of the offense); *Gore*, 517 U. S., at 585–586 ($2 million punitive damages award for failing to advise customers of minor predelivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional).

In these cases, the constitutional violations were predicated on judicial determinations that the punishments were "grossly disproportional to the gravity of . . . defendant[s'] offense[s]." *Bajakajian*, 524 U. S., at 334; see also *Gore*, 517 U. S., at 585–586; *Solem*, 463 U. S., at 303; *Coker*, 433 U. S., at 592 (opinion of White, J.). We have recognized that the relevant constitutional line is "inherently imprecise," *Ba-*

[8] Although disagreeing with the specific holding in *Coker*, Chief Justice Burger and then-JUSTICE REHNQUIST accepted the proposition that the "concept of disproportionality bars the death penalty for minor crimes." 433 U. S., at 604 (Burger, C. J., dissenting).

jakajian, 524 U. S., at 336, rather than one "marked by a simple mathematical formula," *Gore*, 517 U. S., at 582. But in deciding whether that line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability, see, *e. g.*, *Bajakajian*, 524 U. S., at 337; *Gore*, 517 U. S., at 575–580; *Solem*, 463 U. S., at 290–291; *Enmund*, 458 U. S., at 798; *Coker*, 433 U. S., at 598 (opinion of White, J.); the relationship between the penalty and the harm to the victim caused by the defendant's actions, see, *e. g.*, *Bajakajian*, 524 U. S., at 339; *Gore*, 517 U. S., at 580–583; *Solem*, 463 U. S., at 293; *Enmund*, 458 U. S., at 798; *Coker*, 433 U. S., at 598 (opinion of White, J.); and the sanctions imposed in other cases for comparable misconduct, see, *e. g.*, *Bajakajian*, 524 U. S., at 340–343; *Gore*, 517 U. S., at 583–585; *Solem*, 463 U. S., at 291; *Enmund*, 458 U. S., at 789–796; *Coker*, 433 U. S., at 593–597 (opinion of White, J.). Moreover, and of greatest relevance for the issue we address today, in each of these cases we have engaged in an independent examination of the relevant criteria. See, *e. g.*, *Bajakajian*, 524 U. S., at 337–344; *Gore*, 517 U. S., at 575–586; *Solem*, 463 U. S., at 295–300; *Enmund*, 458 U. S., at 788–801; *Coker*, 433 U. S., at 592–600 (opinion of White, J.).

In *Bajakajian*, we expressly noted that the courts of appeals must review the proportionality determination "*de novo*" and specifically rejected the suggestion of the respondent, who had prevailed in the District Court, that the trial judge's determination of excessiveness should be reviewed only for an abuse of discretion. "The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous. . . . But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 524 U. S., at 336–337, n. 10 (citing *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996)).

Likewise, in *Ornelas*, we held that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. The reasons we gave in support of that holding are equally applicable in this case. First, as we observed in *Ornelas*, the precise meaning of concepts like "reasonable suspicion" and "probable cause" cannot be articulated with precision; they are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Id.*, at 696. That is, of course, also a characteristic of the concept of "gross excessiveness." Second, "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*, at 697. Again, this is also true of the general criteria set forth in *Gore;* they will acquire more meaningful content through case-by-case application at the appellate level. "Finally, *de novo* review tends to unify precedent" and " 'stabilize the law.' " 517 U. S., at 697–698. JUSTICE BREYER made a similar point in his concurring opinion in *Gore:*

> "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." 517 U. S., at 587.

Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.[9]

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[9] Contrary to respondent's assertion, Brief for Respondent 12–13, our decision today is *supported* by our reasoning in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 20–21 (1991). In that case, we emphasized the

III

"Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, see, *e. g.*, [*St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648 (1915)], the level of punitive damages is not really a 'fact' 'tried' by the jury." *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 459 (1996) (SCALIA, J., dissenting). Because the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its *amicus*.[10] See Brief for Respondent 18–24; Brief for Association of Trial Lawyers of America as *Amicus Curiae* 17–20. Our decisions in *Gasperini* and *Hetzel* v. *Prince William County*, 523 U. S. 208 (1998) *(per curiam)*, both of which concerned compensatory damages, are not to the contrary.[11]

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importance of appellate review to ensuring that a jury's award of punitive damages comports with due process. See *id.*, at 20–21 ("[A]ppellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition").

[10] Respondent argues that our decision in *Honda Motor Co.* v. *Oberg*, 512 U. S. 415 (1994), rests upon the assumption that punitive damages awards are findings of fact. In that case, we held that the Oregon Constitution, which prohibits the reexamination of any "fact tried by a jury," Ore. Const., Art. VII, § 3, violated due process because it did not allow for any review of the constitutionality of punitive damages awards. Respondent claims that, because we considered this provision of the Oregon Constitution to cover punitive damages, we implicitly held that punitive damages are a "fact tried by a jury." Brief for Respondent 27–28. It was the Oregon Supreme Court's interpretation of that provision, however, and not our own, that compelled the treatment of punitive damages as covered. See *Oberg*, 512 U. S., at 427; see also *Van Lom* v. *Schneiderman*, 187 Ore. 89, 93, 210 P. 2d 461, 462 (1949) (construing the Oregon Constitution).

[11] Nor does the historical material upon which respondent relies so extensively, see Brief for Respondent 19–24, conflict with our decision to require *de novo* review. Most of the sources respondent cites merely

It might be argued that the deterrent function of punitive damages suggests that the amount of such damages awarded is indeed a "fact" found by the jury and that, as a result, the Seventh Amendment is implicated in appellate review of that award. Some scholars, for example, assert that punitive damages should be used to compensate for the underdeterrence of unlawful behavior that will result from a defendant's evasion of liability. See Polinsky & Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 890–891

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stand for the proposition that, perhaps because it is a fact-sensitive undertaking, determining the amount of punitive damages should be left to the discretion of the jury. See, *e. g.*, *Barry* v. *Edmunds*, 116 U. S. 550, 565 (1886) ("[I]t is the peculiar function of the jury" to set the amount of punitive damages); *Day* v. *Woodworth*, 13 How. 363, 371 (1852) (punitive damages should be "left to the discretion of the jury"). They do not, however, indicate that the amount of punitive damages imposed by the jury is itself a "fact" within the meaning of the Seventh Amendment's Reexamination Clause. See *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 432 (1996) (distinguishing between the "Trial by Jury" Clause, which "bears . . . on the allocation of trial functions between judge and jury," and the "Reexamination" Clause, which "controls the allocation of authority to review verdicts"); see also *id.*, at 447–448 (STEVENS, J., dissenting) (same).

In any event, punitive damages have evolved somewhat since the time of respondent's sources. Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. See *Haslip*, 499 U. S., at 61 (O'CONNOR, J., dissenting); see also Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 520 (1957) (observing a "vacillation" in the 19th-century cases between "compensatory" and "punitive" theories of "exemplary damages"). As the types of compensatory damages available to plaintiffs have broadened, see, *e. g.*, 1 J. Nates, C. Kimball, D. Axelrod, & R. Goldstein, Damages in Tort Actions § 3.01[3][a] (2000) (pain and suffering are generally available as species of compensatory damages), the theory behind punitive damages has shifted toward a more purely punitive (and therefore less factual) understanding. Cf. Note, 70 Harv. L. Rev., at 520 (noting a historical shift away from a compensatory—and toward a more purely punitive—conception of punitive damages).

(1998) (in order to obtain optimal deterrence, "punitive damages should equal the harm multiplied by . . . the ratio of the injurer's chance of escaping liability to his chance of being found liable"); see also *Ciraolo* v. *New York*, 216 F. 3d 236, 244–245 (CA2 2000) (Calabresi, J., concurring). "The efficient deterrence theory thus regards punitive damages as merely an augmentation of compensatory damages designed to achieve economic efficiency." Galanter & Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1449 (1993).

However attractive such an approach to punitive damages might be as an abstract policy matter, it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages. See Sunstein, Schkade, & Kahneman, Do People Want Optimal Deterrence?, 29 J. Legal Studies 237, 240 (2000). After all, deterrence is not the only purpose served by punitive damages. See *supra*, at 432. And there is no dispute that, in this case, deterrence was but one of four concerns the jury was instructed to consider when setting the amount of punitive damages.[12] Moreover, it is not at all obvious that even the *deterrent* function of punitive damages can be served *only* by economically "optimal deterrence." "[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-

[12] The jury was instructed to consider the following factors: (1) "The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims"; (2) "The defendant's motive"; (3) "The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future"; and (4) "The defendant's income and assets." App. 14. Although the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings. See, *e. g.*, *Gore*, 517 U. S., at 579–580.

beneficial morally offensive conduct; efficiency is just one consideration among many." Galanter & Luban, 42 Am. U. L. Rev., at 1450.[13]

Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. In *Gore*, we instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 517 U. S., at 574–575. Only with respect to the first *Gore* inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor.[14] Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review.

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[13] We express no opinion on the question whether *Gasperini* would govern—and *de novo* review would be inappropriate—if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages. This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined was necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (*e. g.*, treble damages).

[14] While we have determined that the Court of Appeals must review the District Court's application of the *Gore* test *de novo*, it of course remains true that the Court of Appeals should defer to the District Court's findings of fact unless they are clearly erroneous. See *United States* v. *Bajakajian*, 524 U. S. 321, 336–337, n. 10 (1998).

IV

It is possible that the standard of review applied by the Court of Appeals will affect the result of the *Gore* analysis in only a relatively small number of cases. See Brief for Respondent 46–48; Brief for Association of American Railroads as *Amicus Curiae* 18; see also *Gasperini*, 518 U. S., at 448 (STEVENS, J., dissenting). Nonetheless, it does seem likely that in this case a thorough, independent review of the District Court's rejection of petitioner's due process objections to the punitive damages award might well have led the Court of Appeals to reach a different result. Indeed, our own consideration of each of the three *Gore* factors reveals a series of questionable conclusions by the District Court that may not survive *de novo* review.

When the jury assessed the reprehensibility of Cooper's misconduct, it was guided by instructions that characterized the deliberate copying of the PST as wrongful. The jury's selection of a penalty to deter wrongful conduct may, therefore, have been influenced by an intent to deter Cooper from engaging in such copying in the future. Similarly, the District Court's belief that Cooper acted unlawfully in deliberately copying the PST design might have influenced its consideration of the first *Gore* factor. See App. to Pet. for Cert. 23a. But, as the Court of Appeals correctly held, such copying of the functional features of an unpatented product is lawful. See *TrafFix Devices, Inc.* v. *Marketing Displays, Inc.*, *ante*, p. 23. The Court of Appeals recognized that the District Court's award of attorney's fees could not be supported if based on the premise that the copying was unlawful, but it did not consider whether that improper predicate might also have undermined the basis for the jury's large punitive damages award.

In evaluating the second *Gore* factor, the ratio between the size of the award of punitive damages and the harm caused by Cooper's tortious conduct, the District Court

might have been influenced by respondent's submission that it was not the actual injury—which the jury assessed at $50,000—that was relevant, but rather "the potential harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct." See Brief for Respondent 7; see also Record Doc. No. 323, p. 23. Respondent calculated that "potential harm" by referring to the fact that Cooper had anticipated "gross profits of approximately $3 million during the first five years of sales." Brief for Respondent 7; see also Record Doc. No. 323, at 23. Even if that estimate were correct, however, it would be unrealistic to assume that all of Cooper's sales of the ToolZall would have been attributable to its misconduct in using a photograph of a modified PST in its initial advertising materials. As the Court of Appeals pointed out, the picture of the PST did not misrepresent the features of the original ToolZall and could not have deceived potential customers in any significant way. Its use was wrongful because it enabled Cooper to expedite the promotion of its tool, but that wrongdoing surely could not be treated as the principal cause of Cooper's entire sales volume for a 5-year period.

With respect to the third *Gore* factor, respondent argues that Cooper would have been subject to a comparable sanction under Oregon's Unlawful Trade Practices Act. Brief for Respondent 49. In a suit brought by a State under that Act, a civil penalty of up to $25,000 per violation may be assessed. Ore. Rev. Stat. § 646.642(3) (1997). In respondent's view, *each* of the thousands of pieces of promotional material containing a picture of the PST that Cooper distributed warranted the maximum fine. Brief for Respondent 49. Petitioner, on the other hand, argues that its preparation of a single "mock-up" for use in a single distribution would have been viewed as a single violation under the state statute. Reply Brief for Petitioner 2–3. The Court of Appeals expressed no opinion on this dispute. It did, however, observe that the unfairness in Cooper's use of the picture

apparently had nothing to do with misleading customers but was related to its inability to obtain a "mock-up" quickly and cheaply. App. to Pet. for Cert. 3a. This observation is more consistent with the single-violation theory than with the notion that the statutory violation would have been sanctioned with a multimillion dollar fine.

We have made these comments on issues raised by application of the three *Gore* guidelines to the facts of this case, not to prejudge the answer to the constitutional question, but rather to illustrate why we are persuaded that the Court of Appeals' answer to that question may depend upon the standard of review. The *de novo* standard should govern its decision. Because the Court of Appeals applied a less demanding standard in this case, we vacate the judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I continue to believe that the Constitution does not constrain the size of punitive damages awards. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting). For this reason, given the opportunity, I would vote to overrule *BMW*. This case, however, does not present such an opportunity. The only issue before us today is what standard should be used to review a trial court's ruling on a *BMW* challenge. Because I agree with the Court's resolution of that issue, I join the opinion of the Court.

JUSTICE SCALIA, concurring in the judgment.

I was (and remain) of the view that excessive punitive damages do not violate the Due Process Clause; but the Court held otherwise. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996); *id.*, at 598 (SCALIA, J., dissenting). And I was of the view that we should review for abuse

of discretion (rather than *de novo*) fact-bound constitutional issues which, in their resistance to meaningful generalization, resemble the question of excessiveness of punitive damages—namely, whether there exists reasonable suspicion for a stop and probable cause for a search; but the Court held otherwise. See *Ornelas* v. *United States*, 517 U. S. 690 (1996); *id.*, at 700 (SCALIA, J., dissenting). Finally, in a case in which I joined a dissent that made it unnecessary for me to reach the issue, the Court categorically stated that "the question whether a fine is constitutionally excessive calls for . . . *de novo* review." *United States* v. *Bajakajian*, 524 U. S. 321, 336–337, n. 10 (1998); see *id.*, at 344 (KENNEDY, J., joined by REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., dissenting). Given these precedents, I agree that *de novo* review of the question of excessive punitive damages best accords with our jurisprudence. Accordingly, I concur in the judgment of the Court.

JUSTICE GINSBURG, dissenting.

In *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415 (1996), we held that appellate review of a federal trial court's refusal to set aside a jury verdict as excessive is reconcilable with the Seventh Amendment if "appellate control [is] limited to review for 'abuse of discretion.'" *Id.*, at 419. *Gasperini* was a diversity action in which the defendant had challenged a compensatory damages award as excessive under New York law. The reasoning of that case applies as well to an action challenging a punitive damages award as excessive under the Constitution. I would hold, therefore, that the proper standard of appellate oversight is not *de novo* review, as the Court today concludes, but review for abuse of discretion.

"An essential characteristic of [the federal court] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amend-

ment, assigns the decisions of disputed questions of fact to the jury." *Id.*, at 432 (citing *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 537 (1958)). The Seventh Amendment provides: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In *Gasperini*, we observed that although trial courts traditionally had broad authority at common law to set aside jury verdicts and to grant new trials, 518 U. S., at 432–433, "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development," *id.*, at 434. We ultimately concluded that the Seventh Amendment does not preclude such appellate review, *id.*, at 436, but explained that "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [an excessiveness standard]," *id.*, at 438. "Trial judges have the unique opportunity to consider the evidence in the living courtroom context," we said, "while appellate judges see only the cold paper record." *Ibid.* (citations and internal quotation marks omitted). "If [courts of appeals] reverse, it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. . . . [Appellate courts] must give the benefit of every doubt to the judgment of the trial judge." *Id.*, at 438–439 (internal quotation marks omitted) (citing *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, 806 (CA2 1961)).

Although *Gasperini* involved compensatory damages, I see no reason why its logic should be abandoned when punitive damages are alleged to be excessive. At common law, as our longstanding decisions reiterate, the task of determining the amount of punitive damages "has [always been] left to the discretion of the jury." *Day* v. *Woodworth*, 13 How. 363, 371 (1852); see *Barry* v. *Edmunds*, 116 U. S. 550, 565 (1886)

("[N]othing is better settled than that . . . it is the peculiar function of the jury to determine the amount [of punitive damages] by their verdict."). The commitment of this function to the jury, we have explained, reflects the historical understanding that "the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day*, 13 How., at 371. The relevant factors include "the conduct and motives of the defendant" and whether, "in committing the wrong complained of, he acted recklessly, or wilfully and maliciously, with a design to oppress and injure the plaintiff." 1 J. Sutherland, Law of Damages 720 (1882). Such inquiry, the Court acknowledges, "is a fact-sensitive undertaking." *Ante*, at 438, n. 11.

The Court nevertheless today asserts that a "jury's award of punitive damages does not constitute a finding of 'fact'" within the meaning of the Seventh Amendment. *Ante*, at 437. An ultimate award of punitive damages, it is true, involves more than the resolution of matters of historical or predictive fact. See *ibid.* (citing *Gasperini*, 518 U. S., at 459 (SCALIA, J., dissenting)). But there can be no question that a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings—*e. g.*, the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously. Punitive damages are thus not "[u]nlike the measure of actual damages suffered," *ante*, at 437 (citation and internal quotation marks omitted), in cases of intangible, noneconomic injury. One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, see *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237

U. S. 648, 661 (1915) (compensation for pain and suffering "involves only a question of fact"), it seems to me the other should be so regarded as well.

In *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), we approved application of an abuse-of-discretion standard for appellate review of a district court's ruling on a motion to set aside a punitive damages award as excessive. See *id.*, at 279. *Browning-Ferris* reserved the question whether even such deferential appellate review might run afoul of the Seventh Amendment. At that time (*i. e.*, pre-*Gasperini*), the Court "ha[d] never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive." 492 U. S., at 279, n. 25. We found it unnecessary to reach the Seventh Amendment question in *Browning-Ferris* because the jury verdict there survived lower court review intact. *Id.*, at 279, n. 25, 280. *Browning-Ferris*, in short, signaled our recognition that appellate review of punitive damages, if permissible at all, would involve *at most* abuse-of-discretion review. "[P]articularly . . . because the federal courts operate under the strictures of the Seventh Amendment," we were "reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Id.*, at 280, n. 26.

The Court finds no incompatibility between this case and *Browning-Ferris*, observing that *Browning-Ferris* presented for our review an excessiveness challenge resting solely on state law, not on the Constitution. See *ante*, at 433, and n. 7. It is unclear to me why this distinction should make a difference. Of the three guideposts *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), established for assessing constitutional excessiveness, two were derived from common-law standards that typically inform state law. See *id.*, at 575, n. 24 ("The principle that punishment should fit the crime is deeply rooted and frequently repeated in

common-law jurisprudence." (citation and internal quotation marks omitted)); *id.*, at 580 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."). The third guidepost—comparability of sanctions for comparable misconduct—is not similarly rooted in common law, nor is it similarly factbound. As the Court states, "the third *Gore* criterion . . . calls for a broad legal comparison." *Ante*, at 440. But to the extent the inquiry is "legal" in character, there is little difference between review *de novo* and review for abuse of discretion. Cf. *Gasperini*, 518 U. S., at 448 (STEVENS, J., dissenting) ("[I]t is a familiar . . . maxim that deems an error of law an abuse of discretion.").[1]

Apart from "Seventh Amendment constraints," an abuse-of-discretion standard also makes sense for "practical reasons." *Id.*, at 438. With respect to the first *Gore* inquiry (*i. e.*, reprehensibility of the defendant's conduct), district courts have an undeniably superior vantage over courts of appeals. As earlier noted, *supra*, at 445, district courts view the evidence not on a "cold paper record," but "in the living courtroom context," *Gasperini*, 518 U. S., at 438. They can assess from the best seats the vital matter of witness credibility. And "it of course remains true that [a]

[1] Appellate courts, following our instruction, apply *de novo* review to trial court determinations of reasonable suspicion, probable cause, and excessiveness of fines. See *ante*, at 435–436 (citing *United States* v. *Bajakajian*, 524 U. S. 321, 336–337, n. 10 (1998), and *Ornelas* v. *United States*, 517 U. S. 690, 696–698 (1996)). But such determinations typically are made without jury involvement, see, *e. g.*, *Bajakajian*, 524 U. S., at 325–326; *Ornelas*, 517 U. S., at 694, and surely do not implicate the Seventh Amendment. Moreover, although *Bajakajian* said "the question whether a [criminal] fine is constitutionally excessive calls for . . . *de novo* review," 524 U. S., at 336–337, n. 10, *Bajakajian* did not disturb our holding in *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), that the "Excessive Fines Clause does not apply to awards of punitive damages in [civil] cases between private parties," *id.*, at 260.

Court of Appeals should defer to the District Court's findings of fact unless they are clearly erroneous." *Ante*, at 440, n. 14.[2]

The Court recognizes that district courts have the edge on the first *Gore* factor, *ante*, at 440, but goes on to say that "[t]rial courts and appellate courts seem equally capable of analyzing the second *[Gore]* factor" (*i. e.*, whether punitive damages bear a reasonable relationship to the actual harm inflicted), *ibid.* Only "the third *Gore* criterion [*i. e.*, intrajurisdictional and interjurisdictional comparisons] . . . seems more suited to the expertise of appellate courts." *Ibid.*

To the extent the second factor requires a determination of "the actual harm inflicted on the plaintiff," *Gore*, 517 U. S., at 580, district courts may be better positioned to conduct the inquiry, especially in cases of intangible injury. I can demur to the Court's assessment of relative institutional strengths, however, for even accepting that assessment, I would disagree with the Court's conclusion that "[c]onsiderations of institutional competence . . . fail to tip the balance in favor of deferential appellate review," *ante*, at 440. *Gore* itself assigned particular importance to the first inquiry, characterizing "degree of reprehensibility" as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." 517 U. S., at 575. District courts, as just noted, *supra*, at 448 and this page, have a superior vantage over courts of appeals in conducting that fact-intensive inquiry. Therefore, in the typical case envisioned by *Gore*, where reasonableness is primarily tied to reprehensibility, an appellate court should have infrequent occasion to reverse.

This observation, I readily acknowledge, suggests that the practical difference between the Court's approach and

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[2] An appellate court might be at a loss to accord such deference to jury findings of fact absent trial court employment of either a special verdict or a general verdict accompanied by written interrogatories. See Fed. Rule Civ. Proc. 49.

my own is not large. An abuse-of-discretion standard, as I see it, hews more closely to "the strictures of the Seventh Amendment," *Browning-Ferris*, 492 U. S., at 280, n. 26. The Court's *de novo* standard is more complex. It requires lower courts to distinguish between ordinary common-law excessiveness and constitutional excessiveness, *ante*, at 433, and to separate out factfindings that qualify for "clearly erroneous" review, *ante*, at 440, n. 14. See also *ante*, at 440, n. 13 (suggesting abuse-of-discretion review might be in order "if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages"). The Court's approach will be challenging to administer. Complex as it is, I suspect that approach and mine will yield different outcomes in few cases.

The Ninth Circuit, I conclude, properly identified abuse of discretion as the appropriate standard in reviewing the District Court's determination that the punitive damages awarded against Cooper were not grossly excessive. For the Seventh Amendment and practical reasons stated, I would affirm the judgment of the Court of Appeals.

Syllabus

ROGERS *v.* TENNESSEE

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 99–6218. Argued November 1, 2000—Decided May 14, 2001

Following James Bowdery's death some 15 months after petitioner stabbed him, petitioner was convicted in Tennessee state court of second degree murder under the State's criminal homicide statute. Although that statute makes no mention of the common law "year and a day rule"—under which no defendant could be convicted of murder unless his victim died by the defendant's act within a year and a day of the act, see, *e. g.*, *Louisville, E. & St. L. R. Co.* v. *Clarke*, 152 U. S. 230, 239—petitioner argued on appeal that the rule persisted as part of the State's common law and, as such, precluded his conviction. The Tennessee Court of Criminal Appeals disagreed and affirmed the conviction. In affirming, the State Supreme Court abolished the rule, finding that the reasons for recognizing the rule at common law no longer existed. The court disagreed with petitioner's contention that application of its decision abolishing the rule to his case would violate the *Ex Post Facto* Clauses of the State and Federal Constitutions, observing that those provisions refer only to legislative Acts. The court also concluded that application of its decision to petitioner would not run afoul of *Bouie* v. *City of Columbia*, 378 U. S. 347, 354, in which this Court held that due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.

Held: The Tennessee Supreme Court's retroactive application to petitioner of its decision abolishing the year and a day rule did not deny petitioner due process of law in violation of the Fourteenth Amendment. Pp. 456–467.

(a) To the extent petitioner argues that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause, he misreads *Bouie*. *Bouie* contains some dicta suggestive of the broad interpretation for which petitioner argues, see, *e. g.*, 378 U. S., at 353–354, but the decision was rooted firmly in well established notions of *due process*. Its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct, see, *e. g.*, *id.*, at 351, 352, 354–355. Subsequent decisions have not interpreted *Bouie* as extending so far as petitioner suggests, but have uniformly viewed *Bouie*

as restricted to its traditional due process roots. In doing so, they have applied *Bouie*'s check on retroactive judicial decisionmaking not by reference to the scope of the *Ex Post Facto* Clause, but, rather, in accordance with the more basic and general principle of fair warning that *Bouie* so clearly articulated. See, *e. g.*, *United States* v. *Lanier*, 520 U. S. 259, 266. While petitioner's assertion that the two Clauses safeguard common interests is undoubtedly correct, he is mistaken to suggest that these considerations compel extending the *Ex Post Facto* Clause's strictures to the context of common law judging through the rubric of due process. Such an extension would circumvent the *Ex Post Facto* Clause's clear text, which expressly applies only to legislatures; would evince too little regard for the important institutional and contextual differences between legislating and common law decisionmaking; would be incompatible with the resolution of uncertainty that marks any evolving legal system; and would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. It was on account of such concerns that *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. See 378 U. S., at 354. That restriction adequately serves the common law context as well. Pp. 456–462.

(b) The Tennessee court's abolition of the year and a day rule was not unexpected and indefensible. Advances in medical and related science have so undermined the rule's usefulness as to render it without question obsolete, and it has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue. Despite petitioner's argument to the contrary, the fact that a vast number of jurisdictions outside Tennessee have abolished the rule is surely relevant to whether its abolition in his case, which involves the continuing viability of a common law rule, can be said to be unexpected and indefensible by reference to the law as it then existed. *Bouie*, *supra*, at 359–360, distinguished. Perhaps most importantly, at the time of petitioner's crime the rule had only the most tenuous foothold as part of Tennessee's criminal law. It did not exist as part of the State's statutory criminal code, and while the Tennessee Supreme Court concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any murder prosecution in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta. These cases hardly suggest that the Tennessee court's decision was "unexpected and indefensible" such that it offended the due process principle of fair warning articulated in *Bouie* and its progeny. There is noth-

ing to indicate that abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking that brought the law into conformity with reason and common sense. Pp. 462–467.

992 S. W. 2d 393, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Kennedy, Souter, and Ginsburg, JJ., joined. Stevens, J., filed a dissenting opinion, *post*, p. 467. Scalia, J., filed a dissenting opinion, in which Stevens and Thomas, JJ., joined, and in which Breyer, J., joined as to Part II, *post*, p. 467. Breyer, J., filed a dissenting opinion, *post*, p. 481.

W. Mark Ward argued the cause for petitioner. With him on the briefs were *Tony Brayton* and *Garland Ergüden*.

Michael E. Moore, Solicitor General of Tennessee, argued the cause for respondent. With him on the brief were *Paul G. Summers*, Attorney General, and *Gordon W. Smith*, Associate Solicitor General.*

Justice O'Connor delivered the opinion of the Court.

This case concerns the constitutionality of the retroactive application of a judicial decision abolishing the common law "year and a day rule." At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act. See, *e. g.*, *Louisville, E. & St. L. R. Co.* v. *Clarke*, 152 U. S. 230, 239 (1894); 4 W. Blackstone, Commentaries on the Laws of England 197–198 (1769). The Supreme Court of Tennessee abolished the rule as it had existed at common law in Tennessee and applied its decision to petitioner to uphold his conviction. The question before us is whether, in doing so, the court denied petitioner due process of law in violation of the Fourteenth Amendment.

**Paula R. Voss* filed a brief for the Tennessee Association of Criminal Defense Attorneys as *amicus curiae* urging reversal.

I

Petitioner Wilbert K. Rogers was convicted in Tennessee state court of second degree murder. According to the undisputed facts, petitioner stabbed his victim, James Bowdery, with a butcher knife on May 6, 1994. One of the stab wounds penetrated Bowdery's heart. During surgery to repair the wound to his heart, Bowdery went into cardiac arrest, but was resuscitated and survived the procedure. As a result, however, he had developed a condition known as "cerebral hypoxia," which results from a loss of oxygen to the brain. Bowdery's higher brain functions had ceased, and he slipped into and remained in a coma until August 7, 1995, when he died from a kidney infection (a common complication experienced by comatose patients). Approximately 15 months had passed between the stabbing and Bowdery's death which, according to the undisputed testimony of the county medical examiner, was caused by cerebral hypoxia "'secondary to a stab wound to the heart.'" 992 S. W. 2d 393, 395 (Tenn. 1999).

Based on this evidence, the jury found petitioner guilty under Tennessee's criminal homicide statute. The statute, which makes no mention of the year and a day rule, defines criminal homicide simply as "the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide." Tenn. Code Ann. §39–13–201 (1997). Petitioner appealed his conviction to the Tennessee Court of Criminal Appeals, arguing that, despite its absence from the statute, the year and a day rule persisted as part of the common law of Tennessee and, as such, precluded his conviction. The Court of Criminal Appeals rejected that argument and affirmed the conviction. The court held that Tennessee's Criminal Sentencing Reform Act of 1989 (1989 Act), which abolished all common law defenses in criminal actions in Tennessee, had abolished the rule. See Tenn. Code Ann. §39–11–203(e)(2) (1997). The court also rejected

petitioner's further contention that the legislative abolition of the rule constituted an *ex post facto* violation, noting that the 1989 Act had taken effect five years before petitioner committed his crime. No. 02C01–9611–CR–00418 (Tenn. Crim. App., Oct. 17, 1997), App. 7.

The Supreme Court of Tennessee affirmed on different grounds. The court observed that it had recognized the viability of the year and a day rule in Tennessee in *Percer* v. *State*, 118 Tenn. 765, 103 S. W. 780 (1907), and that, "[d]espite the paucity of case law" on the rule in Tennessee, "both parties . . . agree that the . . . rule was a part of the common law of this State." 992 S. W. 2d, at 396. Turning to the rule's present status, the court noted that the rule has been legislatively or judicially abolished by the "vast majority" of jurisdictions recently to have considered the issue. *Id.*, at 397. The court concluded that, contrary to the conclusion of the Court of Criminal Appeals, the 1989 Act had not abolished the rule. After reviewing the justifications for the rule at common law, however, the court found that the original reasons for recognizing the rule no longer exist. Accordingly, the court abolished the rule as it had existed at common law in Tennessee. *Id.*, at 399–401.

The court disagreed with petitioner's contention that application of its decision abolishing the rule to his case would violate the *Ex Post Facto* Clauses of the State and Federal Constitutions. Those constitutional provisions, the court observed, refer only to legislative Acts. The court then noted that in *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), this Court held that due process prohibits retroactive application of any "'judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.'" 992 S. W. 2d, at 402 (quoting *Bouie* v. *City of Columbia*, *supra*, at 354) (alteration in original). The court concluded, however, that application of its decision to petitioner would

not offend this principle. 992 S. W. 2d, at 402. We granted certiorari, 529 U. S. 1129 (2000), and we now affirm.

II

Although petitioner's claim is one of due process, the Constitution's *Ex Post Facto* Clause figures prominently in his argument. The Clause provides simply that "[n]o State shall . . . pass any . . . ex post facto Law." Art. I, § 10, cl. 1. The most well-known and oft-repeated explanation of the scope of the Clause's protection was given by Justice Chase, who long ago identified, in dictum, four types of laws to which the Clause extends:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (*seriatim* opinion of Chase, J.) (emphasis deleted).

Accord, *Carmell* v. *Texas*, 529 U. S. 513, 521–525 (2000); *Collins* v. *Youngblood*, 497 U. S. 37, 41–42, 46 (1990). As the text of the Clause makes clear, it "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Marks* v. *United States*, 430 U. S. 188, 191 (1977) (citation omitted).

We have observed, however, that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process. In *Bouie* v. *City of Columbia*, we considered the South Carolina Supreme Court's retroactive application

of its construction of the State's criminal trespass statute to the petitioners in that case. The statute prohibited "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry . . . ." 378 U. S., at 349, n. 1 (citation and internal quotation marks omitted). The South Carolina court construed the statute to extend to patrons of a drug store who had received no notice prohibiting their entry into the store, but had refused to leave the store when asked. Prior to the court's decision, South Carolina cases construing the statute had uniformly held that conviction under the statute required proof of notice before entry. None of those cases, moreover, had given the "slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." *Id.*, at 357.

We held that the South Carolina court's retroactive application of its construction to the store patrons violated due process. Reviewing decisions in which we had held criminal statutes "void for vagueness" under the Due Process Clause, we noted that this Court has often recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Id.*, at 350; see *id.*, at 350–352 (discussing, *inter alia*, *United States* v. *Harriss*, 347 U. S. 612 (1954), *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), and *Connally* v. *General Constr. Co.*, 269 U. S. 385 (1926)). Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Bouie* v. *City of Columbia*, 378 U. S., at 352. For that reason, we concluded that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect." *Id.*, at 354 (quoting J. Hall, General Principles of Criminal Law 61 (2d ed. 1960)). We found that the South

Carolina court's construction of the statute violated this principle because it was so clearly at odds with the statute's plain language and had no support in prior South Carolina decisions. 378 U. S., at 356.

Relying largely upon *Bouie*, petitioner argues that the Tennessee court erred in rejecting his claim that the retroactive application of its decision to his case violates due process. Petitioner contends that the *Ex Post Facto* Clause would prohibit the retroactive application of a decision abolishing the year and a day rule if accomplished by the Tennessee Legislature. He claims that the purposes behind the Clause are so fundamental that due process should prevent the Supreme Court of Tennessee from accomplishing the same result by judicial decree. Brief for Petitioner 8–18. In support of this claim, petitioner takes *Bouie* to stand for the proposition that "[i]n evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power." Brief for Petitioner 12.

To the extent petitioner argues that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause as identified in *Calder*, petitioner misreads *Bouie*. To be sure, our opinion in *Bouie* does contain some expansive language that is suggestive of the broad interpretation for which petitioner argues. Most prominent is our statement that "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U. S., at 353–354; see also *id.*, at 353 ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law"); *id.*, at 362 ("The Due Process Clause compels the same result" as would the constitutional proscription against *ex post facto* laws "where the State has sought to achieve

precisely the same [impermissible] effect by judicial construction of the statute"). This language, however, was dicta. Our decision in *Bouie* was rooted firmly in well established notions of *due process.* See *supra*, at 457–458. Its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct. See, *e. g.*, 378 U. S., at 351, 352, 354–355. And we couched its holding squarely in terms of that established due process right, and not in terms of the *ex post facto*-related dicta to which petitioner points. *Id.*, at 355 (concluding that "the South Carolina Code did not give [the petitioners] fair warning, at the time of their conduct . . . , that the act for which they now stand convicted was rendered criminal by the statute"). Contrary to petitioner's suggestion, nowhere in the opinion did we go so far as to incorporate jot-for-jot the specific categories of *Calder* into due process limitations on the retroactive application of judicial decisions.

Nor have any of our subsequent decisions addressing *Bouie*-type claims interpreted *Bouie* as extending so far. Those decisions instead have uniformly viewed *Bouie* as restricted to its traditional due process roots. In doing so, they have applied *Bouie*'s check on retroactive judicial decisionmaking not by reference to the *ex post facto* categories set out in *Calder*, but, rather, in accordance with the more basic and general principle of fair warning that *Bouie* so clearly articulated. See, *e. g.*, *United States* v. *Lanier*, 520 U. S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Marks* v. *United States*, 430 U. S., at 191–192 (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); *Rose* v. *Locke*, 423 U. S. 48, 53 (1975) *(per curiam)* (upholding defendant's con-

viction under statute prohibiting "crimes against nature" because, unlike in *Bouie*, the defendant "[could] make no claim that [the statute] afforded no notice that his conduct might be within its scope"); *Douglas* v. *Buder*, 412 U. S. 430, 432 (1973) *(per curiam)* (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe* v. *Washington*, 405 U. S. 313, 316 (1972) *(per curiam)* (reversing conviction under state obscenity law because it did "not giv[e] fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

Petitioner observes that the Due Process and *Ex Post Facto* Clauses safeguard common interests—in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws. Brief for Petitioner 12–18. While this is undoubtedly correct, see, *e. g.*, *Lynce* v. *Mathis*, 519 U. S. 433, 439–440, and n. 12 (1997), petitioner is mistaken to suggest that these considerations compel extending the strictures of the *Ex Post Facto* Clause to the context of common law judging. The *Ex Post Facto* Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.

Petitioner contends that state courts acting in their common law capacity act much like legislatures in the exercise of their lawmaking function, and indeed may in some cases even be subject to the same kinds of political influences and pressures that justify *ex post facto* limitations upon legislatures. Brief for Petitioner 12–18; Reply Brief for Petitioner 15. A court's "opportunity for discrimination," however, "is more limited than [a] legislature's, in that [it] can only act

in construing existing law in actual litigation." *James* v. *United States*, 366 U. S. 213, 247, n. 3 (1961) (Harlan, J., concurring in part and dissenting in part). Moreover, "[g]iven the divergent pulls of flexibility and precedent in our case law system," *ibid.*, incorporation of the *Calder* categories into due process limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system.

That is particularly so where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles. It was on account of concerns such as these that *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie* v. *City of Columbia*, 378 U. S., at 354 (internal quotation marks omitted).

We believe this limitation adequately serves the common law context as well. It accords common law courts the substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevalu-

ating and refining them as may be necessary to bring the common law into conformity with logic and common sense. It also adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law. Accordingly, we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Ibid.*

JUSTICE SCALIA makes much of the fact that, at the time of the framing of the Constitution, it was widely accepted that courts could not "change" the law, see *post,* at 472–473, 477–478 (dissenting opinion), and that (according to JUSTICE SCALIA) there is no doubt that the *Ex Post Facto* Clause would have prohibited a legislative decision identical to the Tennessee court's decision here, see *post,* at 469–471, 478. This latter argument seeks at bottom merely to reopen what has long been settled by the constitutional text and our own decisions: that the *Ex Post Facto* Clause does not apply to judicial decisionmaking. The former argument is beside the point. Common law courts at the time of the framing undoubtedly believed that they were finding rather than making law. But, however one characterizes their actions, the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process of judicial evolution at the time of the framing, and it does not do so today.

III

Turning to the particular facts of the instant case, the Tennessee court's abolition of the year and a day rule was not unexpected and indefensible. The year and a day rule is widely viewed as an outdated relic of the common law. Peti-

tioner does not even so much as hint that good reasons exist for retaining the rule, and so we need not delve too deeply into the rule and its history here. Suffice it to say that the rule is generally believed to date back to the 13th century, when it served as a statute of limitations governing the time in which an individual might initiate a private action for murder known as an "appeal of death"; that by the 18th century the rule had been extended to the law governing public prosecutions for murder; that the primary and most frequently cited justification for the rule is that 13th century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death; and that, as practically every court recently to have considered the rule has noted, advances in medical and related science have so undermined the usefulness of the rule as to render it without question obsolete. See, *e. g.*, *People* v. *Carrillo*, 164 Ill. 2d 144, 150, 646 N. E. 2d 582, 585 (1995); *Commonwealth* v. *Lewis*, 381 Mass. 411, 414–415, 409 N. E. 2d 771, 772–773 (1980); *People* v. *Stevenson*, 416 Mich. 383, 391–392, 331 N. W. 2d 143, 146 (1982); *State* v. *Hefler*, 310 N. C. 135, 138–140, 310 S. E. 2d 310, 313 (1984); see generally Comment, 59 U. Chi. L. Rev. 1337 (1992) (tracing the history of the rule).

For this reason, the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue. See 992 S. W. 2d, at 397, n. 4 (reviewing cases and statutes). Citing *Bouie*, petitioner contends that the judicial abolition of the rule in other jurisdictions is irrelevant to whether he had fair warning that the rule in Tennessee might similarly be abolished and, hence, to whether the Tennessee court's decision was unexpected and indefensible as applied to him. Brief for Petitioner 28–30. In discussing the apparent meaning of the South Carolina statute in *Bouie*, we noted that "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own

State's statute meant something quite different from what its words said." 378 U. S., at 359–360. This case, however, involves not the precise meaning of the words of a particular statute, but rather the continuing viability of a common law rule. Common law courts frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience. Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State. At the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed.

Finally, and perhaps most importantly, at the time of petitioner's crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee. The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta.

The first mention of the rule in Tennessee, and the only mention of it by the Supreme Court of that State, was in 1907 in *Percer* v. *State*, 118 Tenn. 765, 103 S. W. 780. In *Percer*, the court reversed the defendant's conviction for second degree murder because the defendant was not present in court when the verdict was announced and because the proof failed to show that the murder occurred prior to the finding of the indictment. In discussing the latter ground

for its decision, the court quoted the rule that "'it is . . . for the State to show that the crime was committed before the indictment was found, and, where it fails to do so, a conviction will be reversed.'" *Id.*, at 777, 103 S. W., at 783 (quoting 12 Cyclopedia of Law and Procedure 382 (1904)). The court then also quoted the rule that "'[i]n murder, the death must be proven to have taken place within a year and a day from the date of the injury received.'" 118 Tenn., at 777, 103 S. W., at 783 (quoting F. Wharton, Law of Homicide § 18 (3d ed. 1907)).

While petitioner relies on this case for the proposition that the year and a day rule was firmly entrenched in the common law of Tennessee, we agree with the Supreme Court of Tennessee that the case cannot establish nearly so much. After reciting the rules just mentioned, the court in *Percer* went on to point out that the indictment was found on July 6, 1906; that it charged that the murder was committed sometime in May 1906; and that the only evidence of when the victim died was testimony from a witness stating that he thought the death occurred sometime in July, but specifying neither a date nor a year. From this, the court concluded that it did "not affirmatively appear" from the evidence "whether the death occurred before or after the finding of the indictment." 118 Tenn., at 777, 103 S. W., at 783. The court made no mention of the year and a day rule anywhere in its legal analysis or, for that matter, anywhere else in its opinion. Thus, whatever the import of the court's earlier quoting of the rule, it is clear that the rule did not serve as the basis for the *Percer* court's decision.

The next two references to the rule both were by the Tennessee Court of Criminal Appeals in cases in which the date of the victim's death was not even in issue. Sixty-seven years after *Percer*, the court in *Cole* v. *State*, 512 S. W. 2d 598 (Tenn. Crim. App. 1974), noted the existence of the rule in rejecting the defendants' contentions that insufficient evidence existed to support the jury's conclusion that they had caused the victim's death in a drag-racing crash. *Id.*, at 601.

Twenty-one years after that, in *State* v. *Ruane,* 912 S. W. 2d 766 (Tenn. Crim. App. 1995), a defendant referred to the rule in arguing that the operative cause of his victim's death was removal of life support rather than a gunshot wound at the defendant's hand. The victim had died within 10 days of receiving the wound. The Court of Criminal Appeals rejected the defendant's argument, concluding, as it had in this case, that the year and a day rule had been abolished by the 1989 Act. It went on to hold that the evidence of causation was sufficient to support the conviction. *Id.*, at 773–777. *Ruane,* of course, was decided after petitioner committed his crime, and it concluded that the year and a day rule no longer existed in Tennessee for a reason that the high court of that State ultimately rejected. But we note the case nonetheless to complete our account of the few appearances of the common law rule in the decisions of the Tennessee courts.

These cases hardly suggest that the Tennessee court's decision was "unexpected and indefensible" such that it offended the due process principle of fair warning articulated in *Bouie* and its progeny. This is so despite the fact that, as JUSTICE SCALIA correctly points out, the court viewed the year and a day rule as a "substantive principle" of the common law of Tennessee. See *post,* at 480. As such, however, it was a principle in name only, having never once been enforced in the State. The Supreme Court of Tennessee also emphasized this fact in its opinion, see 992 S. W. 2d, at 402, and rightly so, for it is surely relevant to whether the court's abolition of the rule in petitioner's case violated due process limitations on retroactive judicial decisionmaking. And while we readily agree with JUSTICE SCALIA that fundamental due process prohibits the punishment of conduct that cannot fairly be said to have been criminal at the time the conduct occurred, see, *e. g., post,* at 470, 478, 480, nothing suggests that is what took place here.

There is, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented

an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

The judgment of the Supreme Court of Tennessee is accordingly affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting.

While I have joined JUSTICE SCALIA's entire dissent, I must add this brief caveat. The perception that common-law judges had no power to change the law was unquestionably an important aspect of our judicial heritage in the 17th century but, as he has explained, that perception has played a role of diminishing importance in later years. Whether the most significant changes in that perception occurred before the end of the 18th century or early in the 19th century is, in my judgment, a tangential question that need not be resolved in order to decide this case correctly. For me, far more important than the historical issue is the fact that the majority has undervalued the threat to liberty that is posed whenever the criminal law is changed retroactively.

JUSTICE SCALIA, with whom JUSTICE STEVENS and JUSTICE THOMAS join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

The Court today approves the conviction of a man for a murder that was not murder (but only manslaughter) when the offense was committed. It thus violates a principle—encapsulated in the maxim *nulla poena sine lege*—which "dates from the ancient Greeks" and has been described as

one of the most "widely held value-judgment[s] in the entire history of human thought." J. Hall, General Principles of Criminal Law 59 (2d ed. 1960). Today's opinion produces, moreover, a curious constitution that only a judge could love. One in which (by virtue of the *Ex Post Facto* Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that. One in which the predictability of parliamentary lawmaking cannot validate the retroactive creation of crimes, but the predictability of judicial lawmaking can do so. I do not believe this is the system that the Framers envisioned—or, for that matter, that any reasonable person would imagine.

I

A

To begin with, let us be clear that the law here was altered after the fact. Petitioner, whatever else he was guilty of, was innocent of murder under the law as it stood at the time of the stabbing, because the victim did not die until after a year and a day had passed. The requisite condition subsequent of the murder victim's death within a year and a day is no different from the requisite condition subsequent of the rape victim's raising a "hue and cry" which we held could not retroactively be eliminated in *Carmell* v. *Texas*, 529 U. S. 513 (2000). Here, as there, it operates to bar conviction. Indeed, if the present condition differs at all from the one involved in *Carmell* it is in the fact that it does not merely pertain to the "quantum of evidence" necessary to corroborate a charge, *id.*, at 530, but is an actual *element* of the crime—a "substantive principle of law," 992 S. W. 2d 393, 399 (Tenn. 1999), the failure to establish which "entirely precludes a murder prosecution," *id.*, at 400. Though the Court spends some time questioning whether the year-and-a-day rule was ever truly established in Tennessee, see *ante*, at

464–466, the Supreme Court of Tennessee said it was, see 992 S. W. 2d, at 396, 400, and this reasonable reading of state law by the State's highest court is binding upon us.

Petitioner's claim is that his conviction violated the Due Process Clause of the Fourteenth Amendment, insofar as that Clause contains the principle applied against the legislature by the *Ex Post Facto* Clause of Article I. We first discussed the relationship between these two Clauses in *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964). There, we considered Justice Chase to have spoken for the Court in *Calder* v. *Bull*, 3 Dall. 386, 390 (1798), when he defined an *ex post facto* law as, *inter alia*, one that "aggravates a crime, or makes it greater than it was, when committed." 378 U. S., at 353 (emphasis deleted). We concluded that, "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.*, at 353–354. The Court seeks to avoid the obvious import of this language by characterizing it as mere dicta. See *ante*, at 459. Only a concept of dictum that includes the very reasoning of the opinion could support this characterization. The *ratio decidendi* of *Bouie* was that the principle applied to the legislature though the *Ex Post Facto* Clause was contained in the Due Process Clause insofar as judicial action is concerned. I cannot understand why the Court derives such comfort from the fact that later opinions applying *Bouie* have referred to the Due Process Clause rather than the *Ex Post Facto* Clause, see *ante*, at 459–460; that is entirely in accord with the rationale of the case, which I follow and which the Court discards.

The Court attempts to cabin *Bouie* by reading it to prohibit only "'unexpected and indefensible'" judicial law revision, and to permit retroactive judicial changes so long as the defendant has had "fair warning" that the changes might occur. *Ante*, at 462. This reading seems plausible because

Bouie does indeed use those quoted terms; but they have been wrenched entirely out of context. The "fair warning" to which *Bouie* and subsequent cases referred was not "fair warning that the law might be changed," but fair warning *of what constituted the crime at the time of the offense.* And *Bouie* did not express disapproval of "unexpected and indefensible changes in the law" (and thus implicitly approve "expected or defensible changes"). It expressed disapproval of "*judicial construction* of a criminal statute" that is "unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue.*" 378 U. S., at 354 (emphasis added; internal quotation marks omitted). It thus implicitly approved only a judicial construction that was an expected or defensible application of prior cases interpreting the statute. Extending this principle from statutory crimes to common-law crimes would result in the approval of retroactive holdings that accord with prior cases expounding the common law, and the disapproval of retroactive holdings that clearly depart from prior cases expounding the common law. According to *Bouie*, not just "unexpected and indefensible" retroactive changes in the common law of crimes are bad, but *all* retroactive changes.

Bouie rested squarely upon "[t]he fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,'" *ibid. (Nulla poena sine lege.)* Proceeding from that principle, *Bouie* said that "a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result [prohibited by the *Ex Post Facto* Clause] by judicial construction." *Id.*, at 353–354. There is no doubt that "fair warning" of the legislature's intent to change the law does not insulate retroactive *legislative* criminalization. Such a statute violates the *Ex Post Facto* Clause, no matter that, at the time the offense was committed, the bill enacting the change was pending and assured of passage—or indeed, had already been passed but not yet signed by the President whose administration had

proposed it. It follows from the analysis of *Bouie* that "fair warning" of impending change cannot insulate retroactive *judicial* criminalization either.

Nor is there any reason in the nature of things why it should. According to the Court, the exception is necessary because prohibiting retroactive judicial criminalization would "place an unworkable and unacceptable restraint on normal judicial processes," would be "incompatible with the resolution of uncertainty that marks any evolving legal system," and would "unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system." *Ante*, at 461. That assessment ignores the crucial difference between simply applying a law to a new set of circumstances and changing the law that has previously been applied to the very circumstances before the court. Many criminal cases present some factual nuance that arguably distinguishes them from cases that have come before; a court applying the penal statute to the new fact pattern does not purport to *change* the law. That, however, is not the action before us here, but rather, a square, head-on *overruling* of prior law—or, more accurately, something even more extreme than that: a judicial opinion acknowledging that under prior law, for reasons that used to be valid, the accused could not be convicted, but decreeing that, because of changed circumstances, "we hereby abolish the common law rule," 992 S. W. 2d, at 401, and upholding the conviction by applying the new rule to conduct that occurred before the change in law was announced. Even in civil cases, and even in modern times, such retroactive revision of a concededly valid legal rule is extremely rare. With regard to criminal cases, I have no hesitation in affirming that it was unheard of at the time the original Due Process Clause was adopted. As I discuss in detail in the following section, proceeding in that fashion would have been regarded as contrary to the judicial traditions embraced within the concept of due process of law.

B

The Court's opinion considers the judgment at issue here "a routine exercise of common law decisionmaking," whereby the Tennessee court "brought the law into conformity with reason and common sense," by "laying to rest an archaic and outdated rule." *Ante,* at 467. This is an accurate enough description of what modern "common law decisionmaking" consists of—but it is not an accurate description of the theoretical model of common-law decisionmaking accepted by those who adopted the Due Process Clause. At the time of the framing, common-law jurists believed (in the words of Sir Francis Bacon) that the judge's "office is *jus dicere,* and not *jus dare;* to interpret law, and not to make law, or give law." Bacon, Essays, Civil and Moral, in 3 Harvard Classics 130 (C. Eliot ed. 1909) (1625). Or as described by Blackstone, whose Commentaries were widely read and "accepted [by the framing generation] as the most satisfactory exposition of the common law of England," see *Schick* v. *United States,* 195 U. S. 65, 69 (1904), "judicial decisions are the principal and most authoritative *evidence,* that can be given, of the existence of such a custom as shall form a part of the common law," 1 W. Blackstone, Commentaries *69 (hereinafter Blackstone) (emphasis added).

Blackstone acknowledged that the courts' exposition of what the law was could change. *Stare decisis,* he said, "admits of exception, where the former determination is most evidently contrary to reason . . . ." *Ibid.* But "in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id.,* at *70. To fit within this category of bad law, a law must be "manifestly absurd or unjust." It would not suffice, he said, that "the particular reason [for the law] can at this distance of time [not be] precisely assigned." "[F]or though [its] reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted

wholly without consideration." *Ibid.*[1] By way of example, Blackstone pointed to the seemingly unreasonable rule that one cannot inherit the estate of one's half brother. Though he accepted that the feudal reason behind the law was no longer obvious, he wrote "yet it is not *in [a common law judge's] power* to alter it." *Id.*, at *70–*71 (emphasis added).[2] Moreover, "the unreasonableness of a custom in modern circumstances will not affect its validity if the Court is satisfied of a reasonable origin." Allen 140–141. "A custome once reasonable and tolerable, if after it become grievous, and not answerable to the reason, whereupon it was grounded, yet is to be . . . taken away by act of parliament." 2 E. Coke, Institutes of the Laws of England *664 (hereinafter Institutes); see also *id.*, at *97 ("No law, or custome of England can be taken away, abrogated, or adnulled, but by authority of parliament"); Of Oaths before an Ecclesiastical Judge Ex Officio, 12 Co. Rep. *26, *29 (1655) ("[T]he law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament").

There are, of course, stray statements and doctrines found in the historical record that—read out of context—could be thought to support the modern-day proposition that the com-

[1] Inquiring into a law's original reasonableness was perhaps tantamount to questioning whether it existed at all. "In holding the origin to have been unreasonable, the Court nearly always doubts or denies the actual origin and continuance of the custom *in fact*." C. Allen, Law in the Making 140 (3d ed. 1939) (hereinafter Allen).

[2] The near-dispositive strength Blackstone accorded *stare decisis* was not some mere personal predilection. Chancellor Kent was of the same view: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have *a right* to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." 1 J. Kent, Commentaries *475–*476 (emphasis added). See also Hamilton's statement in The Federalist: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 471 (C. Rossiter ed. 1961).

mon law was always meant to evolve. Take, for instance, Lord Coke's statement in the Institutes that "the reason of the law ceasing, the law itself ceases." This maxim is often cited by modern devotees of a turbulently changing common law—often in its Latin form *(cessante ratione legis, cessat ipse lex)* to create the impression of great venerability. In its original context, however, it had nothing to do with the power of common-law courts to change the law. At the point at which it appears in the Institutes, Coke was discussing the exception granted abbots and mayors from the obligation of military service to the King which attached to land ownership. Such service would be impracticable for a man of the cloth or a mayor. But, said Coke, "if they convey over the lands to any naturall man and his heires," the immunity "by the conveyance over ceaseth." 1 Institutes *70. In other words, the service which attached to the land would apply to any subsequent owner not cloaked in a similar immunity. It was in describing this change that Coke employed the Latin maxim *cessante ratione legis, cessat ipse lex.* It had to do, not with a changing of the common-law rule, but with a change of circumstances that rendered the common-law rule no longer applicable to the case.

The same is true of the similar quotation from Coke: "*[R]atio legis est anima legis, et mutata legis ratione, mutatur et lex*"—reason is the soul of the law; the reason of the law being changed, the law is also changed. This is taken from Coke's report of *Milborn's Case,* 7 Co. Rep. 6b, 7a (1587), a suit involving a town's responsibility for a murder committed within its precincts. The common-law rule had been that a town could be amerced for failure to apprehend a murderer who committed his crime on its streets during the day, but not a murderer who struck after nightfall, when its citizens were presumably asleep. Parliament, however, enacted a statute requiring towns to close their gates at night, and the court reasoned that thereafter a town that left its gates open could be amerced for the nocturnal homicide

as well, since the town's violation of the Act was negligence that facilitated the escape. This perhaps partakes more of a new right of action implied from legislation than of any common-law rule. But to the extent it involved the common law, it assuredly did not *change* the prior rule: A town not in violation of the statute would continue to be immune. *Milborn's Case* simply held that the rule would not be extended to towns that wrongfully failed to close their gates—which involves no overruling, but nothing more than normal, case-by-case common-law adjudication.

It is true that framing-era judges in this country considered themselves authorized to reject English common-law precedent they found "barbarous" and "ignorant," see 1 Z. Swift, A System of the Laws of the State of Connecticut 46 (1795) (hereinafter Swift); N. Chipman, A Dissertation on the Act Adopting the Common and Statute Laws of England, in Reports and Dissertations 117, 128 (1793) (hereinafter Chipman). That, however, was not an assertion of *judges'* power to *change* the common law. For, as Blackstone wrote, the common law was a law for England, and did not automatically transfer to the American Colonies; rather, it had to be adopted. See 1 Blackstone *107–*108 (observing that "the common law of England, as such, has no allowance or authority" in "[o]ur American plantations"); see also 1 Swift 46 ("The English common law is not in itself binding in this state"); *id.*, at 44–45 ("The English common law has never been considered to be more obligatory here, than the Roman law has been in England"). In short, the colonial courts felt themselves perfectly free to pick and choose which parts of the English common law they would adopt.[3] As stated by

[3] In fact, however, "most of the basic departures [from English common law] were accomplished not by judicial decision but by local statute, so that by the time of the American Revolution one hears less and less about the unsuitability of common law principles to the American environment." 1 M. Horwitz, Transformation of American Law 1780–1860, p. 5 (1977) (hereinafter Horwitz).

Chipman 128: "If no reason can be assigned, in support of rules, or precedents, *not already adopted in practice*, to adopt such rules, is certainly contrary to the principles of our government." (Emphasis added.) This discretion not to adopt would not presuppose, or even support, the power of colonial courts subsequently to change the accumulated colonial common law. The absence of belief in *that* power is demonstrated by the following passage from 1 Horwitz 5: "Massachusetts Chief Justice Hutchison could declare in 1767 that 'laws should be established, else Judges and Juries must go according to their Reason, that is, their Will.' It was also imperative 'that *the Judge* should never be the *Legislator:* Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery.'" Or, as Judge Swift put it, courts "ought never to be allowed to depart from the well known boundaries of express law, into the wide fields of discretion." 2 Swift 366.

Nor is the framing era's acceptance of common-law crimes support for the proposition that the Framers accepted an evolving common law. The acknowledgment of a new crime, not thitherto rejected by judicial decision, was not a *changing* of the common law, but an *application* of it. At the time of the framing, common-law crimes were considered unobjectionable, for "'a law founded on the law of nature may be retrospective, because it always existed,'" 1 Horwitz 7, quoting *Blackwell* v. *Wilkinson*, Jefferson's Rep. 73, 77 (Va. 1768) (argument of then-Attorney General John Randolph). Of course, the notion of a common-law crime is utterly anathema today, which leads one to wonder why that is so. The obvious answer is that we now agree with the perceptive chief justice of Connecticut, who wrote in 1796 that common-law crimes "partak[e] of the odious nature of an ex post facto law." 2 Swift 365–366. But, as Horwitz makes clear, a widespread sharing of Swift's "preoccupation with the unfairness of administering a system of judge-made criminal law was a distinctly *post-revolutionary* phenome-

non, reflecting a profound change in sensibility. For the inarticulate premise that lay behind Swift's warnings against the danger of judicial discretion was *a growing perception that judges no longer merely discovered law; they also made it.*" 1 Horwitz 14–15 (emphases added). In other words, the connection between *ex post facto* lawmaking and common-law judging would not have become widely apparent *until* common-law judging *became* lawmaking, not (as it had been) law declaring. This did not happen, see *id.*, at 1–4, until the 19th century, *after* the framing.

What occurred in the present case, then, is precisely what Blackstone said—and the Framers believed—would not suffice. The Tennessee Supreme Court made no pretense that the year-and-a-day rule was "bad" law from the outset; rather, it asserted, the need for the rule, as a means of assuring causality of the death, had disappeared with time. Blackstone—and the Framers who were formed by Blackstone—would clearly have regarded that *change* in law as a matter for the legislature, beyond the *power* of the court. It may well be that some common-law decisions of the era in fact changed the law while purporting not to. But that is beside the point. What is important here is that it was an undoubted point of principle, at the time the Due Process Clause was adopted, that courts could not "change" the law. That explains why the Constitution restricted only the legislature from enacting *ex post facto* laws. Under accepted norms of judicial process, an *ex post facto* law (in the sense of a judicial holding, not that a prior decision was erroneous, but that the prior valid law is hereby retroactively *changed*) was simply not an option for the courts. This attitude subsisted, I may note, well beyond the founding era, and beyond the time when due process guarantees were extended against the States by the Fourteenth Amendment. In an 1886 admiralty case, for example, this Court said the following: "The rights of persons in this particular under the maritime law of this country are not different from those under

the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule." *The Harrisburg*, 119 U. S. 199, 213–214 (1886), overruled by *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970).

It is not a matter, therefore, of "[e]xtending the *[Ex Post Facto]* Clause to courts through the rubric of due process," and thereby "circumvent[ing] the clear constitutional text," *ante*, at 460. It is simply a matter of determining what due judicial process consists of—and it does not consist of retroactive creation of crimes. The *Ex Post Facto* Clause is relevant only because it demonstrates beyond doubt that, however much the acknowledged and accepted role of common-law courts could evolve (as it has) in other respects, retroactive revision of the criminal law was regarded as so fundamentally unfair that an alteration of the judicial role which permits *that* will be a denial of due process. Madison wrote that "*ex-post-facto* laws . . . are contrary to the first principles of the social compact, and to every principle of social legislation." The Federalist No. 44, p. 282 (C. Rossiter ed. 1961). I find it impossible to believe, as the Court does, that this strong sentiment attached only to retroactive laws passed by the legislature, and would not apply equally (or indeed with even greater force) to a court's production of the same result through disregard of the traditional limits upon judicial power. Insofar as the "first principles of the social compact" are concerned, what possible difference does it make that "[a] court's opportunity for discrimination" by retroactively changing a law "is more limited than a legislature's, in that it can only act in construing existing law in actual litigation"? *Ante*, at 460–461 (internal quotation marks and citation omitted). The injustice to the individuals affected is no less.

II

Even if I agreed with the Court that the Due Process Clause is violated only when there is lack of "fair warning" of the impending retroactive change, I would not find such fair warning here. It is not clear to me, in fact, what the

Court believes the fair warning consisted of. Was it the mere fact that "[t]he year and a day rule is widely viewed as an outdated relic of the common law"? *Ante*, at 462. So are many of the elements of common-law crimes, such as "breaking the close" as an element of burglary, or "asportation" as an element of larceny. See W. LaFave & A. Scott, Criminal Law 631–633, 708–710 (1972). Are all of these "outdated relics" subject to retroactive judicial rescission? Or perhaps the fair warning consisted of the fact that "the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue." *Ante*, at 463. But why not count in petitioner's favor (as giving him no reason to expect a change in law) those even more numerous jurisdictions that have chosen *not* "recently to have addressed the issue"? And why not also count in petitioner's favor (rather than *against* him) those jurisdictions that have abolished the rule *legislatively*, and those jurisdictions that have abolished it through *prospective* rather than *retroactive* judicial rulings (together, a large majority of the abolitions, see 992 S. W. 2d, at 397, n. 4, 402 (listing statutes and cases))? That is to say, even if it was predictable that the rule would be changed, it was *not* predictable that it would be changed *retroactively*, rather than in the *prospective* manner to which legislatures are restricted by the *Ex Post Facto* Clause, or in the *prospective* manner that most other courts have employed.

In any event, as the Court itself acknowledges, "[d]ue process . . . does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State." *Ante*, at 464. The Court tries to counter this self-evident point with the statement that "[a]t the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible

by reference to the law as it then existed," *ibid.* This retort rests upon the fallacy that I discussed earlier: that "expected or defensible" "abolition" of prior law was approved by *Bouie*. It was not—and according such conclusive effect to the "defensibility" (by which I presume the Court means the "reasonableness") of the change in law will validate the retroactive creation of many new crimes.

Finally, the Court seeks to establish fair warning by discussing at great length, *ante*, at 464–466, how unclear it was that the year-and-a-day rule was ever the law in Tennessee. As I have already observed, the Supreme Court of Tennessee is the authoritative expositor of Tennessee law, and has said categorically that the year-and-a-day rule was the law. Does the Court mean to establish the principle that fair warning of impending change exists—or perhaps fair warning can be dispensed with—when the prior law is not crystal clear? Yet another boon for retroactively created crimes.

I reiterate that the only "fair warning" discussed in our precedents, and the only "fair warning" relevant to the issue before us here, is fair warning *of what the law is*. That warning, unlike the new one that today's opinion invents, goes well beyond merely "safeguarding defendants against *unjustified* and *unpredictable* breaks with prior law," *ante*, at 462 (emphasis added). It safeguards them against *changes in the law after the fact*. But even accepting the Court's novel substitute, the opinion's conclusion that this watered-down standard has been met seems to me to proceed on the principle that a large number of almost-valid arguments makes a solid case. As far as I can tell, petitioner had nothing that could fairly be called a "warning" that the Supreme Court of Tennessee would retroactively eliminate one of the elements of the crime of murder.

* * *

To decide this case, we need only conclude that due process prevents a court from (1) acknowledging the validity, when

they were rendered, of prior decisions establishing a particular element of a crime; (2) changing the prior law so as to eliminate that element; and (3) applying that change to conduct that occurred under the prior regime. A court would remain free to apply common-law criminal rules to new fact patterns, see *ante*, at 461–462, so long as that application is consistent with a fair reading of prior cases. It would remain free to conclude that a prior decision or series of decisions establishing a particular element of a crime was in error, and to apply that conclusion retroactively (so long as the "fair notice" requirement of *Bouie* is satisfied). It would even remain free, insofar as the *ex post facto* element of the Due Process Clause is concerned, to "reevaluat[e] and refin[e]" the elements of common-law crimes to its heart's content, so long as it does so prospectively. (The majority of state courts that have abolished the year-and-a-day rule have done so in this fashion.) And, of course (as Blackstone and the Framers envisioned), legislatures would be free to eliminate outmoded elements of common-law crimes for the future *by law.* But what a court cannot do, consistent with due process, is what the Tennessee Supreme Court did here: avowedly *change* (to the defendant's disadvantage) the criminal law governing past acts.

For these reasons, I would reverse the judgment of the Supreme Court of Tennessee.

JUSTICE BREYER, dissenting.

I agree with the Court's basic approach. Justice Cardozo pointed out that retroactivity should be determined "not by metaphysical conceptions of the nature of judge-made law, . . . but by considerations of convenience, of utility, and of the deepest sentiments of justice." The Nature of the Judicial Process 148–149 (1921). Similarly, the Due Process Clause asks us to consider the basic fairness or unfairness of retroactive application of the Tennessee court's change in the law. That Clause provides protection against after-the-fact

changes in criminal law that deprive defendants of fair warning of the nature and consequences of their actions. It does not enshrine Blackstone's "ancient dogma that the law declared by . . . courts had a Platonic or ideal existence before the act of declaration," *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 365 (1932) (Cardozo, J.). Cf. *ante*, at 473–474 (SCALIA, J., dissenting).

I also agree with the Court that, in applying the Due Process Clause, we must ask whether the judicial ruling in question was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie* v. *City of Columbia*, 378 U. S. 347, 354 (1964) (quoting J. Hall, General Principles of Criminal Law 61 (2d ed. 1960) (internal quotation marks omitted)).

I cannot agree, however, with the majority's application of that due process principle to this case. As JUSTICE SCALIA well explains, Rogers did not have fair warning that the Tennessee courts would abolish the year and a day rule or that they would retroactively apply the new law to the circumstances of his case, thereby upgrading the crime those circumstances revealed from attempted murder to murder. I therefore join Part II of JUSTICE SCALIA's dissenting opinion.

Syllabus

UNITED STATES *v.* OAKLAND CANNABIS BUYERS' COOPERATIVE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–151. Argued March 28, 2001—Decided May 14, 2001

Respondent Oakland Cannabis Buyers' Cooperative was organized to distribute marijuana to qualified patients for medical purposes. The United States sued to enjoin the Cooperative and its executive director, also a respondent (together, the Cooperative), under the Controlled Substances Act. The United States argued that the Cooperative's activities violated the Act's prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance. The District Court enjoined the Cooperative's activities, but the Cooperative continued to distribute marijuana. The District Court found the Cooperative in contempt, rejecting its defense that any distributions were medically necessary. The court later rejected the Cooperative's motion to modify the injunction to permit medically necessary distributions. The Cooperative appealed, and the Ninth Circuit reversed and remanded the ruling on the motion to modify the injunction. According to the Ninth Circuit, medical necessity is a legally cognizable defense likely applicable in the circumstances, the District Court mistakenly believed it had no discretion to issue an injunction more limited in scope than the Controlled Substances Act, and the District Court should have weighed the public interest and considered factors such as the serious harm in depriving patients of marijuana in deciding whether to modify the injunction.

Held:

1. There is no medical necessity exception to the Controlled Substances Act's prohibitions on manufacturing and distributing marijuana. Pp. 489–495.

(a) Because that Act classifies marijuana as a schedule I controlled substance, it provides only one express exception to the prohibitions on manufacturing and distributing the drug: Government-approved research projects. The Cooperative's contention that a common-law medical necessity defense should be written into the Act is rejected. There is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute. But that question need not be answered to resolve the issue presented here, for the terms

of the Controlled Substances Act leave no doubt that the medical necessity defense is unavailable. Pp. 489–491.

(b) Under any conception of legal necessity, the defense cannot succeed when the legislature itself has made a determination of values. Here, the Act reflects a determination that marijuana has no medical benefits worthy of an exception (other than Government-approved research). Whereas other drugs can be dispensed and prescribed for medical use, see 21 U. S. C. § 829, the same is not true for marijuana, which has "no currently accepted medical use" at all, § 812. This conclusion is supported by the structure of the Act, which divides drugs into five schedules, depending in part on whether a drug has a currently accepted medical use, and then imposes restrictions according to the schedule in which it has been placed. The Attorney General is authorized to include a drug in schedule I, the most restrictive schedule, only if the drug has no currently accepted medical use. The Cooperative errs in arguing that, because Congress, instead of the Attorney General, placed marijuana into that schedule, marijuana can be distributed when medically necessary. The statute treats all schedule I drugs alike, and there is no reason why drugs that Congress placed there should be subject to fewer controls than those that the Attorney General placed there. Also rejected is the Cooperative's argument that a drug may be found medically necessary for a particular patient or class even when it has not achieved general acceptance as a medical treatment. It is clear from the text of the Act that Congress determined that marijuana has no medical benefits worthy of an exception granted to other drugs. The statute expressly contemplates that many drugs have a useful medical purpose, see § 801(1), but it includes no exception at all for any medical use of marijuana. This Court is unwilling to view that omission as an accident and is unable, in any event, to override a legislative determination manifest in the statute. Finally, the canon of constitutional avoidance has no application here, because there is no statutory ambiguity. Pp. 491–495.

2. The discretion that courts of equity traditionally possess in fashioning relief does not serve as a basis for affirming the Ninth Circuit in this case. To be sure, district courts properly acting as courts of equity have discretion unless a statute clearly provides otherwise. But the mere fact that the District Court had discretion does not suggest that the court, when evaluating the motion, could consider any and all factors that might relate to the public interest or the parties' conveniences, including medical needs. Equity courts cannot ignore Congress' judgment expressed in legislation. Their choice is whether a particular means of enforcement should be chosen over another permissible means,

Syllabus

not whether enforcement is preferable to no enforcement at all. To the extent a district court considers the public interest and parties' conveniences, the court is limited to evaluating how those factors are affected by the selection of an injunction over other enforcement mechanisms. Because the Controlled Substances Act covers even those who have what could be termed a medical necessity, it precludes consideration of the evidence that the Ninth Circuit deemed relevant. Pp. 495–499.

190 F. 3d 1109, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 499. BREYER, J., took no part in the consideration or decision of the case.

Acting Solicitor General Underwood argued the cause for the United States. With her on the briefs were former *Solicitor General Waxman*, *Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, and *Lisa Schiavo Blatt.*

Gerald F. Uelmen argued the cause for respondents. With him on the brief were *James J. Brosnahan*, *Annette P. Carnegie*, *Christina Kirk-Kazhe*, *Robert A. Raich*, and *Randy E. Barnett.**

**Janet M. LaRue* filed a brief for the Family Research Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Bill Lockyer*, Attorney General, and *David De Alba*, Special Assistant Attorney General; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Daniel P. Tokaji*, and *Jordan C. Budd;* for the American Public Health Association et al. by *Daniel N. Abrahamson;* for the Marijuana Policy Project et al. by *Cheryl Flax-Davidson;* for the National Organization for the Reform of Marijuana Laws et al. by *R. Keith Stroup*, *John Wesley Hall, Jr.*, and *Lisa B. Kemler;* for Edward Neil Brundridge et al. by *Thomas V. Loran III;* and for Sheriff Mark N. Dion et al. by *Julie M. Carpenter.*

Briefs of *amici curiae* were filed for the California Medical Association et al. by *Catherine I. Hanson* and *Alice P. Mead;* and for the Institute on Global Drug Policy of the Drug Free America Foundation et al. by *David G. Evans* and *John E. Lamp.*

JUSTICE THOMAS delivered the opinion of the Court.

The Controlled Substances Act, 84 Stat. 1242, 21 U. S. C. § 801 *et seq.*, prohibits the manufacture and distribution of various drugs, including marijuana. In this case, we must decide whether there is a medical necessity exception to these prohibitions. We hold that there is not.

I

In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient's medical purposes upon the recommendation or approval of a physician. *Ibid.* In the wake of this voter initiative, several groups organized "medical cannabis dispensaries" to meet the needs of qualified patients. *United States* v. *Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1092 (ND Cal. 1998). Respondent Oakland Cannabis Buyers' Cooperative is one of these groups.

The Cooperative is a not-for-profit organization that operates in downtown Oakland. A physician serves as medical director, and registered nurses staff the Cooperative during business hours. To become a member, a patient must provide a written statement from a treating physician assenting to marijuana therapy and must submit to a screening interview. If accepted as a member, the patient receives an identification card entitling him to obtain marijuana from the Cooperative.

In January 1998, the United States sued the Cooperative and its executive director, respondent Jeffrey Jones (to-

gether, the Cooperative), in the United States District Court for the Northern District of California. Seeking to enjoin the Cooperative from distributing and manufacturing marijuana,[1] the United States argued that, whether or not the Cooperative's activities are legal under California law, they violate federal law. Specifically, the Government argued that the Cooperative violated the Controlled Substances Act's prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance. 21 U. S. C. § 841(a). Concluding that the Government had established a probability of success on the merits, the District Court granted a preliminary injunction. App. to Pet. for Cert. 39a–40a; 5 F. Supp. 2d, at 1105.

The Cooperative did not appeal the injunction but instead openly violated it by distributing marijuana to numerous persons, App. to Pet. for Cert. 21a–23a. To terminate these violations, the Government initiated contempt proceedings. In defense, the Cooperative contended that any distributions were medically necessary. Marijuana is the only drug, according to the Cooperative, that can alleviate the severe pain and other debilitating symptoms of the Cooperative's patients. *Id.*, at 29a. The District Court rejected this defense, however, after determining there was insufficient evidence that each recipient of marijuana was in actual danger of imminent harm without the drug. *Id.*, at 29a–32a. The District Court found the Cooperative in contempt and, at the Government's request, modified the preliminary injunction to empower the United States Marshal to seize the Cooperative's premises. *Id.*, at 37a. Although recognizing that

[1] The Government requested, and the District Court granted, an injunction that prohibited the possession of marijuana with the intent to manufacture and distribute, as well as the distribution and manufacture of marijuana. For simplicity, in this opinion, we refer to these activities collectively as distributing and manufacturing marijuana. The legal issues are the same for all of these activities.

"human suffering" could result, the District Court reasoned that a court's "equitable powers [do] not permit it to ignore federal law." *Ibid.* Three days later, the District Court summarily rejected a motion by the Cooperative to modify the injunction to permit distributions that are medically necessary.

The Cooperative appealed both the contempt order and the denial of the Cooperative's motion to modify. Before the Court of Appeals for the Ninth Circuit decided the case, however, the Cooperative voluntarily purged its contempt by promising the District Court that it would comply with the initial preliminary injunction. Consequently, the Court of Appeals determined that the appeal of the contempt order was moot. 190 F. 3d 1109, 1112–1113 (1999).

The denial of the Cooperative's motion to modify the injunction, however, presented a live controversy that was appealable under 28 U. S. C. § 1292(a)(1). Reaching the merits of this issue, the Court of Appeals reversed and remanded. According to the Court of Appeals, the medical necessity defense was a "legally cognizable defense" that likely would apply in the circumstances. 190 F. 3d, at 1114. Moreover, the Court of Appeals reasoned, the District Court erroneously "believed that it had no discretion to issue an injunction that was more limited in scope than the Controlled Substances Act itself." *Id.*, at 1114–1115. Because, according to the Court of Appeals, district courts retain "broad equitable discretion" to fashion injunctive relief, the District Court could have, and should have, weighed the "public interest" and considered factors such as the serious harm in depriving patients of marijuana. *Ibid.* Remanding the case, the Court of Appeals instructed the District Court to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.*, at 1115. Following these instructions, the District Court granted the Cooperative's

motion to modify the injunction to incorporate a medical necessity defense.[2]

The United States petitioned for certiorari to review the Court of Appeals' decision that medical necessity is a legally cognizable defense to violations of the Controlled Substances Act. Because the decision raises significant questions as to the ability of the United States to enforce the Nation's drug laws, we granted certiorari. 531 U. S. 1010 (2000).

II

The Controlled Substances Act provides that, "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U. S. C. § 841(a)(1). The subchapter, in turn, establishes exceptions.

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[2] The amended preliminary injunction reaffirmed that the Cooperative is generally enjoined from manufacturing, distributing, and possessing with the intent to manufacture or distribute marijuana, but it carved out an exception for cases of medical necessity. Specifically, the District Court ordered that "[t]he foregoing injunction does not apply to the distribution of cannabis by [the Cooperative] to patient-members who (1) suffer from a serious medical condition, (2) will suffer imminent harm if the patient-member does not have access to cannabis, (3) need cannabis for the treatment of the patient-member's medical condition, or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of the patient-member's medical condition or symptoms associated with the medical condition because the patient-member has tried all other legal alternatives to cannabis and the alternatives have been ineffective in treating or alleviating the patient-member's medical condition or symptoms associated with the medical condition, or the alternatives result in side effects which the patient-member cannot reasonably tolerate." App. to Pet. for Cert. 16a–17a.

The United States appealed the District Court's order amending the preliminary injunction. At the Government's request, we stayed the order pending the appeal. 530 U. S. 1298 (2000). The Court of Appeals has postponed oral argument pending our decision in this case.

For marijuana (and other drugs that have been classified as "schedule I" controlled substances), there is but one express exception, and it is available only for Government-approved research projects, § 823(f). Not conducting such a project, the Cooperative cannot, and indeed does not, claim this statutory exemption.

The Cooperative contends, however, that notwithstanding the apparently absolute language of § 841(a), the statute is subject to additional, implied exceptions, one of which is medical necessity. According to the Cooperative, because necessity was a defense at common law, medical necessity should be read into the Controlled Substances Act. We disagree.

As an initial matter, we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute. A necessity defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States* v. *Bailey*, 444 U. S. 394, 410 (1980). Even at common law, the defense of necessity was somewhat controversial. See, *e. g.*, *Queen* v. *Dudley & Stephens*, 14 Q. B. 273 (1884). And under our constitutional system, in which federal crimes are defined by statute rather than by common law, see *United States* v. *Hudson*, 7 Cranch 32, 34 (1812), it is especially so. As we have stated: "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." *United States* v. *Rutherford*, 442 U. S. 544, 559 (1979). Nonetheless, we recognize that this Court has discussed the possibility of a necessity defense without altogether rejecting it. See, *e. g.*, *Bailey*, *supra*, at 415.[3]

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[3] The Cooperative is incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute. There, the Court rejected the necessity defense of a prisoner who contended that adverse prison conditions justified his prison escape. The Court held that the necessity defense is un-

We need not decide, however, whether necessity can ever be a defense when the federal statute does not expressly provide for it. In this case, to resolve the question presented, we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense.[4] But its provisions leave no doubt that the defense is unavailable.

Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a "determination of values." 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.4, p. 629 (1986). In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U. S. C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all. § 812.

The structure of the Act supports this conclusion. The statute divides drugs into five schedules, depending in part on whether the particular drug has a currently accepted

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available to prisoners, like Bailey, who fail to present evidence of a bona fide effort to surrender as soon as the claimed necessity had lost its coercive force. 444 U. S., at 415. It was not argued, and so there was no occasion to consider, whether the statute might be unable to bear any necessity defense at all. And although the Court noted that Congress "legislates against a background of Anglo-Saxon common law" and thus "may" have contemplated a necessity defense, the Court refused to "balanc[e] [the] harms," explaining that "we are construing an Act of Congress, not drafting it." *Id.*, at 415–416, n. 11.

[4] We reject the Cooperative's intimation that elimination of the defense requires an "explici[t]" statement. Brief for Respondents 21. Considering that we have never held necessity to be a viable justification for violating a federal statute, see *supra*, at 490, and n. 3, and that such a defense would entail a social balancing that is better left to Congress, we decline to set the bar so high.

medical use. The Act then imposes restrictions on the manufacture and distribution of the substance according to the schedule in which it has been placed. Schedule I is the most restrictive schedule.[5] The Attorney General can include a drug in schedule I only if the drug "has no currently accepted medical use in treatment in the United States," "has a high potential for abuse," and has "a lack of accepted safety for use . . . under medical supervision." §§ 812(b)(1)(A)–(C). Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use.

The Cooperative points out, however, that the Attorney General did not place marijuana into schedule I. Congress put it there, and Congress was not required to find that a drug lacks an accepted medical use before including the drug in schedule I. We are not persuaded that this distinction has any significance to our inquiry. Under the Cooperative's logic, drugs that Congress places in schedule I could be distributed when medically necessary whereas drugs that the Attorney General places in schedule I could not. Nothing in the statute, however, suggests that there are two tiers of schedule I narcotics, with drugs in one tier more readily available than drugs in the other. On the contrary, the statute consistently treats all schedule I drugs alike. See, *e. g.*, § 823(a) (providing criteria for Attorney General to consider when determining whether to register an applicant to manufacture schedule I controlled substances), § 823(b) (providing criteria for Attorney General to consider when determining whether to register an applicant to distribute schedule I controlled substances), § 823(f) (providing procedures for becoming a government-approved research project), § 826 (establishing production quotas for schedule I drugs). Moreover,

[5] As noted, *supra*, at 490, the only express exception for schedule I drugs is the Government-approved research project, see 21 U. S. C. § 823(f). Unlike drugs in other schedules, see § 829, schedule I drugs cannot be dispensed under a prescription.

the Cooperative offers no convincing explanation for why drugs that Congress placed on schedule I should be subject to fewer controls than the drugs that the Attorney General placed on the schedule. Indeed, the Cooperative argues that, in placing marijuana and other drugs on schedule I, Congress "wishe[d] to assert the most restrictive level of controls created by the [Controlled Substances Act]." Brief for Respondents 24. If marijuana should be subject to the most restrictive level of controls, it should not be treated any less restrictively than other schedule I drugs.

The Cooperative further argues that use of schedule I drugs generally—whether placed in schedule I by Congress or the Attorney General—can be medically necessary, notwithstanding that they have "no currently accepted medical use." According to the Cooperative, a drug may not yet have achieved general acceptance as a medical treatment but may nonetheless have medical benefits to a particular patient or class of patients. We decline to parse the statute in this manner. It is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.[6]

[6] The Government argues that the 1998 "sense of the Congress" resolution, 112 Stat. 2681–760 to 2681–761, supports its position that Congress has foreclosed the medical necessity defense. Entitled "Not Legalizing Marijuana for Medicinal Use," the resolution declares that "Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration." Because we conclude that the Controlled Substances

Finally, the Cooperative contends that we should construe the Controlled Substances Act to include a medical necessity defense in order to avoid what it considers to be difficult constitutional questions. In particular, the Cooperative asserts that, shorn of a medical necessity defense, the statute exceeds Congress' Commerce Clause powers, violates the substantive due process rights of patients, and offends the fundamental liberties of the people under the Fifth, Ninth, and Tenth Amendments. As the Cooperative acknowledges, however, the canon of constitutional avoidance has no application in the absence of statutory ambiguity. Because we have no doubt that the Controlled Substances Act cannot bear a medical necessity defense to distributions of marijuana, we do not find guidance in this avoidance principle. Nor do we consider the underlying constitutional issues today. Because the Court of Appeals did not address these claims, we decline to do so in the first instance.

For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana.[7] The

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Act cannot sustain the medical necessity defense, we need not consider whether the 1998 "sense of the Congress resolution" is additional evidence of a legislative determination to eliminate the defense.

[7] Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is "seriously ill" and lacks alternative avenues for relief. Indeed, it is the Cooperative's argument that its patients are "seriously ill," see, *e. g.*, Brief for Respondents 11, 13, 17, and lacking "alternatives," see, *e. g.*, *id.*, at 13. We reject the argument that these factors warrant a medical necessity exception. If we did not, we would be affirming instead of reversing the Court of Appeals.

Finally, we share JUSTICE STEVENS' concern for "showing respect for the sovereign States that comprise our Federal Union." *Post*, at 502 (opinion concurring in judgment). However, we are "construing an Act of Congress, not drafting it." *United States* v. *Bailey*, 444 U. S. 394, 415, n. 11 (1980). Because federal courts interpret, rather than author, the

Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F. 3d, at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.*, at 1115.

III

The Cooperative contends that, even if the Controlled Substances Act forecloses the medical necessity defense, there is an alternative ground for affirming the Court of Appeals. This case, the Cooperative reminds us, arises from a motion to modify an injunction to permit distributions that are medically necessary. According to the Cooperative, the Court of Appeals was correct that the District Court had "broad equitable discretion" to tailor the injunctive relief to account for medical necessity, irrespective of whether there is a legal defense of necessity in the statute. *Id.*, at 1114. To sustain the judgment below, the argument goes, we need only reaffirm that federal courts, in the exercise of their equity jurisdiction, have discretion to modify an injunction based upon a weighing of the public interest.[8]

We disagree. Although district courts whose equity powers have been properly invoked indeed have discretion in fashioning injunctive relief (in the absence of a statutory restriction), the Court of Appeals erred concerning the factors that the district courts may consider in exercising such discretion.

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federal criminal code, we are not at liberty to rewrite it. Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause.

[8] Notwithstanding JUSTICE STEVENS' concerns, *post*, at 502–503, it is appropriate for us to address this issue because this case arises from a motion to modify the injunction, because the Court of Appeals held that the District Court misconstrued its equitable discretion, and because the Cooperative offers this conclusion as an alternative ground for affirmance.

A

As an initial matter, the Cooperative is correct that, when district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise. For "several hundred years," courts of equity have enjoyed "sound discretion" to consider the "necessities of the public interest" when fashioning injunctive relief. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944). See also *id.*, at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it"); *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction"). Such discretion is displaced only by a "clear and valid legislative command." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946). See also *Romero-Barcelo*, *supra*, at 313 ("Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles").

The Cooperative is also correct that the District Court in this case had discretion. The Controlled Substances Act vests district courts with jurisdiction to enjoin violations of the Act, 21 U. S. C. § 882(a). But a "grant of jurisdiction to issue [equitable relief] hardly suggests an absolute duty to do so under any and all circumstances," *Hecht*, *supra*, at 329 (emphasis deleted). Because the District Court's use of equitable power is not textually required by any "clear and valid legislative command," the court did not have to issue an injunction.

TVA v. *Hill*, 437 U. S. 153 (1978), does not support the Government's contention that the District Court lacked discretion in fashioning injunctive relief. In *Hill*, the Court held that the Endangered Species Act of 1973 required the

District Court to enjoin completion of a dam, whose operation would either eradicate the known population of the snail darter or destroy its critical habitat. *Id.*, at 193–195. The District Court lacked discretion because an injunction was the "only means of ensuring compliance." *Romero-Barcelo*, *supra*, at 314 (explaining why the District Court in *Hill* lacked discretion). Congress' "order of priorities," as expressed in the statute, would be deprived of effect if the District Court could choose to deny injunctive relief. *Hill*, *supra*, at 194. In effect, the District Court had only a Hobson's choice. By contrast, with respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction.

B

But the mere fact that the District Court had discretion does not suggest that the District Court, when evaluating the motion to modify the injunction, could consider any and all factors that might relate to the public interest or the conveniences of the parties, including the medical needs of the Cooperative's patients. On the contrary, a court sitting in equity cannot "ignore the judgment of Congress, deliberately expressed in legislation." *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 551 (1937). A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." *Hill*, 437 U. S., at 194. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. *Id.*, at 194–195. Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another per-

missible means; their choice is not whether enforcement is preferable to no enforcement at all.[9] Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction," *Romero-Barcelo*, 456 U. S., at 312, over the other available methods of enforcement. Cf. *id.*, at 316 (referring to "discretion to rely on remedies other than an immediate prohibitory injunction"). To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

C

In this case, the Court of Appeals erred by considering relevant the evidence that some people have "serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms," that these people "will suffer serious harm if they are denied cannabis," and that "there is no legal alternative to cannabis

[9] *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), for example, held that the District Court was not required to issue an injunction to restrain violations of the Emergency Price Control Act of 1942 and regulations thereunder when "some 'other order' might be more appropriate, or at least so appear to the court." *Id.*, at 328 (quoting statutory provision that enabled district court to issue an injunction, a restraining order, "or other order"). *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982), held that a District Court had discretion not to issue an injunction precluding the United States Navy from releasing ordnance into water, but to rely on other means of ensuring compliance, including ordering the Navy to obtain a permit. *Id.*, at 314–318. See also *Amoco Production Co.* v. *Gambell*, 480 U. S. 531, 544–546 (1987) (holding that a District Court did not err in declining to issue an injunction to bar exploratory drilling on Alaskan public lands, because the District Court's decision "did not undermine" the policy of the Alaska National Interest Lands Conservation Act, 16 U. S. C. § 3120, and because the Secretary of the Interior had other means of meaningfully complying with the statute).

for the effective treatment of their medical conditions." 190 F. 3d, at 1115. As explained above, in the Controlled Substances Act, the balance already has been struck against a medical necessity exception. Because the statutory prohibitions cover even those who have what could be termed a medical necessity, the Act precludes consideration of this evidence. It was thus error for the Court of Appeals to instruct the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Ibid.*

* * *

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

It is so ordered.

JUSTICE BREYER took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, concurring in the judgment.

Lest the Court's narrow holding be lost in its broad dicta, let me restate it here: "[W]e hold that medical necessity is not a defense to *manufacturing* and *distributing* marijuana." *Ante*, at 494 (emphasis added). This confined holding is consistent with our grant of certiorari, which was limited to the question "[w]hether the Controlled Substances Act, 21 U. S. C. 801 *et seq.*, forecloses a medical necessity defense to the Act's prohibition against *manufacturing* and *distributing* marijuana, a Schedule I controlled substance." Pet. for Cert. (I) (emphasis added). And, at least with respect to distribution, this holding is consistent with how the issue was raised and litigated below. As stated by the District Court, the question before it was "whether [respondents'] admitted *distribution* of marijuana for use by seri-

ously ill persons upon a physician's recommendation violates federal law," and if so, whether such distribution "should be enjoined pursuant to the injunctive relief provisions of the federal Controlled Substances Act." *United States* v. *Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1091 (ND Cal. 1998) (emphasis added).

Accordingly, in the lower courts as well as here, respondents have raised the medical necessity defense as a justification for distributing marijuana to cooperative members, and it was in that context that the Ninth Circuit determined that respondents had "a legally cognizable defense." 190 F. 3d 1109, 1114 (1999). The Court is surely correct to reverse that determination. Congress' classification of marijuana as a schedule I controlled substance—that is, one that cannot be distributed outside of approved research projects, see 21 U. S. C. §§ 812, 823(f), 829—makes it clear that "the Controlled Substances Act cannot bear a medical necessity defense to *distributions* of marijuana," *ante*, at 494 (emphasis added).[1]

Apart from its limited holding, the Court takes two unwarranted and unfortunate excursions that prevent me from joining its opinion. First, the Court reaches beyond its holding, and beyond the facts of the case, by suggesting that the defense of necessity is unavailable for anyone under the

[1] In any event, respondents do not fit the paradigm of a defendant who may assert necessity. The defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States* v. *Bailey*, 444 U. S. 394, 410 (1980); see generally 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.4, pp. 627–640 (1986). Respondents, on the other hand, have not been forced to confront a choice of evils—violating federal law by distributing marijuana to seriously ill patients or letting those individuals suffer—but have thrust that choice upon themselves by electing to become distributors for such patients. Of course, respondents also cannot claim necessity based upon the choice of evils facing seriously ill patients, as that is not the same choice respondents face.

Controlled Substances Act. *Ante,* at 491–493, 494–495, n. 7, 499. Because necessity was raised in this case as a defense to distribution, the Court need not venture an opinion on whether the defense is available to anyone other than distributors. Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here.[2]

Second, the Court gratuitously casts doubt on "whether necessity can ever be a defense" to *any* federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an "open question." *Ante,* at 490, 491. By contrast, our precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words. See, *e. g.*, *United States* v. *Bailey,* 444 U. S. 394, 415 (1980) ("We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force"); *id.,* at 416, n. 11 ("Our principal difference with the dissent, therefore, is not as to the *existence* of such a defense but as to the importance of surrender as an element of it" (emphasis added)). Indeed, the Court's comment on the general availability of the necessity defense is completely unnecessary because the Government has made no such suggestion. Cf. Brief for United States 17–18 (narrowly arguing that necessity defense cannot succeed if legislature has

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[2] As a result, perhaps the most glaring example of the Court's dicta is its footnote 7, where it opines that "nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." *Ante,* at 494, n. 7.

already "canvassed the issue" and precluded it for a particular statute (internal quotation marks omitted)). The Court's opinion on this point is pure dictum.

The overbroad language of the Court's opinion is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). In my view, this is such a case.[3] By passing Proposition 215, California voters have decided that seriously ill patients and their primary caregivers should be exempt from prosecution under state laws for cultivating and possessing marijuana if the patient's physician recommends using the drug for treatment.[4] This case does not call upon the Court to deprive *all* such patients of the benefit of the necessity defense to federal prosecution, when the case itself does not involve *any* such patients.

An additional point deserves emphasis. This case does not require us to rule on the scope of the District Court's discretion to enjoin, or to refuse to enjoin, the possession of marijuana or other potential violations of the Controlled

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[3] Cf. Feeney, Bush Backs States' Rights on Marijuana: He Opposes Medical Use But Favors Local Control, Dallas Morning News, Oct. 20, 1999, p. 6A, 1999 WL 28018944 (then-Governor Bush supporting state self-determination on medical marijuana use).

[4] Since 1996, six other States—Alaska, Colorado, Maine, Nevada, Oregon, and Washington—have passed medical marijuana initiatives, and Hawaii has enacted a similar measure through its legislature. See Alaska Stat. Ann. §§ 11.71.090, 17.37.010 to 17.37.080 (2000); Colo. Const., Art. XVIII, § 14; Haw. Rev. Stat. §§ 329–121 to 329–128 (Supp. 2000); Me. Rev. Stat. Ann., Tit. 22, § 2383–B(5) (Supp. 2000); Nev. Const., Art. 4, § 38; Ore. Rev. Stat. §§ 475.300 to 475.346 (1999); Wash. Rev. Code §§ 69.51A.005 to 69.51A.902 (1997 and Supp. 2000–2001).

Substances Act by a seriously ill patient for whom the drug may be a necessity. Whether it would be an abuse of discretion for the District Court to refuse to enjoin those sorts of violations, and whether the District Court may consider the availability of the necessity defense for that sort of violator, are questions that should be decided on the authority of cases such as *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), and *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982), and that properly should be left "open" by this case.

I join the Court's judgment of reversal because I agree that a distributor of marijuana does not have a medical necessity defense under the Controlled Substances Act. I do not, however, join the dicta in the Court's opinion.

Syllabus

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION *v.* GARVEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–1210. Decided May 14, 2001

After arbitrators found that the Major League Baseball Clubs (Clubs) colluded in the market for free-agent services after the 1985, 1986, and 1987 baseball seasons, the Clubs and petitioner agreed that the Clubs would establish a fund to be distributed to injured players. The "Framework" that petitioner designed to evaluate individual claims provided, *inter alia*, that players could seek an arbitrator's review of a distribution plan, but the arbitrator could determine only whether the Framework and its criteria were properly applied. Respondent Garvey sought arbitration after his damages claim was rejected. At his hearing, he produced a letter from San Diego Padres president and CEO Smith, stating that Smith had offered to extend Garvey's contract, but the Padres refused to negotiate thereafter due to collusion. The arbitrator denied the claim because the letter contradicted Smith's testimony denying collusion in earlier arbitration proceedings. The Federal District Court denied Garvey's motion to vacate the arbitrator's award. In *Garvey I*, the Ninth Circuit reversed. It found that review of the award's merits was warranted because the arbitrator's refusal to credit Smith's letter was inexplicable and bordered on irrational since arbitrators had previously concluded that the owners' testimony denying collusion was false, and that there was strong support for the letter's truthfulness. On remand, the District Court remanded the case for further arbitration, and Garvey appealed. Finding that *Garvey I* left only one possible result, the Ninth Circuit in *Garvey II* reversed and directed the District Court to remand the case to arbitration with instructions to enter an award for Garvey.

Held: The Ninth Circuit's decision to resolve the dispute and bar further proceedings is at odds with governing law. Judicial review of a labor-arbitration decision pursuant to a collective-bargaining agreement is very limited. Courts are not authorized to review an arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 36. Only when the arbitrator effectively dispenses his own brand of industrial justice may his decision be unenforceable. *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597.

When the judiciary weighs a particular claim's merits, it usurps a function entrusted to the arbitrator. As a rule a court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result. It should simply vacate the award, leaving open the possibility of further proceedings if the agreement permits them. The Ninth Circuit recited these principles but erred in applying them. In *Garvey I*, it overturned the arbitrator's decision because it disagreed with his factual findings with respect to credibility, but even serious error on the arbitrator's part does not justify overturning his decision where, as here, he is construing a contract and acting within the scope of his authority, *Misco, supra*, at 38. And in *Garvey II*, the court resolved the dispute's merits based on its assessment of the record before the arbitrator, which it ordinarily cannot do, no matter how erroneous the arbitrator's decision, *Misco, supra*, at 40, n. 10. Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings.

Certiorari granted; 243 F. 3d 547, reversed and remanded.

PER CURIAM.

The Court of Appeals for the Ninth Circuit here rejected an arbitrator's factual findings and then resolved the merits of the parties' dispute instead of remanding the case for further arbitration proceedings. Because the court's determination conflicts with our cases limiting review of an arbitrator's award entered pursuant to an agreement between an employer and a labor organization and prescribing the appropriate remedy where vacation of the award is warranted, we grant the petition for a writ of certiorari and reverse. The motions for leave to file briefs *amicus curiae* of the National Academy of Arbitrators and the Office of the Commissioner of Baseball are granted.

In the late 1980's, petitioner Major League Baseball Players Association (Association) filed grievances against the Major League Baseball Clubs (Clubs), claiming the Clubs had colluded in the market for free-agent services after the 1985, 1986, and 1987 baseball seasons, in violation of the industry's collective-bargaining agreement. A free agent is a player who may contract with any Club, rather than one whose right to contract is restricted to a particular Club. In a

series of decisions, arbitrators found collusion by the Clubs and damage to the players. The Association and Clubs subsequently entered into a Global Settlement Agreement (Agreement), pursuant to which the Clubs established a $280 million fund to be distributed to injured players. The Association also designed a "Framework" to evaluate the individual player's claims, and, applying that Framework, recommended distribution plans for claims relating to a particular season or seasons.

The Framework provided that players could seek an arbitrator's review of the distribution plan. The arbitrator would determine "'only whether the approved Framework and the criteria set forth therein have been properly applied in the proposed Distribution Plan.'" *Garvey* v. *Roberts*, 203 F. 3d 580, 583 (CA9 2000) *(Garvey I)*. The Framework set forth factors to be considered in evaluating players' claims, as well as specific requirements for lost contract-extension claims. Such claims were cognizable "'only in those cases where evidence exists that a specific offer of an extension was made by a club prior to collusion only to thereafter be withdrawn when the collusion scheme was initiated.'" *Id.*, at 584.

Respondent Steve Garvey, a retired, highly regarded first baseman, submitted a claim for damages of approximately $3 million. He alleged that his contract with the San Diego Padres was not extended to the 1988 and 1989 seasons due to collusion. The Association rejected Garvey's claim in February 1996, because he presented no evidence that the Padres actually offered to extend his contract. Garvey objected, and an arbitration hearing was held. He testified that the Padres offered to extend his contract for the 1988 and 1989 seasons and then withdrew the offer after they began colluding with other teams. He presented a June 1996 letter from Ballard Smith, Padres' President and CEO from 1979 to 1987, stating that, before the end of the 1985 season, Smith offered to extend Garvey's contract through

the 1989 season, but that the Padres refused to negotiate with Garvey thereafter due to collusion.

The arbitrator denied Garvey's claim, after seeking additional documentation from the parties. In his award, he explained that "'[t]here exists . . . substantial doubt as to the credibility of the statements in the Smith letter.'" *Id.*, at 586. He noted the "stark contradictions" between the 1996 letter and Smith's testimony in the earlier arbitration proceedings regarding collusion, where Smith, like other owners, denied collusion and stated that the Padres simply were not interested in extending Garvey's contract. *Ibid.* The arbitrator determined that, due to these contradictions, he "'must reject [Smith's] more recent assertion that Garvey did not receive [a contract] extension'" due to collusion, and found that Garvey had not shown a specific offer of extension. *Ibid.* He concluded:

> "'The shadow cast over the credibility of the Smith testimony coupled with the absence of any other corroboration of the claim submitted by Garvey compels a finding that the Padres declined to extend his contract not because of the constraints of the collusion effort of the clubs but rather as a baseball judgment founded upon [Garvey's] age and recent injury history.'" *Ibid.*

Garvey moved in Federal District Court to vacate the arbitrator's award, alleging that the arbitrator violated the Framework by denying his claim. The District Court denied the motion. The Court of Appeals for the Ninth Circuit reversed by a divided vote. The court acknowledged that judicial review of an arbitrator's decision in a labor dispute is extremely limited. But it held that review of the merits of the arbitrator's award was warranted in this case, because the arbitrator "'dispensed his own brand of industrial justice.'" *Id.*, at 589. The court recognized that Smith's prior testimony with respect to collusion conflicted with the statements in his 1996 letter. But in the court's view, the arbitra-

tor's refusal to credit Smith's letter was "inexplicable" and "border[ed] on the irrational," because a panel of arbitrators, chaired by the arbitrator involved here, had previously concluded that the owners' prior testimony was false. *Id.*, at 590. The court rejected the arbitrator's reliance on the absence of other corroborating evidence, attributing that fact to Smith and Garvey's direct negotiations. The court also found that the record provided "strong support" for the truthfulness of Smith's 1996 letter. *Id.*, at 591–592. The Court of Appeals reversed and remanded with directions to vacate the award.

The District Court then remanded the case to the arbitration panel for further hearings, and Garvey appealed. The Court of Appeals, again by a divided vote, explained that *Garvey I* established that "the conclusion that Smith made Garvey an offer and subsequently withdrew it because of the collusion scheme was the only conclusion that the arbitrator could draw from the record in the proceedings." No. 00–56080, 2000 WL 1801383, *1 (CA9, Dec. 7, 2000) (unpublished), judgt. order reported at 243 F. 3d 547 *(Garvey II)*. Noting that its prior instructions might have been unclear, the court clarified that *Garvey I* "left only one possible result—the result our holding contemplated—an award in Garvey's favor." 2000 WL 1801383, at *1. The Court of Appeals reversed the District Court and directed that it remand the case to the arbitration panel with instructions to enter an award for Garvey in the amount he claimed.[1]

[1] Garvey contends that, because the Association's petition was filed more than 90 days after *Garvey I*, we cannot consider a challenge raising issues resolved in that decision. But there is no question that the Association's petition was filed in sufficient time for us to review *Garvey II*, and we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals. *Mercer* v. *Theriot*, 377 U. S. 152 (1964) *(per curiam); Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916).

The parties do not dispute that this case arises under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185(a), as the controversy involves an assertion of rights under an agreement between an employer and a labor organization. Although Garvey's specific allegation is that the arbitrator violated the Framework for resolving players' claims for damages, that Framework was designed to facilitate payments to remedy the Clubs' breach of the collective-bargaining agreement. Garvey's right to be made whole is founded on that agreement.

Judicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 36 (1987). We recently reiterated that if an "'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000) (quoting *Misco*, *supra*, at 38). It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispense[s] his own brand of industrial justice" that his decision may be unenforceable. *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960). When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award. *Misco*, 484 U. S., at 39.

In discussing the courts' limited role in reviewing the merits of arbitration awards, we have stated that "'courts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.'"

Id., at 37 (quoting *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960)). When the judiciary does so, "it usurps a function which . . . is entrusted to the arbitration tribunal." *Id.*, at 569; see also *Enterprise Wheel & Car Corp.*, *supra*, at 599 ("It is the arbitrator's construction [of the agreement] which was bargained for . . ."). Consistent with this limited role, we said in *Misco* that "[e]ven in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result." 484 U. S., at 40–41, n. 10. That step, we explained, "would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for" in their agreement. *Ibid.* Instead, the court should "simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement." *Ibid.*

To be sure, the Court of Appeals here recited these principles, but its application of them is nothing short of baffling. The substance of the court's discussion reveals that it overturned the arbitrator's decision because it disagreed with the arbitrator's factual findings, particularly those with respect to credibility. The Court of Appeals, it appears, would have credited Smith's 1996 letter, and found the arbitrator's refusal to do so at worst "irrational" and at best "bizarre." *Garvey I*, 203 F. 3d, at 590–591. But even "serious error" on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority. *Misco*, *supra*, at 38.

In *Garvey II*, the court clarified that *Garvey I* both rejected the arbitrator's findings and went further, resolving the merits of the parties' dispute based on the court's assessment of the record before the arbitrator. For that reason, the court found further arbitration proceedings inappropri-

ate. But again, established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision. *Misco*, *supra*, at 40, n. 10; see also *American Mfg. Co.*, *supra*, at 568. Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings. *Misco*, *supra*, at 40, n. 10. The dissent suggests that the remedy described in *Misco* is limited to cases where the arbitrator's errors are procedural. *Post*, at 512 (opinion of STEVENS, J.). *Misco* did involve procedural issues, but our discussion regarding the appropriate remedy was not so limited. If a remand is appropriate *even* when the arbitrator's award has been set aside for "procedural aberrations" that constitute "affirmative misconduct," it follows that a remand ordinarily will be appropriate when the arbitrator simply made factual findings that the reviewing court perceives as "irrational." The Court of Appeals usurped the arbitrator's role by resolving the dispute and barring further proceedings, a result at odds with this governing law.[2]

For the foregoing reasons, the Court of Appeals erred in reversing the order of the District Court denying the motion to vacate the arbitrator's award, and it erred further in directing that judgment be entered in Garvey's favor. The petition for a writ of certiorari is granted, the judgment of

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[2] In any event, no serious error on the arbitrator's part is apparent in this case. The fact that an earlier panel of arbitrators rejected the owners' testimony as a whole does not compel the conclusion that the panel found Smith's specific statements with respect to Garvey to be false. The arbitrator's explanation for his decision indicates that he simply found Smith an unreliable witness and that, in the absence of corroborating evidence, he could only conclude that Garvey failed to show that the Padres had offered to extend his contract. The arbitrator's analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court.

the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I agree with the Court that in *Garvey* v. *Roberts*, 203 F. 3d 580 (CA9 2000), the Ninth Circuit should not have disturbed the arbitrator's award. Correction of that error sets this case straight. I see no need to say more.

JUSTICE STEVENS, dissenting.

It is well settled that an arbitrator "does not sit to dispense his own brand of industrial justice." *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960). We have also said fairly definitively, albeit in dicta, that a court should remedy an arbitrator's "procedural aberrations" by vacating the award and remanding for further proceedings. *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 40–41, n. 10 (1987). Our cases, however, do not provide significant guidance as to what standards a federal court should use in assessing whether an arbitrator's behavior is so untethered to either the agreement of the parties or the factual record so as to constitute an attempt to "dispense his own brand of industrial justice." Nor, more importantly, do they tell us how, having made such a finding, courts should deal with "the extraordinary circumstance in which the arbitrator's own rulings make clear that, more than being simply erroneous, his finding is completely inexplicable and borders on the irrational." *Garvey* v. *Roberts*, 203 F. 3d 580, 590 (CA9 2000) (case below). Because our case law is not sufficiently clear to allow me to conclude that the case below was wrongly decided—let alone to conclude that the decision was so wrong as to require the extraordinary remedy of a sum-

mary reversal—I dissent from the Court's disposition of this petition.

Without the benefit of briefing or argument, today the Court resolves two difficult questions. First, it decides that even if the Court of Appeals' appraisal of the merits is correct—that is to say, even if the arbitrator did dispense his own brand of justice untethered to the agreement of the parties, and even if the correct disposition of the matter is perfectly clear—the only course open to a reviewing court is to remand the matter for another arbitration. That conclusion is not compelled by any of our cases, nor by any analysis offered by the Court. As the issue is subject to serious arguments on both sides, the Court should have set this case for argument if it wanted to answer this remedial question.

Second, without reviewing the record or soliciting briefing, the Court concludes that, in any event, "no serious error on the arbitrator's part is apparent in this case." *Ante*, at 511, n. 2. At this stage in the proceedings, I simply cannot endorse that conclusion. After examining the record, obtaining briefing, and hearing oral argument, the Court of Appeals offered a reasoned explanation of its conclusion. See 203 F. 3d, at 589–592; see also *id.*, at 593–594 (Hawkins, J., concurring). Whether or not I would ultimately agree with the Ninth Circuit's analysis, I find the Court's willingness to reverse a factbound determination of the Court of Appeals without engaging that court's reasoning a troubling departure from our normal practice.*

Accordingly, I respectfully dissent.

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*The Court's opinion is somewhat ambiguous as to its reasons for overturning the portion of the Court of Appeals' decision setting aside the arbitration. It is unclear whether the majority is saying that a court may never set aside an arbitration because of a factual error, no matter how perverse, or whether the Court merely holds that the error in this case was not sufficiently severe to allow a court to take that step. If it is the latter, the Court offers no explanation of what standards it is using or of its reasons for reaching that conclusion.

Syllabus

BARTNICKI ET AL. *v.* VOPPER, AKA WILLIAMS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99–1687. Argued December 5, 2000—Decided May 21, 2001*

During contentious collective-bargaining negotiations between a union representing teachers at a Pennsylvania high school and the local school board, an unidentified person intercepted and recorded a cell phone conversation between the chief union negotiator and the union president (hereinafter petitioners). After the parties accepted a nonbinding arbitration proposal generally favorable to the teachers, respondent Vopper, a radio commentator, played a tape of the intercepted conversation on his public affairs talk show in connection with news reports about the settlement. Petitioners filed this damages suit under both federal and state wiretapping laws, alleging, among other things, that their conversation had been surreptitiously intercepted by an unknown person; that respondent Yocum, the head of a local organization opposed to the union's demands, had obtained the tape and intentionally disclosed it to, *inter alios*, media representatives; and that they had repeatedly published the conversation even though they knew or had reason to know that it had been illegally intercepted. In ruling on cross-motions for summary judgment, the District Court concluded that, under the statutory language, an individual violates the federal Act by intentionally disclosing the contents of an electronic communication when he or she knows or has reason to know that the information was obtained through an illegal interception, even if the individual was not involved in that interception; found that the question whether the interception was intentional raised a genuine issue of material fact; and rejected respondents' defense that they were protected by the First Amendment even if the disclosures violated the statutes, finding that the statutes were content-neutral laws of general applicability containing no indicia of prior restraint or the chilling of free speech. The Third Circuit accepted an interlocutory appeal, and the United States, also a petitioner, intervened to defend the federal Act's constitutionality. Applying intermediate scrutiny, the court found the statutes invalid because they deterred significantly more speech than necessary to protect the private

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*Together with No. 99–1728, *United States* v. *Vopper, aka Williams, et al.*, also on certiorari to the same court.

interests at stake, and remanded the case with instructions to enter summary judgment for respondents.

Held: The First Amendment protects the disclosures made by respondents in this suit. Pp. 522–535.

(a) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, generally prohibits the interception of wire, electronic, and oral communications. Title 18 U. S. C. § 2511(1)(a) applies to the person who willfully intercepts such communications and subsection (c) to any person who, knowing or having reason to know that the communication was obtained through an illegal interception, willfully discloses its contents. Pp. 522–524.

(b) Because of this suit's procedural posture, the Court accepts that the interception was unlawful and that respondents had reason to know that. Accordingly, the disclosures violated the statutes. In answering the remaining question whether the statutes' application in such circumstances violates the First Amendment, the Court accepts respondents' submissions that they played no part in the illegal interception, that their access to the information was obtained lawfully, and that the conversations dealt with a matter of public concern. Pp. 524–525.

(c) Section 2511(1)(c) is a content-neutral law of general applicability. The statute's purpose is to protect the privacy of wire, electronic, and oral communications, and it singles out such communications by virtue of the fact that they were illegally intercepted—by virtue of the source rather than the subject matter. Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791. On the other hand, the prohibition against disclosures is fairly characterized as a regulation of speech. Pp. 526–527.

(d) In *New York Times Co.* v. *United States*, 403 U. S. 713, this Court upheld the press' right to publish information of great public concern obtained from documents stolen by a third party. In so doing, this Court focused on the stolen documents' character and the consequences of public disclosure, not on the fact that the documents were stolen. *Ibid.* It also left open the question whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may punish not only the unlawful acquisition, but also the ensuing publication. *Florida Star* v. *B. J. F.*, 491 U. S. 524, 535, n. 8. The issue here is a narrower version of that question: Where the publisher has lawfully obtained information from a source who obtained it unlawfully, may the government punish the ensuing publication based on the defect in a chain? The Court's refusal to construe the issue more broadly is consistent with its repeated refusal to answer categorically whether the publication of truthful information may ever be punished consistent with the First Amendment. Accordingly, the Court considers whether,

given the facts here, the interests served by § 2511(1)(c) justify its restrictions on speech. Pp. 527–529.

(e) The first interest identified by the Government—removing an incentive for parties to intercept private conversations—does not justify applying § 2511(1)(c) to an otherwise innocent disclosure of public information. The normal method of deterring unlawful conduct is to punish the person engaging in it. It would be remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party. In virtually all § 2511(1)(a), (c), or (d) violations, the interceptor's identity has been known. There is no evidence that Congress thought that the prohibition against disclosures would deter illegal interceptions, and no evidence to support the assumption that the prohibition reduces the number of such interceptions. Pp. 529–532.

(f) The Government's second interest—minimizing the harm to persons whose conversations have been illegally intercepted—is considerably stronger. Privacy of communication is an important interest. However, in this suit, privacy concerns give way when balanced against the interest in publishing matters of public importance. One of the costs associated with participation in public affairs is an attendant loss of privacy. The profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open supported this Court's holding in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct. Parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. Pp. 532–535.

200 F. 3d 109, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 535. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 541.

Jeremiah A. Collins argued the cause for petitioners in No. 99–1687. With him on the briefs were *Raymond P. Wendolowski* and *Scott C. Gartley.*

Solicitor General Waxman argued the cause for the United States in No. 99–1728. With him on the briefs were

Assistant Attorney General Ogden, Deputy Solicitor General Dreeben, Jeffrey A. Lamken, and *Douglas N. Letter.*

Lee Levine argued the cause for respondents Vopper et al. With him on the brief was *Jay Ward Brown. Thomas C. Goldstein* argued the cause for respondent Yokum. With him on the brief were *Erik S. Jaffe* and *Frank J. Aritz.**

JUSTICE STEVENS delivered the opinion of the Court.

These cases raise an important question concerning what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication. That question is both novel and narrow. Despite the fact that federal law has prohibited such disclosures since 1934,[1] this is the first time that we have confronted such an issue.

The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the inter-

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*Briefs of *amici curiae* urging reversal were filed for the Cellular Telecommunications Industry Association by *Howard J. Symons* and *Michael F. Altschul;* and for Representative John A. Boehner by *Michael A. Carvin* and *David H. Thompson.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven Shapiro;* for Dow Jones & Co., Inc., by *Theodore B. Olson, Theodore J. Boutrous, Jr.,* and *Jack M. Weiss;* for the Liberty Project by *Nory Miller* and *Julia M. Carpenter;* for Media Entities and Organizations by *Floyd Abrams, George Freeman, Adam Liptak, Richard A. Bernstein, Jerry S. Birenz, Henry S. Hoberman, David A. Schulz, Eve Burton, Susanna M. Lowy, Harold W. Fuson, Jr., Barbara W. Wall, Anne Noble, Kenneth Vittor, René P. Milam, Lucy Dalglish, Bruce W. Sanford,* and *Eric Lieberman;* for WFAA–TV et al. by *Laurence H. Tribe, Jonathan S. Massey, William D. Sims, Jr., Thomas S. Leatherbury,* and *Marie R. Yeates;* and for Representative James A. McDermott by *Frank Cicero, Jr., Christopher Landau,* and *Daryl Joseffer.*

[1] See 48 Stat. 1069, 1103.

ception was unlawful. Accordingly, these cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. The Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception, or the conflict that gave rise to this action. It is therefore not surprising that Circuit judges, as well as the Members of this Court, have come to differing conclusions about the First Amendment's application to this issue. Nevertheless, having considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.

I

During 1992 and most of 1993, the Pennsylvania State Education Association, a union representing the teachers at the Wyoming Valley West High School, engaged in collective-bargaining negotiations with the school board. Petitioner Kane, then the president of the local union, testified that the negotiations were "'contentious'" and received "a lot of media attention." App. 79, 92. In May 1993, petitioner Bartnicki, who was acting as the union's "chief negotiator," used the cellular phone in her car to call Kane and engage in a lengthy conversation about the status of the negotiations. An unidentified person intercepted and recorded that call.

In their conversation, Kane and Bartnicki discussed the timing of a proposed strike, *id.*, at 41–45, difficulties created by public comment on the negotiations, *id.*, at 46, and the need for a dramatic response to the board's intransigence. At one point, Kane said: "'If they're not gonna move for three percent, we're gonna have to go to their, their

homes . . . . To blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news. (UNDECIPHERABLE).'" *Ibid.*

In the early fall of 1993, the parties accepted a nonbinding arbitration proposal that was generally favorable to the teachers. In connection with news reports about the settlement, respondent Vopper, a radio commentator who had been critical of the union in the past, played a tape of the intercepted conversation on his public affairs talk show. Another station also broadcast the tape, and local newspapers published its contents. After filing suit against Vopper and other representatives of the media, Bartnicki and Kane (hereinafter petitioners) learned through discovery that Vopper had obtained the tape from respondent Jack Yocum, the head of a local taxpayers' organization that had opposed the union's demands throughout the negotiations. Yocum, who was added as a defendant, testified that he had found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and Kane. Yocum played the tape for some members of the school board, and later delivered the tape itself to Vopper.

II

In their amended complaint, petitioners alleged that their telephone conversation had been surreptitiously intercepted by an unknown person using an electronic device, that Yocum had obtained a tape of that conversation, and that he intentionally disclosed it to Vopper, as well as other individuals and media representatives. Thereafter, Vopper and other members of the media repeatedly published the contents of that conversation. The amended complaint alleged that each of the defendants "knew or had reason to know" that the recording of the private telephone conversation had been obtained by means of an illegal interception. *Id.*,

at 27. Relying on both federal and Pennsylvania statutory provisions, petitioners sought actual damages, statutory damages, punitive damages, and attorney's fees and costs.[2]

After the parties completed their discovery, they filed cross-motions for summary judgment. Respondents contended that they had not violated the statute because (a) they had nothing to do with the interception, and (b) in any event, their actions were not unlawful since the conversation might have been intercepted inadvertently. Moreover, even if they had violated the statute by disclosing the intercepted conversation, respondents argued, those disclosures were protected by the First Amendment. The District Court rejected the first statutory argument because, under the plain statutory language, an individual violates the federal Act by intentionally disclosing the contents of an electronic communication when he or she "know[s] or ha[s] reason to know that the information was obtained" through an illegal interception.[3] App. to Pet. for Cert. in No. 99–1687, pp. 53a–54a (emphasis deleted). Accordingly, actual involvement in the illegal interception is not necessary in order to establish a violation of that statute. With respect to the second statutory argument, the District Court agreed that petitioners had to prove that the interception in ques-

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[2] Either actual damages or "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000" may be recovered under 18 U. S. C. § 2520(c)(2); under the Pennsylvania Act, the amount is the greater of $100 a day or $1,000, but the plaintiff may also recover punitive damages and reasonable attorney's fees. 18 Pa. Cons. Stat. § 5725(a) (2000).

[3] Title 18 U. S. C. § 2511(1)(c) provides that any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished . . . ." The Pennsylvania Act contains a similar provision.

tion was intentional,[4] but concluded that the text of the interception raised a genuine issue of material fact with respect to intent. That issue of fact was also the basis for the District Court's denial of petitioners' motion. Finally, the District Court rejected respondents' First Amendment defense because the statutes were content-neutral laws of general applicability that contained "no indicia of prior restraint or the chilling of free speech." *Id.*, at 55a–56a.

Thereafter, the District Court granted a motion for an interlocutory appeal, pursuant to 28 U. S. C. § 1292(b). It certified as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant [Vopper's] radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of [the] Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping] statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." App. to Pet. for Cert. in No. 99–1728, p. 76a. The Court of Appeals accepted the appeal, and the United States, also a petitioner, intervened pursuant to 28 U. S. C. § 2403 in order to defend the constitutionality of the federal statute.

All three members of the panel agreed with petitioners and the Government that the federal and Pennsylvania wiretapping statutes are "content-neutral" and therefore subject to "intermediate scrutiny." 200 F. 3d 109, 121 (CA3 1999). Applying that standard, the majority concluded that the

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[4] Title 18 U. S. C. § 2511(1)(a) provides: "(1) Except as otherwise specifically provided in this chapter [§§ 2510–2520 (1994 ed. and Supp. V)] any person who—

"(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . . shall be punished . . . ."

statutes were invalid because they deterred significantly more speech than necessary to protect the privacy interests at stake. The court remanded the case with instructions to enter summary judgment for respondents. In dissent, Senior Judge Pollak expressed the view that the prohibition against disclosures was necessary in order to remove the incentive for illegal interceptions and to preclude compounding the harm caused by such interceptions through wider dissemination. In so doing, he agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, *Boehner* v. *McDermott*, 191 F. 3d 463 (1999). See also *Peavy* v. *WFAA–TV, Inc.*, 221 F. 3d 158 (CA5 2000).[5] We granted certiorari to resolve the conflict. 530 U. S. 1260 (2000).

III

As we pointed out in *Berger* v. *New York*, 388 U. S. 41, 45–49 (1967), sophisticated (and not so sophisticated) methods of eavesdropping on oral conversations and intercepting telephone calls have been practiced for decades, primarily by law enforcement authorities.[6] In *Berger*, we held that New

[5] In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. 191 F. 3d, at 465. In the opinion of the majority, the defendant acted unlawfully in accepting the tape in order to provide it to the media. *Id.*, at 476. Apparently because the couple responsible for the interception did not eavesdrop "for purposes of direct or indirect commercial advantage or private financial gain," they were fined only $500. See Department of Justice Press Release, Apr. 23, 1997. In another similar case involving a claim for damages under § 2511(1)(c), *Peavy* v. *WFAA–TV, Inc.*, 221 F. 3d 158 (CA5 2000), the media defendant in fact participated in the interceptions at issue.

[6] In particular, calls placed on cellular and cordless telephones can be intercepted more easily than those placed on traditional phones. See *Shubert* v. *Metrophone, Inc.*, 898 F. 2d 401, 404–405 (CA3 1990). Although calls placed on cell and cordless phones can be easily intercepted, it is not clear how often intentional interceptions take place. From 1992 through

York's broadly written statute authorizing the police to conduct wiretaps violated the Fourth Amendment. Largely in response to that decision, and to our holding in *Katz* v. *United States*, 389 U. S. 347 (1967), that the attachment of a listening and recording device to the outside of a telephone booth constituted a search, "Congress undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use otherwise. S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968)." *Gelbard* v. *United States*, 408 U. S. 41, 78 (1972) (REHNQUIST, J., dissenting). The ultimate result of those efforts was Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, entitled Wiretapping and Electronic Surveillance.

One of the stated purposes of that title was "to protect effectively the privacy of wire and oral communications." *Ibid.* In addition to authorizing and regulating electronic surveillance for law enforcement purposes, Title III also regulated private conduct. One part of those regulations, § 2511(1), defined five offenses punishable by a fine of not more than $10,000, by imprisonment for not more than five years, or by both. Subsection (a) applied to any person who "willfully intercepts . . . any wire or oral communication." Subsection (b) applied to the intentional use of devices designed to intercept oral conversations; subsection (d) applied to the use of the contents of illegally intercepted wire or

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1997, less than 100 cases were prosecuted charging violations of 18 U. S. C. § 2511. See Statement of James K. Kallstrom, Assistant Director in Charge of the New York Division of the FBI on February 5, 1997 before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U. S. House of Representatives Regarding Cellular Privacy. However, information concerning techniques and devices for intercepting cell and cordless phone calls can be found in a number of publications, trade magazines, and sites on the Internet, see *id.*, at 6, and at one set of congressional hearings in 1997, a scanner, purchased off the shelf and minimally modified, was used to intercept phone calls of Members of Congress.

oral communications; and subsection (e) prohibited the unauthorized disclosure of the contents of interceptions that were authorized for law enforcement purposes. Subsection (c), the original version of the provision most directly at issue in this suit, applied to any person who "willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection." The oral communications protected by the Act were only those "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." § 2510(2).

As enacted in 1968, Title III did not apply to the monitoring of radio transmissions. In the Electronic Communications Privacy Act of 1986, 100 Stat. 1848, however, Congress enlarged the coverage of Title III to prohibit the interception of "electronic" as well as oral and wire communications. By reason of that amendment, as well as a 1994 amendment which applied to cordless telephone communications, 108 Stat. 4279, Title III now applies to the interception of conversations over both cellular and cordless phones.[7] Although a lesser criminal penalty may apply to the interception of such transmissions, the same civil remedies are available whether the communication was "oral," "wire," or "electronic," as defined by 18 U. S. C. § 2510 (1994 ed. and Supp. V).

IV

The constitutional question before us concerns the validity of the statutes as applied to the specific facts of these cases. Because of the procedural posture of these cases, it is appropriate to make certain important assumptions about those

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[7] See, *e. g.*, *Nix* v. *O'Malley*, 160 F. 3d 343, 346 (CA6 1998); *McKamey* v. *Roach*, 55 F. 3d 1236, 1240 (CA6 1995).

facts. We accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents "had reason to know" that it was unlawful. Accordingly, the disclosure of the contents of the intercepted conversation by Yocum to school board members and to representatives of the media, as well as the subsequent disclosures by the media defendants to the public, violated the federal and state statutes. Under the provisions of the federal statute, as well as its Pennsylvania analogue, petitioners are thus entitled to recover damages from each of the respondents. The only question is whether the application of these statutes in such circumstances violates the First Amendment.[8]

In answering that question, we accept respondents' submission on three factual matters that serve to distinguish most of the cases that have arisen under § 2511. First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Cf. *Florida Star* v. *B. J. F.*, 491 U. S. 524, 536 (1989) ("Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step"). Third, the subject matter of the conversation was a matter of public concern. If the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.

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[8] In answering this question, we draw no distinction between the media respondents and Yocum. See, *e. g., New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265–266 (1964); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978).

V

We agree with petitioners that § 2511(1)(c), as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability. "Deciding whether a particular regulation is content based or content neutral is not always a simple task. . . . As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 642–643 (1994). In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation; typically, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989).[9]

In this suit, the basic purpose of the statute at issue is to "protec[t] the privacy of wire[, electronic,] and oral communications." S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968). The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the communications at issue are singled out by virtue of the fact that they were illegally intercepted—by virtue of the source, rather than the subject matter.

On the other hand, the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the "use" of the contents of

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[9] "But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 642–643 (1994).

an illegal interception in § 2511(1)(d),[10] subsection (c) is not a regulation of conduct. It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects.[11] As the majority below put it, "[i]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." 200 F. 3d, at 120.

VI

As a general matter, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 102 (1979). More specifically, this Court has repeatedly

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[10] The Solicitor General has cataloged some of the cases that fall under subsection (d): "[I]t is unlawful for a company to use an illegally intercepted communication about a business rival in order to create a competing product; it is unlawful for an investor to use illegally intercepted communications in trading in securities; it is unlawful for a union to use an illegally intercepted communication about management (or vice versa) to prepare strategy for contract negotiations; it is unlawful for a supervisor to use information in an illegally recorded conversation to discipline a subordinate; and it is unlawful for a blackmailer to use an illegally intercepted communication for purposes of extortion. See, *e. g.*, 1968 Senate Report 67 (corporate and labor-management uses); *Fultz* v. *Gilliam*, 942 F. 2d 396, 400 n. 4 (6th Cir. 1991) (extortion); *Dorris* v. *Absher*, 959 F. Supp. 813, 815–817 (M. D. Tenn. 1997) (workplace discipline), aff'd in part, rev'd in part, 179 F. 3d 420 (6th Cir. 1999). The statute has also been held to bar the use of illegally intercepted communications for important and socially valuable purposes. See *In re Grand Jury*, 111 F. 3d 1066, 1077–1079 (3d Cir. 1997)." Brief for United States 24.

[11] Put another way, what gave rise to statutory liability in this suit was the information communicated on the tapes. See *Boehner* v. *McDermott*, 191 F. 3d 463, 484 (CADC 1999) (Sentelle, J., dissenting) ("What . . . is being punished . . . here is not conduct dependent upon the nature or origin of the tapes; it is speech dependent upon the nature of the contents").

held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." *Id.*, at 103; see also *Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978).

Accordingly, in *New York Times Co.* v. *United States*, 403 U. S. 713 (1971) *(per curiam)*, the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party. In so doing, that decision resolved a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information that, if disclosed, might seriously impair the security of the Nation. In resolving that conflict, the attention of every Member of this Court was focused on the character of the stolen documents' contents and the consequences of public disclosure. Although the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted in Justice Harlan's dissent, *id.*, at 754, neither the majority nor the dissenters placed any weight on that fact.

However, *New York Times* v. *United States* raised, but did not resolve, the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."[12] *Florida Star*, 491 U. S., at 535, n. 8. The question here, however, is a narrower version of that still-open question. Simply put, the issue here is this: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Boehner*, 191 F. 3d, at 484–485 (Sentelle, J., dissenting).

[12] That question was subsequently reserved in *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 837 (1978).

Our refusal to construe the issue presented more broadly is consistent with this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment. Rather,

> "[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star*, 491 U. S., at 532–533.

See also *Landmark Communications*, 435 U. S., at 838. Accordingly, we consider whether, given the facts of these cases, the interests served by § 2511(1)(c) can justify its restrictions on speech.

The Government identifies two interests served by the statute—first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted. We assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor's own use of information that he or she acquired by violating § 2511(1)(a), but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.

The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter

conduct by a non-law-abiding third party. Although there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another, see, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747 (1982),[13] this is not such a case.

With only a handful of exceptions, the violations of § 2511(1)(a) that have been described in litigated cases have been motivated by either financial gain or domestic disputes.[14] In virtually all of those cases, the identity of the person or persons intercepting the communication has been known.[15] Moreover, petitioners cite no evidence that Congress viewed the prohibition against disclosures as a response to the difficulty of identifying persons making improper use of scanners and other surveillance devices and accordingly of deterring such conduct,[16] and there is no

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[13] In cases relying on such a rationale, moreover, the speech at issue is considered of minimal value. *Osborne* v. *Ohio*, 495 U. S. 103 (1990); *New York* v. *Ferber*, 458 U. S., at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*").

The Government also points to two other areas of the law—namely, mail theft and stolen property—in which a ban on the receipt or possession of an item is used to deter some primary illegality. Brief for United States 14; see also *post*, at 550–551 (REHNQUIST, C. J., dissenting). Neither of those examples, though, involve prohibitions on speech. As such, they are not relevant to a First Amendment analysis.

[14] The media respondents have included a list of 143 cases under § 2511(1)(a) and 63 cases under §§ 2511(1)(c) and (d)—which must also involve violations of subsection (a)—in an appendix to their brief. The Reply Brief filed by the United States contains an appendix describing each of the cases in the latter group.

[15] In only 5 of the 206 cases listed in the appendixes, see n. 14, *supra*, n. 17, *infra*, was the identity of the interceptor wholly unknown.

[16] The legislative history of the 1968 Act indicates that Congress' concern focused on private surveillance "in domestic relations and industrial espionage situations." S. Rep. No. 1097, 90th Cong., 2d Sess., 225 (1968). Similarly, in connection with the enactment of the 1986 amendment, one Senator referred to the interest in protecting private communications

empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions.[17]

Although this suit demonstrates that there may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, surely this is the exceptional case. Moreover, there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing to engage in surreptitious interceptions. Unusual cases fall far short of a

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from "a corporate spy, a police officer without probable cause, or just a plain snoop." 131 Cong. Rec. 24366 (1985) (statement of Sen. Leahy).

[17] The dissent argues that we have not given proper respect to "congressional findings" or to "'Congress' factual predictions.'" *Post,* at 550. But the relevant factual foundation is not to be found in the legislative record. Moreover, the dissent does not argue that Congress did provide empirical evidence in support of its assumptions, nor, for that matter, does it take real issue with the fact that in the vast majority of cases involving illegal interceptions, the identity of the person or persons responsible for the interceptions is known. Instead, the dissent advances a minor disagreement with our numbers, stating that nine cases "involved an unknown *or unproved* eavesdropper." *Post,* at 552, n. 9 (emphasis added). The dissent includes in that number cases in which the identity of the interceptor, though suspected, was not "proved" because the identity of the interceptor was not at issue or the evidence was insufficient. In any event, whether there are 5 cases or 9 involving anonymous interceptors out of the 206 cases under § 2511, in most of the cases involving illegal interceptions, the identity of the interceptor is no mystery. If, as the proponents of the dry-up-the-market theory would have it, it is difficult to identify the persons responsible for illegal interceptions (and thus necessary to prohibit disclosure by third parties with no connection to, or responsibility for, the initial illegality), one would expect to see far more cases in which the identity of the interceptor was unknown (and, concomitantly, far fewer in which the interceptor remained anonymous). Thus, not only is there a dearth of evidence in the legislative record to support the dry-up-the-market theory, but what postenactment evidence is available cuts against it.

showing that there is a "need . . . of the highest order" for a rule supplementing the traditional means of deterring antisocial conduct. The justification for any such novel burden on expression must be "far stronger than mere speculation about serious harms." *United States* v. *Treasury Employees*, 513 U. S. 454, 475 (1995).[18] Accordingly, the Government's first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient.[19]

The Government's second argument, however, is considerably stronger. Privacy of communication is an important interest, *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985),[20] and Title III's restrictions are intended to protect that interest, thereby "encouraging the uninhibited exchange of ideas and information among private parties . . . ." Brief for United States 27. More-

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[18] Indeed, even the burden of justifying restrictions on commercial speech requires more than "'mere speculation or conjecture.'" *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 188 (1999).

[19] Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully. "It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Branzburg* v. *Hayes*, 408 U. S. 665, 691 (1972).

[20] "'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S., at 559 (quoting *Estate of Hemingway* v. *Random House, Inc.*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968)).

over, the fear of public disclosure of private conversations might well have a chilling effect on private speech.

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

Accordingly, it seems to us that there are important interests to be considered on *both* sides of the constitutional calculus. In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place.

We need not decide whether that interest is strong enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern. Cf. *Time, Inc.* v. *Hill*, 385 U. S. 374, 387–388 (1967) (reserving the question whether truthful publication of private matters unrelated to public affairs can be constitutionally proscribed). In other words, the outcome of these cases does not turn on whether § 2511(1)(c) may be enforced with respect to most violations of the statute without offending the First Amendment. The enforcement of that provision in these cases, however, implicates the core purposes

of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.

In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "The right of privacy does not prohibit any publication of matter which is of public or general interest." The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy.

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Time, Inc.* v. *Hill*, 385 U. S., at 388 (quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940)).[21]

Our opinion in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), reviewed many of the decisions that settled the "general proposition that freedom of expression upon public questions is secured by the First Amendment." *Id.*, at 269; see *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *Bridges* v. *California*, 314 U. S. 252, 270 (1941); *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). Those cases all relied on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U. S., at 270; see *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949); *De Jonge* v. *Oregon*,

[21] Moreover, "our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Butterworth* v. *Smith*, 494 U. S. 624, 634 (1990).

299 U. S. 353, 365 (1937); *Whitney* v. *California*, 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring); see also *Roth*, 354 U. S., at 484; *Stromberg*, 283 U. S., at 369; *Bridges*, 314 U. S., at 270. It was the overriding importance of that commitment that supported our holding that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct. *Id.*, at 273; see also *NAACP* v. *Button*, 371 U. S. 415, 445 (1963); *Wood* v. *Georgia*, 370 U. S. 375 (1962); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331, 342, 343, n. 5, 345 (1946); *Bridges*, 314 U. S., at 270.

We think it clear that parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.[22] The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern. That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney* v. *California*, 274 U. S., at 372, but it is no less worthy of constitutional protection.

The judgment is affirmed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, concurring.

I join the Court's opinion. I agree with its narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized in-

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[22] See, *e. g.*, *Florida Star* v. *B. J. F.*, 491 U. S. 524, 535 (1989) (acknowledging "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing truthful information").

volved a matter of unusual public concern, namely, a threat of potential physical harm to others. I write separately to explain why, in my view, the Court's holding does not imply a significantly broader constitutional immunity for the media.

As the Court recognizes, the question before us—a question of immunity from statutorily imposed civil liability—implicates competing constitutional concerns. *Ante,* at 532–533. The statutes directly interfere with free expression in that they prevent the media from publishing information. At the same time, they help to protect personal privacy—an interest here that includes not only the "right to be let alone," *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting), but also "the interest . . . in fostering private speech," *ante,* at 518. Given these competing interests "on both sides of the equation, the key question becomes one of proper fit." *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 227 (1997) (BREYER, J., concurring in part). See also *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 402 (2000) (BREYER, J., concurring).

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called "strict scrutiny"—with its strong presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated. See *ante,* at 518 (recognizing "conflict between interests of the highest order"); *ante,* at 533 ("important interests to be considered on *both* sides of the constitutional calculus"); *ante,* at 534 ("balanc[ing]" the interest in privacy "against the in-

terest in publishing matters of public importance"); *ante*, at 534 (privacy interest outweighed in these cases).

The statutory restrictions before us directly enhance private speech. See *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985) (describing "'freedom *not* to speak publicly'" (quoting *Estate of Hemingway* v. *Random House, Inc.*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968))). The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home. That assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place.

At the same time, these statutes restrict public speech directly, deliberately, and of necessity. They include media publication within their scope not simply as a means, say, to deter interception, but also as an end. Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call. See *Gelbard* v. *United States*, 408 U. S. 41, 51–52 (1972). And the threat of that widespread dissemination can create a far more powerful disincentive to speak privately than the comparatively minor threat of disclosure to an interceptor and perhaps to a handful of others. Insofar as these statutes protect private communications against that widespread dissemination, they resemble laws that would award damages caused through publication of information obtained by theft from a private bedroom. See generally Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) (hereinafter Warren & Brandeis). See also Restatement (Second) of Torts § 652D (1977).

As a general matter, despite the statutes' direct restrictions on speech, the Federal Constitution must tolerate

laws of this kind because of the importance of these privacy and speech-related objectives. See Warren & Brandeis 196 (arguing for state-law protection of the right to privacy). Cf. *Katz* v. *United States*, 389 U. S. 347, 350–351 (1967) ("[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States"); *ante*, at 518 (protecting privacy and promoting speech are "interests of the highest order"). Rather than broadly forbid this kind of legislative enactment, the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy.

Nonetheless, looked at more specifically, the statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives. Rather, they disproportionately interfere with media freedom. For one thing, the broadcasters here engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained. They "neither encouraged nor participated directly or indirectly in the interception." App. to Pet. for Cert. in No. 99–1687, p. 33a. See also *ante*, at 525. No one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media. Cf. 18 U. S. C. § 2 (criminalizing aiding and abetting any federal offense); 2 W. LaFave & A. Scott, Substantive Criminal Law §§ 6.6(b)–(c), pp. 128–129 (1986) (describing criminal liability for aiding and abetting). And, as the Court points out, the statutes do not forbid the receipt of the tape itself. *Ante*, at 525. The Court adds that its holding "does not apply to punishing parties for obtaining the relevant information *unlawfully*." *Ante*, at 532, n. 19 (emphasis added).

For another thing, the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about "blow[ing] off . . . front porches" and "do[ing] some work on some of those guys," App. 46, thereby raising a significant concern for the safety of others. Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety. See Restatement (Second) of Torts § 595, Comment *g* (1977) (general privilege to report that "another intends to kill or rob or commit some other serious crime against a third person"); *id.*, § 652G (privilege applies to invasion of privacy tort). Cf. Restatement (Third) of Unfair Competition § 40, Comment *c* (1995) (trade secret law permits disclosures relevant to public health or safety, commission of crime or tort, or other matters of substantial public concern); *Lachman* v. *Sperry-Sun Well Surveying Co.*, 457 F. 2d 850, 853 (CA10 1972) (nondisclosure agreement not binding in respect to criminal activity); *Tarasoff* v. *Regents of Univ. of Cal.*, 17 Cal. 3d 425, 436, 551 P. 2d 334, 343–344 (1976) (psychiatric privilege not binding in presence of danger to self or others). Even where the danger may have passed by the time of publication, that fact cannot legitimize the speaker's earlier privacy expectation. Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.

Further, the speakers themselves, the president of a teacher's union and the union's chief negotiator, were "limited public figures," for they voluntarily engaged in a public controversy. They thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs. See, *e. g.*, *ante*, at 535 (respondents were engaged in matter of public concern); *Wolston* v. *Reader's Digest Assn., Inc.*, 443

U. S. 157, 164 (1979); *Hutchinson* v. *Proxmire*, 443 U. S. 111, 134 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 351 (1974). See also Warren & Brandeis 215.

This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, *i. e.*, communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters. See *Michaels* v. *Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 841–842 (CD Cal. 1998) (broadcast of videotape recording of sexual relations between famous actress and rock star not a matter of legitimate public concern); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts § 117, p. 857 (5th ed. 1984) (stating that there is little expectation of privacy in mundane facts about a person's life, but that "portrayal of . . . intimate private characteristics or conduct" is "quite a different matter"); Warren & Brandeis 214 (recognizing that in certain matters "the community has no legitimate concern"). Cf. *Time, Inc.* v. *Firestone*, 424 U. S. 448, 454–455 (1976) (despite interest of public, divorce of wealthy person not a "public controversy"). Cf. also *ante*, at 533 ("[S]ome intrusions on privacy are more offensive than others").

Thus, in finding a constitutional privilege to publish unlawfully intercepted conversations of the kind here at issue, the Court does not create a "public interest" exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind. Here, the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high. Given these circumstances, along with the lawful nature of respondents' behavior, the statutes' enforcement would disproportionately harm media freedom.

I emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy. Clandestine and pervasive invasions of privacy, unlike the simple theft of documents from a bedroom, are genuine possibilities as a result of continuously advancing technologies. Eavesdropping on ordinary cellular phone conversations in the street (which many callers seem to tolerate) is a very different matter from eavesdropping on encrypted cellular phone conversations or those carried on in the bedroom. But the technologies that allow the former may come to permit the latter. And statutes that may seem less important in the former context may turn out to have greater importance in the latter. Legislatures also may decide to revisit statutes such as those before us, creating better tailored provisions designed to encourage, for example, more effective privacy-protecting technologies.

For these reasons, we should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility. I consequently agree with the Court's holding that the statutes as applied here violate the Constitution, but I would not extend that holding beyond these present circumstances.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations. In an attempt to prevent some of the most egregious violations of privacy, the United States, the District of Columbia,

and 40 States have enacted laws prohibiting the intentional interception and knowing disclosure of electronic communications.[1] The Court holds that all of these statutes violate the First Amendment insofar as the illegally intercepted conversation touches upon a matter of "public concern," an amorphous concept that the Court does not even attempt to define. But the Court's decision diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day.

Over 30 years ago, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress recognized that the

> "tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of elec-

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[1] See 18 U. S. C. § 2511(1) (1994 ed. and Supp. V); Ala. Code § 13A–11–30 *et seq.* (1994); Alaska Stat. Ann. § 42.20.300(d) (2000); Ark. Code Ann. § 5–60–120 (1997); Cal. Penal Code Ann. § 631 (West 1999); Colo. Rev. Stat. § 18–9–303 (2000); Del. Code Ann., Tit. 11, § 1336(b)(1) (1995); D. C. Code Ann. § 23–542 (1996); Fla. Stat. § 934.03(1) (Supp. 2001); Ga. Code Ann. § 16–11–66.1 (1996); Haw. Rev. Stat. § 803–42 (1993); Idaho Code § 18–6702 (1997); Ill. Comp. Stat., ch. 720, § 5/14–2(b) (1999 Supp.); Iowa Code § 808B.2 (1994); Kan. Stat. Ann. § 21–4002 (1995); Ky. Rev. Stat. Ann. § 526.060 (Michie 1999); La. Rev. Stat. Ann. § 15:1303 (West 1992); Me. Rev. Stat. Ann., Tit. 15, § 710(3) (Supp. 2000); Md. Cts. & Jud. Proc. Code Ann. § 10–402 (Supp. 2000); Mass. Gen. Laws § 272:99(C)(3) (1997); Mich. Comp. Laws Ann. § 750.539e (West 1991); Minn. Stat. § 626A.02 (2000); Mo. Rev. Stat. § 542.402 (2000); Neb. Rev. Stat. § 86–702 (1999); Nev. Rev. Stat. § 200.630 (1995); N. H. Rev. Stat. Ann. § 570–A:2 (Supp. 2000); N. J. Stat. Ann. § 2A:156A–3 (West Supp. 2000); N. M. Stat. Ann. § 30–12–1 (1994); N. C. Gen. Stat. § 15A–287 (1999); N. D. Cent. Code § 12.1–15–02 (1997); Ohio Rev. Code Ann. § 2933.52(A)(3) (1997); Okla. Stat., Tit. 13, § 176.3 (2000 Supp.); Ore. Rev. Stat. § 165.540 (1997); 18 Pa. Cons. Stat. § 5703 (2000); R. I. Gen. Laws § 11–35–21 (2000); Tenn. Code Ann. § 39–13–601 (1997); Tex. Penal Code Ann. § 16.02 (Supp. 2001); Utah Code Ann. § 77–23a–4 (1982); Va. Code Ann. § 19.2–62 (1995); W. Va. Code § 62–1D–3 (2000); Wis. Stat. § 968.31(1) (1994); Wyo. Stat. Ann. § 7–3–602 (1995).

> tronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. . . . No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. Rep. No. 1097, 90th Cong., 2d Sess., 67 (1968) (hereinafter S. Rep. No. 1097).

This concern for privacy was inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure:

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

To effectuate these important privacy and speech interests, Congress and the vast majority of States have proscribed the intentional interception and knowing disclosure of the contents of electronic communications.[2] See, *e. g.*, 18 U. S. C. § 2511(1)(c) (placing restrictions upon "any person who . . . intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic commu-

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[2] "Electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 18 U. S. C. § 2510(12) (1994 ed., Supp. V).

nication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication").

The Court correctly observes that these are "content-neutral law[s] of general applicability" which serve recognized interests of the "highest order": "the interest in individual privacy and . . . in fostering private speech." *Ante*, at 526, 518. It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas. See *ante*, at 532 (holding that petitioners have not established the requisite "'need . . . of the highest order'") (quoting *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 103 (1979)). There is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny.

A content-neutral regulation will be sustained if

> "'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 662 (1994) (quoting *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968)).

Here, Congress and the Pennsylvania Legislature have acted "'without reference to the content of the regulated speech.'" *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986). There is no intimation that these laws seek "to suppress unpopular ideas or information or manipulate the public debate" or that they "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting*, *supra*, at 641, 643. The antidisclosure provision is based solely upon the manner in which the conversation was acquired, not the subject matter of the conversation or the viewpoints of the speakers. The same

information, if obtained lawfully, could be published with impunity. Cf. *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20, 34 (1984) (upholding under intermediate scrutiny a protective order on information acquired during discovery in part because "the party may disseminate the identical information . . . as long as the information is gained through means independent of the court's processes"). As the concerns motivating strict scrutiny are absent, these content-neutral restrictions upon speech need pass only intermediate scrutiny.

The Court's attempt to avoid these precedents by reliance upon the *Daily Mail* string of newspaper cases is unpersuasive. In these cases, we held that statutes prohibiting the media from publishing certain truthful information—the name of a rape victim, *Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), the confidential proceedings before a state judicial review commission, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), and the name of a juvenile defendant, *Daily Mail*, *supra; Oklahoma Publishing Co.* v. *District Court, Oklahoma Cty.*, 430 U. S. 308 (1977) *(per curiam)*—violated the First Amendment. In so doing, we stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Daily Mail*, *supra*, at 103. Neither this *Daily Mail* principle nor any other aspect of these cases, however, justifies the Court's imposition of strict scrutiny here.

Each of the laws at issue in the *Daily Mail* cases regulated the content or subject matter of speech. This fact alone was enough to trigger strict scrutiny, see *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) ("[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny"), and suffices to distinguish these antidisclosure provisions. But, as our synthesis of these

cases in *Florida Star* made clear, three other unique factors also informed the scope of the *Daily Mail* principle.

First, the information published by the newspapers had been lawfully obtained from the government itself.[3] "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star*, *supra*, at 534. See, *e. g.*, *Landmark Communications*, *supra*, at 841, and n. 12 (noting that the State could have taken steps to protect the confidentiality of its proceedings, such as holding in contempt commission members who breached their duty of confidentiality). Indeed, the State's ability to control the information undermined the claim that the restriction was necessary, for "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." *Cox Broadcasting*, *supra*, at 495. This factor has no relevance in the present cases, where we deal with private conversations that have been intentionally kept out of the public domain.

Second, the information in each case was already "publicly available," and punishing further dissemination would not have advanced the purported government interests of confidentiality. *Florida Star*, *supra*, at 535. Such is not the case here. These statutes only prohibit "disclos[ure]," 18 U. S. C. § 2511(1)(c); 18 Pa. Cons. Stat. § 5703(2) (2000), and one cannot "disclose" what is already in the public domain. See Black's Law Dictionary 477 (7th ed. 1999) (defining "disclosure" as "[t]he act or process of making known something that was previously unknown; a revelation of facts");

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[3] The one exception was *Daily Mail*, where reporters obtained the juvenile defendant's name from witnesses to the crime. See 443 U. S., at 99. However, the statute at issue there imposed a blanket prohibition on the publication of the information. See *id.*, at 98–99. In contrast, these anti-disclosure provisions do not prohibit publication so long as the information comes from a legal source.

S. Rep. No. 1097, at 93 ("The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited"). These laws thus do not fall under the axiom that "the interests in privacy fade when the information involved already appears on the public record." *Cox Broadcasting*, *supra*, at 494–495.

Third, these cases were concerned with "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information." *Florida Star*, 491 U. S., at 535. But fear of "timidity and self-censorship" is a basis for upholding, not striking down, these antidisclosure provisions: They allow private conversations to transpire without inhibition. And unlike the statute at issue in *Florida Star*, which had no scienter requirement, see *id.*, at 539, these statutes only address those who *knowingly* disclose an illegally intercepted conversation.[4] They do not impose a duty to inquire into the source of the information and one could negligently disclose the contents of an illegally intercepted communication without liability.

In sum, it is obvious that the *Daily Mail* cases upon which the Court relies do not address the question presented here. Our decisions themselves made this clear: "The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star*, *supra*, at 535, n. 8; see also *Daily Mail*, 443 U. S., at 105 ("Our holding in this case is narrow. There is no issue before us of unlawful press [conduct]"); *Landmark*

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[4] In 1986, to ensure that only the most culpable could face liability for disclosure, Congress increased the scienter requirement from "willful" to "intentional." 18 U. S. C. § 2511(1)(c); see also S. Rep. No. 99–541, p. 6 (1986) ("In order to underscore that the inadvertent reception of a protected communication is not a crime, the subcommittee changed the state of mind requirement under [Title III] from 'willful' to 'intentional' ").

Communications, 435 U. S., at 837 ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it").[5]

Undaunted, the Court places an inordinate amount of weight upon the fact that the receipt of an illegally intercepted communication has not been criminalized. See *ante*, at 528–532. But this hardly renders those who knowingly receive and disclose such communications "law-abiding," *ante*, at 529, and it certainly does not bring them under the *Daily Mail* principle. The transmission of the intercepted communication from the eavesdropper to the third party is itself illegal; and where, as here, the third party then knowingly discloses that communication, another illegal act has been committed. The third party in this situation cannot be likened to the reporters in the *Daily Mail* cases, who lawfully obtained their information through consensual interviews or public documents.

These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. These laws therefore should be upheld if they further a sub-

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[5] Tellingly, we noted in *Florida Star* that "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." 491 U. S., at 534; see also *id.*, at 535 ("[I]t is highly anomalous to sanction persons other than the source of [the] release").

stantial governmental interest unrelated to the suppression of free speech, and they do.

Congress and the overwhelming majority of States reasonably have concluded that sanctioning the knowing disclosure of illegally intercepted communications will deter the initial interception itself, a crime which is extremely difficult to detect. It is estimated that over 20 million scanners capable of intercepting cellular transmissions currently are in operation, see Thompson, Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished, 35 Am. Crim. L. Rev. 137, 149 (1997), notwithstanding the fact that Congress prohibited the marketing of such devices eight years ago, see 47 U. S. C. § 302a(d).[6] As Congress recognized, "[a]ll too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected." S. Rep. No. 1097, at 69. See also Hearings on H. R. 3378 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess. and 2d Sess., 290 (1986) ("Congress should be under no illusion . . . that the Department [of Justice], because of the difficulty of such investigations, would be able to bring a substantial number of successful prosecutions").

Nonetheless, the Court faults Congress for providing "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions," *ante*, at 530–531, and insists that "there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from contin-

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[6] The problem is pervasive because legal "radio scanners [may be] modified to intercept cellular calls." S. Rep. No. 99–541, at 9. For example, the scanner at issue in *Boehner* v. *McDermott*, 191 F. 3d 463 (CADC 1999), had been recently purchased at Radio Shack. See Thompson, 35 Am. Crim. L. Rev., at 152, and n. 138 (citing Stratton, Scanner Wasn't Supposed to Pick up Call, But it Did, Orlando Sentinel, Jan. 18, 1997, p. A15).

uing to engage in surreptitious interceptions," *ante,* at 531. It is the Court's reasoning, not the judgment of Congress and numerous States regarding the necessity of these laws, which disappoints.

The "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 391 (2000). "[C]ourts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting,* 512 U. S., at 665 (citing *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 103 (1973)). This deference recognizes that, as an institution, Congress is far better equipped than the judiciary to evaluate the vast amounts of data bearing upon complex issues and that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting,* 512 U. S., at 665. Although we must nonetheless independently evaluate such congressional findings in performing our constitutional review, this "is not a license to reweigh the evidence *de novo,* or to replace Congress' factual predictions with our own." *Id.,* at 666.

The "dry-up-the-market" theory, which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime, is neither novel nor implausible. It is a time-tested theory that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.10(a), p. 422 (1986) ("Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms"). We ourselves adopted the exclusionary

rule based upon similar reasoning, believing that it would "deter unreasonable searches," *Oregon* v. *Elstad*, 470 U. S. 298, 306 (1985), by removing an officer's "incentive to disregard [the Fourth Amendment]," *Elkins* v. *United States*, 364 U. S. 206, 217 (1960).[7]

The same logic applies here and demonstrates that the incidental restriction on alleged First Amendment freedoms is no greater than essential to further the interest of protecting the privacy of individual communications. Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection. Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion. The law against interceptions, which the Court agrees is valid, would be utterly ineffectual without these antidisclosure provisions.

For a similar reason, we upheld against First Amendment challenge a law prohibiting the distribution of child pornography. See *New York* v. *Ferber*, 458 U. S. 747 (1982). Just as with unlawfully intercepted electronic communications, we there noted the difficulty of policing the "low-profile, clandestine industry" of child pornography production and concurred with 36 legislatures that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.*, at 760. In so doing, we did not demand, nor did Congress provide, any empirical

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[7] In crafting the exclusionary rule, we did not first require empirical evidence. See *Elkins*, 364 U. S., at 218 ("Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained"). When it comes to this Court's awesome power to strike down an Act of Congress as unconstitutional, it should not be "do as we say, not as we do."

evidence to buttress this basic syllogism. Indeed, we reaffirmed the theory's vitality in *Osborne* v. *Ohio*, 495 U. S. 103, 109–110 (1990), finding it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[8]

At base, the Court's decision to hold these statutes unconstitutional rests upon nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of 41 legislative bodies and the United States Congress.[9] The Court does not explain how or from where Congress should obtain statistical evidence about the effectiveness of these laws, and "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled." *Elkins*, *supra*, at 218. Reliance upon the "dry-up-the-market" the-

[8] The Court attempts to distinguish *Ferber* and *Osborne* on the ground that they involved low-value speech, but this has nothing to do with the reasonableness of the "dry-up-the-market" theory. The Court also posits that Congress here could simply have increased the penalty for intercepting cellular communications. See *ante*, at 529. But the Court's back-seat legislative advice does nothing to undermine the reasonableness of Congress' belief that prohibiting only the initial interception would not effectively protect the privacy interests of cellular telephone users.

[9] The Court observes that in many of the cases litigated under § 2511(1), "the person or persons intercepting the communication ha[ve] been known." *Ante*, at 530. Of the 206 cases cited in the appendices, 143 solely involved § 2511(1)(a) claims of wrongful interception—*disclosure* was not at issue. It is of course unremarkable that intentional *interception* cases have not been pursued where the identity of the eavesdropper was unknown. Of the 61 disclosure and use cases with published facts brought under §§ 2511(1)(c) and (d), 9 involved an unknown or unproved eavesdropper, 1 involved a lawful pen register, and 5 involved recordings that were not surreptitious. Thus, as relevant, 46 disclosure cases involved known eavesdroppers. Whatever might be gleaned from this figure, the Court is practicing voodoo statistics when it states that it undermines the "dry-up-the-market" theory. See *ante*, at 531, n. 17. These cases say absolutely nothing about the interceptions and disclosures that have been *deterred*.

ory is both logical and eminently reasonable, and our precedents make plain that it is "far stronger than mere speculation." *United States* v. *Treasury Employees*, 513 U. S. 454, 475 (1995).

These statutes also protect the important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications. Over a century ago, Samuel Warren and Louis Brandeis recognized that "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890). "There is necessarily, and within suitably defined areas, a . . . freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985) (internal quotation marks and citation omitted). One who speaks into a phone "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz* v. *United States*, 389 U. S. 347, 352 (1967); cf. *Gelbard* v. *United States*, 408 U. S. 41, 52 (1972) (compelling testimony about matters obtained from an illegal interception at a grand jury proceeding "compounds the statutorily proscribed invasion of . . . privacy by adding to the injury of the interception the insult of . . . disclosure").

These statutes undeniably protect this venerable right of privacy. Concomitantly, they further the First Amendment rights of the parties to the conversation. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting*, 512 U. S., at 641. By "protecting the privacy of individual thought and expression," *United States*

v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 302 (1972), these statutes further the "uninhibited, robust, and wide-open" speech of the private parties, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). Unlike the laws at issue in the *Daily Mail* cases, which served only to protect the identities and actions of a select group of individuals, these laws protect millions of people who communicate electronically on a daily basis. The chilling effect of the Court's decision upon these private conversations will surely be great: An estimated 49.1 million analog cellular telephones are currently in operation. See Hao, Nokia Profits from Surge in Cell Phones, Fla. Today, July 18, 1999, p. E1.

Although the Court recognizes and even extols the virtues of this right to privacy, see *ante*, at 532–533, these are "mere words," W. Shakespeare, Troilus and Cressida, act v, sc. 3, overridden by the Court's newfound right to publish unlawfully acquired information of "public concern," *ante*, at 525. The Court concludes that the private conversation between Gloria Bartnicki and Anthony Kane is somehow a "debate . . . . worthy of constitutional protection." *Ante*, at 535. Perhaps the Court is correct that "[i]f the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy." *Ante*, at 525. The point, however, is that Bartnicki and Kane had no intention of contributing to a public "debate" at all, and it is perverse to hold that another's unlawful interception and knowing disclosure of their conversation is speech "worthy of constitutional protection." Cf. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' "). The Constitution should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or

concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.

The Court's decision to hold inviolable our right to broadcast conversations of "public importance" enjoys little support in our precedents. As discussed above, given the qualified nature of their holdings, the *Daily Mail* cases cannot bear the weight the Court places upon them. More mystifying still is the Court's reliance upon the "Pentagon Papers" case, *New York Times Co.* v. *United States*, 403 U. S. 713 (1971) *(per curiam)*, which involved the United States' attempt to prevent the publication of Defense Department documents relating to the Vietnam War. In addition to involving Government controlled information, that case fell squarely under our precedents holding that prior restraints on speech bear "'a heavy presumption against . . . constitutionality.'" *Id.*, at 714. Indeed, it was this presumption that caused Justices Stewart and White to join the 6-to-3 *per curiam* decision. See *id.*, at 730–731 (White, J., joined by Stewart, J., concurring) ("I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system"). By no stretch of the imagination can the statutes at issue here be dubbed "prior restraints." And the Court's "parallel reasoning" from other inapposite cases fails to persuade. *Ante*, at 535.

Surely "the interest in individual privacy," *ante*, at 518, at its narrowest, must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations. The Court subordinates that right, not to the claims of those who themselves wish to speak, but to the claims of those who wish to

publish the intercepted conversations of others. Congress' effort to balance the above claim to privacy against a marginal claim to speak freely is thereby set at naught.

Syllabus

UNITED STATES *v.* HATTER, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 99–1978. Argued February 20, 2001—Decided May 21, 2001

In 1982, Congress extended Medicare to federal employees. That new law meant, *inter alia*, that then-sitting federal judges, like all other federal employees and most other citizens, began to have Medicare taxes withheld from their salaries. In 1983, Congress required all newly hired federal employees to participate in Social Security and permitted, without requiring, about 96% of the then-currently employed federal employees to participate in that program. The remaining 4%—a class consisting of the President, other high-level Government employees, and all federal judges—were required to participate, except that those who contributed to a "covered" retirement program could modify their participation in a manner that left their total payroll deduction for retirement and Social Security unchanged, in effect allowing them to avoid any additional financial obligation as a result of joining Social Security. A "covered" program was defined to include any retirement system to which an employee had to contribute, which did not encompass the noncontributory pension system for federal judges, whose financial obligations (and payroll deductions) therefore had to increase. A number of federal judges appointed before 1983 filed this suit, arguing that the 1983 law violated the Compensation Clause, which guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office," U. S. Const., Art. III, § 1. Initially, the Court of Federal Claims ruled against the judges, but the Federal Circuit reversed. On certiorari, because some Justices were disqualified and this Court failed to find a quorum, the Federal Circuit's judgment was affirmed "with the same effect as upon affirmance by an equally divided court." 519 U. S. 801. On remand, the Court of Federal Claims found that the judges' Medicare claims were time barred and that a 1984 judicial salary increase promptly cured any violation, making damages minimal. The Federal Circuit reversed, holding that the Compensation Clause prevented the Government from collecting Medicare and Social Security taxes from the judges and that the violation was not cured by the 1984 pay increase.

Syllabus

Held:

1. The Compensation Clause prevents the Government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees. Pp. 565–578.

(a) The Court rejects the judges' claim that the "law of the case" doctrine now prevents consideration of the Compensation Clause because an affirmance by an equally divided Court is conclusive and binding upon the parties. *United States* v. *Pink*, 315 U. S. 203, 216, on which the judges rely, concerned an earlier case in which the Court heard oral argument and apparently considered the merits before affirming by an equally divided Court. The law of the case doctrine presumes a hearing on the merits. See, *e. g.*, *Quern* v. *Jordan*, 440 U. S. 332, 347, n. 18. When this case previously was here, due to absence of a quorum, the Court could not consider either the merits or whether to consider those merits through a grant of certiorari. This fact, along with the obvious difficulty of finding other equivalent substitute forums, convinces the Court that *Pink* does not control here. Pp. 565–566.

(b) Although the Compensation Clause prohibits taxation that singles out judges for specially unfavorable treatment, it does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges and other citizens. See *O'Malley* v. *Woodrough*, 307 U. S. 277, 282. Insofar as *Evans* v. *Gore*, 253 U. S. 245, 255, holds to the contrary, that case is overruled. See *O'Malley*, *supra*, at 283. There is no good reason why a judge should not share the tax burdens borne by all citizens. See *Evans*, *supra*, at 265, 267 (Holmes, J., dissenting); *O'Malley*, *supra*, at 281–283. Although Congress cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce *all* Government salaries, a tax law, unlike a law mandating a salary reduction, affects compensation indirectly, not directly. See *United States* v. *Will*, 449 U. S. 200, 226. And those prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here, where indirect taxation is at issue. In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence, the potential threats to judicial independence that underlie the Compensation Clause, see *Evans*, *supra*, at 251–252, cannot justify a special judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats. Because the Medicare tax is nondiscriminatory, the Federal Circuit erred in finding its application to federal judges unconstitutional. Pp. 566–572.

Syllabus

(c) However, because the special retroactivity-related Social Security rules enacted in 1983 effectively singled out then-sitting federal judges for unfavorable treatment, the Compensation Clause forbids the application of the Social Security tax to those judges. Four features of the law, taken together, lead to the conclusion that it discriminates in a manner the Clause forbids. First, the statutory history, context, purpose, and language indicate that the category of "federal employees" is the appropriate class against which the asserted discrimination must be measured. Second, the practical upshot of defining "covered" system in the way the law did was to permit nearly every then-current federal employee, but not federal judges, to avoid the newly imposed obligation to pay Social Security taxes. Third, the new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them. Inclusion meant a deduction of about $2,000 per year, whereas 95% of the then-active judges had already qualified for Social Security (due to private sector employment) before becoming judges. And participation would benefit only the minority of judges who had not worked the quarters necessary to be fully insured under Social Security. Fourth, the Government's sole justification for the statutory distinction between judges and other high-level federal employees—*i. e.*, equalizing the financial burdens imposed by the noncontributory judicial retirement system and the contributory system to which the other employees belonged—is unsound because such equalization takes place not by offering all current federal employees (including judges) the same opportunities but by employing a statutory disadvantage which offsets an advantage related to those protections afforded judges by the Clause, and because the two systems are not equalized with any precision. Thus, the 1983 law is very different from the nondiscriminatory tax upheld in *O'Malley, supra,* at 282. The Government's additional arguments—that Article III protects judges only against a reduction in stated salary, not against indirect measures that only reduce take-home pay; that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them; and that the law disfavored not only judges but also the President and other high-ranking federal employees—are unconvincing. Pp. 572–578.

2. The Compensation Clause violation was not cured by the 1984 pay increase for federal judges. The context in which that increase took place reveals nothing to suggest that it was intended to make whole the losses sustained by the pre-1983 judges. Rather, everything in the record suggests that the increase was meant to halt a slide in purchasing power resulting from continued and unadjusted-for inflation. Although a circumstance-specific approach is more complex than the Government's

proposed automatic approach, whereby a later salary increase would terminate a Compensation Clause violation regardless of the increase's purpose, there is no reason why such relief as damages or an exemption from Social Security would prove unworkable. *Will, supra,* distinguished. Pp. 578–581.

203 F. 3d 795, affirmed in part, reversed in part, and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which SCALIA, J., joined as to Parts I, II, and V. SCALIA, J., filed an opinion concurring in part and dissenting in part, *post,* p. 581. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 586. STEVENS, J., and O'CONNOR, J., took no part in the consideration or decision of the case.

Paul R. Q. Wolfson argued the cause for the United States. With him on the briefs were *Acting Solicitor General Underwood,* former *Solicitor General Waxman, Assistant Attorney General Ogden, Deputy Solicitor General Kneedler, David M. Cohen, Douglas N. Letter,* and *Anne Murphy.*

Steven S. Rosenthal argued the cause for respondents. With him on the brief were *W. Stephen Smith* and *Ellen E. Deason.**

JUSTICE BREYER delivered the opinion of the Court.

The Constitution's Compensation Clause guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office." U. S. Const., Art. III, § 1. The Court of Appeals for the Federal Circuit held that this Clause prevents the Government from collecting certain

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*Briefs of *amici curiae* urging affirmance were filed for the Federal Judges Association by *Kevin M. Forde* and *Richard J. Prendergast;* and for the Los Angeles County Bar Association et al. by *Mark E. Haddad, Catherine V. Barrad, Paul J. Watford, Richard Walch, Evan A. Davis, Amitai Schwartz, Steven F. Pflaum, Richard William Austin, Barbara J. Collins, Dennis F. Kerrigan, Jr., P. Kevin Castel, Herbert H. Franks, Dennis A. Rendelman,* and *John J. Kenney.*

Medicare and Social Security taxes from a small number of federal judges who held office nearly 20 years ago—before Congress extended the taxes to federal employees in the early 1980's.

In our view, the Clause does not prevent Congress from imposing a "non-discriminatory tax laid generally" upon judges and other citizens, *O'Malley* v. *Woodrough*, 307 U. S. 277, 282 (1939), but it does prohibit taxation that singles out judges for specially unfavorable treatment. Consequently, unlike the Court of Appeals, we conclude that Congress may apply the Medicare tax—a nondiscriminatory tax—to then-sitting federal judges. The special retroactivity-related Social Security rules that Congress enacted in 1984, however, effectively singled out then-sitting federal judges for unfavorable treatment. Hence, like the Court of Appeals, we conclude that the Clause forbids the application of the Social Security tax to those judges.

I

A

The Medicare law before us is straightforward. In 1965, Congress created a Federal Medicare "hospital insurance" program and tied its financing to Social Security. See Social Security Amendments of 1965, 79 Stat. 291. The Medicare law required most American workers (whom Social Security covered) to pay an additional Medicare tax. But it did not require Federal Government employees (whom Social Security did not cover) to pay that tax. See 26 U. S. C. §§ 3121(b)(5), (6) (1982 ed.).

In 1982, Congress, believing that "[f]ederal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually became entitled," S. Rep. No. 97–494, pt. 1, p. 378 (1982), extended both Medicare eligibility and Medicare taxes to all currently employed federal employees as well as to all newly hired federal employees, Tax Equity and Fiscal Responsibility Act of 1982,

§ 278, 96 Stat. 559–563. That new law meant that (as of January 1, 1983) all federal judges, like all other federal employees and most other citizens, would have to contribute between 1.30% and 1.45% of their federal salaries to Medicare's hospital insurance system. See 26 U. S. C. §§ 3101(b)(4)–(6).

The Social Security law before us is more complex. In 1935, Congress created the Social Security program. See Social Security Act, 49 Stat. 620. For nearly 50 years, that program covered employees in the private sector, but it did not cover Government employees. See 26 U. S. C. §§ 3121(b)(5), (6) (1982 ed.) (excluding federal employees); § 3121(b)(7) (excluding state employees). In 1981, a National Commission on Social Security Reform, convened by the President and chaired by Alan Greenspan, noting the need for "action . . . to strengthen the financial status" of Social Security, recommended that Congress extend the program to cover Federal, but not state or local, Government employees. Report of the National Commission on Social Security Reform 2–1, 2–7 (Jan. 1983). In particular, the Commission recommended that Congress *require* all incoming federal employees (those hired after January 1, 1984) to enter the Social Security system and to pay Social Security taxes. *Id.*, at 2–7. The Commission emphasized that "present Federal employees will *not* be affected by this recommendation." *Id.*, at 2–8.

In 1983, Congress enacted the Commission's recommendation into law (effective January 1, 1984) with an important exception. See Social Security Amendments of 1983, § 101(b)(1), 97 Stat. 69 (amending 26 U. S. C. §§ 3121(b)(5), (6)). As the Commission had recommended, Congress *required* all newly hired federal employees to participate in the Social Security program. It also *permitted*, without requiring, almost all (about 96%) then-currently employed federal employees to participate.

Contrary to the Commission's recommendation, however, the law added an exception. That exception seemed to re-

strict the freedom of choice of the remaining 4% of all current employees. This class consisted of the President, Vice President, high-level Executive Branch employees, Members of Congress, a few other Legislative Branch employees, and all federal judges. See 42 U. S. C. §§ 410(a)(5)(C)–(G); see also H. R. Rep. No. 98–25, p. 39 (1983); H. R. Conf. Rep. No. 98–542, p. 13 (1983) (noting that for these current federal employees "the rules are being changed in the middle of the game"). The new law seemed to *require* this class of current federal employees to enter into the Social Security program, see 42 U. S. C. §§ 410(a)(5)(C)–(G). But, as to almost all of these employees, the new law imposed no additional financial obligation or burden.

That is because the new law then created an exception to the exception, see Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, §§ 203(a)(2), 208, 97 Stat. 1107, 1111 (codified at note following 5 U. S. C. § 8331). The exception to the exception said that any member of this small class of current high-level officials (4% of all then-current employees) who contributed to a "covered" retirement program nonetheless could choose to modify their participation in a manner that left their total payroll deduction—for retirement and Social Security—unchanged. A "covered" employee paying 7% of salary to a "covered" program could continue to pay that 7% and no more, in effect avoiding any additional financial obligation as a result of joining Social Security.

The exception to the exception defined a "covered" program to include the Civil Service Retirement and Disability System—a program long available to almost all federal employees—as well as any other retirement system to which an employee must contribute. §§ 203(a)(2)(A), (D). The definition of "covered" program, however, did not encompass the pension system for federal judges—a system that is noncontributory in respect to a judge (but contributory in respect to a spouse).

The upshot is that the 1983 law was specifically aimed at extending Social Security to federal employees. It left about 96% of those who were currently employed free to choose not to participate in Social Security, thereby avoiding any increased financial obligation. It required the remaining 4% to participate in Social Security while freeing them of any added financial obligation (or additional payroll deduction) so long as they previously had participated in other contributory retirement programs. But it left those who could not participate in a contributory program without a choice. Their financial obligations (and payroll deductions) had to increase. And this last mentioned group consisted almost exclusively of federal judges.

B

This litigation began in 1989, when eight federal judges, all appointed before 1983, sued the Government for "compensation" in the United States Claims Court. They argued that the 1983 law, in requiring them to pay Social Security taxes, violated the Compensation Clause. Initially, the Claims Court ruled against the judges on jurisdictional grounds. 21 Cl. Ct. 786 (1990). The Court of Appeals reversed. 953 F. 2d 626 (CA Fed. 1992). On remand, eight more judges joined the lawsuit. They contested the extension to judges of the Medicare tax as well.

The Court of Federal Claims held against the judges on the merits. 31 Fed. Cl. 436 (1994). The Federal Circuit reversed, ordering summary judgment for the judges as to liability. 64 F. 3d 647 (1995). The Government petitioned this Court for a writ of certiorari. Some Members of this Court were disqualified from hearing the matter, and we failed to find a quorum of six Justices. See 28 U. S. C. § 1. Consequently, the Court of Appeals' judgment was affirmed "with the same effect as upon affirmance by an equally divided court." 519 U. S. 801 (1996); see 28 U. S. C. § 2109.

On remand from the Court of Appeals, the Court of Federal Claims found (a) that the 6-year statute of limitations, see 28 U. S. C. §§ 2401(a), 2501, barred some claims, including all Medicare claims; and (b) that, in any event, a subsequently enacted judicial salary increase promptly cured any violation, making damages minimal. 38 Fed. Cl. 166 (1997). The Court of Appeals (eventually en banc) reversed both determinations. 203 F. 3d 795 (CA Fed. 2000).

The Government again petitioned for certiorari. It asked this Court to consider two questions:

(1) Whether Congress violated the Compensation Clause when it extended the Medicare and Social Security taxes to the salaries of sitting federal judges; and

(2) If so, whether any such violation ended when Congress subsequently increased the salaries of all federal judges by an amount greater than the new taxes.

Given the specific statutory provisions at issue and the passage of time, seven Members of this Court had (and now have) no financial stake in the outcome of this case. Consequently a quorum was, and is, available to consider the questions presented. And we granted the Government's petition for a writ of certiorari.

II

At the outset, the judges claim that the "law of the case" doctrine prevents us from now considering the first question presented, namely, the scope of the Compensation Clause. They note that the Government presented that same question in its petition from the Court of Appeals' earlier ruling on liability. They point out that our earlier denial of that petition for lack of a quorum had the "same effect as" an "affirmance by an equally divided court," 28 U. S. C. § 2109. And they add that this Court has said that an affirmance by an equally divided Court is "conclusive and binding upon the parties as respects that controversy." *United States* v. *Pink*, 315 U. S. 203, 216 (1942).

Pink, however, concerned a case, *United States* v. *Moscow Fire Ins. Co.*, 309 U. S. 624 (1940), in which this Court had heard oral argument and apparently considered the merits prior to concluding that affirmance by an equally divided Court was appropriate. The law of the case doctrine presumes a hearing on the merits. See, *e. g.*, *Quern* v. *Jordan*, 440 U. S. 332, 347, n. 18 (1979). This case does not involve a previous consideration of the merits. Indeed, when this case previously was before us, due to absence of a quorum, we could not consider either the merits or whether to consider those merits through grant of a writ of certiorari. This fact, along with the obvious difficulty of finding other equivalent substitute forums, convinces us that *Pink*'s statement does not control the outcome here, that the "law of the case" doctrine does not prevent our considering both issues presented, and that we should now proceed to decide them.

III

The Court of Appeals upheld the judges' claim of tax immunity upon the authority of *Evans* v. *Gore*, 253 U. S. 245 (1920). That case arose in 1919 when Judge Walter Evans challenged Congress' authority to include sitting federal judges within the scope of a federal income tax law that the Sixteenth Amendment had authorized a few years earlier. See Revenue Act of 1918, § 213, 40 Stat. 1065 (defining "gross income" to include judicial salaries). In *Evans* itself, the Court held that the Compensation Clause barred application of the tax to Evans, who had been appointed a judge before Congress enacted the tax. 253 U. S., at 264. A few years later, the Court extended *Evans*, making clear that its rationale covered not only judges appointed before Congress enacted a tax but also judges whose appointments took place after the tax had become law. See *Miles* v. *Graham*, 268 U. S. 501, 509 (1925).

Fourteen years after deciding *Miles*, this Court overruled *Miles*. *O'Malley* v. *Woodrough*, 307 U. S. 277 (1939). But,

as the Court of Appeals noted, this Court did not expressly overrule *Evans* itself. 64 F. 3d, at 650. The Court of Appeals added that, if "changes in judicial doctrine" had significantly undermined *Evans*' holding, this "Court itself would have overruled the case." *Ibid.* Noting that this case is like *Evans* (involving judges appointed *before* enactment of the tax), not like *O'Malley* (involving judges appointed *after* enactment of the tax), the Court of Appeals held that *Evans* controlled the outcome. 64 F. 3d, at 650. Hence application of both Medicare and Social Security taxes to these preenactment judges violated the Compensation Clause.

The Court of Appeals was correct in applying *Evans* to the instant case, given that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); see also *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Nonetheless, the court below, in effect, has invited us to reconsider *Evans.* We now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax.

The Court's opinion in *Evans* began by explaining why the Compensation Clause is constitutionally important, and we begin by reaffirming that explanation. As *Evans* points out, 253 U. S., at 251–252, the Compensation Clause, along with the Clause securing federal judges appointments "during good Behavior," U. S. Const., Art. III, § 1—the practical equivalent of life tenure—helps to guarantee what Alexander Hamilton called the "complete independence of the courts of justice." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961). Hamilton thought these guarantees necessary because the Judiciary is "beyond comparison the weakest of the three" branches of Government. *Id.*, at 465–466. It has "no influence over either the sword or the purse." *Id.*, at 465.

It has "no direction either of the strength or of the wealth of the society." *Ibid.* It has "neither FORCE nor WILL but merely judgment." *Ibid.*

Hamilton's view, and that of many other Founders, was informed by firsthand experience of the harmful consequences brought about when a King of England "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶ 11. And Hamilton knew that "*a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 79, at 472. For this reason, he observed, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Ibid.;* see also *id.*, No. 48, at 310 (J. Madison) ("[A]s the legislative department alone has access to the pockets of the people, and has . . . full discretion . . . over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former").

Evans properly added that these guarantees of compensation and life tenure exist, "not to benefit the judges," but "as a limitation imposed in the public interest." 253 U. S., at 253. They "promote the public weal," *id.*, at 248, in part by helping to induce "learned" men and women "to quit the lucrative pursuits" of the private sector, 1 J. Kent, Commentaries on American Law *294, but more importantly by helping to secure an independence of mind and spirit necessary if judges are "to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty," W. Wilson, Constitutional Government in the United States 143 (1911).

Chief Justice John Marshall pointed out why this protection is important. A judge may have to decide "between the Government and the man whom that Government is prosecuting: between the most powerful individual in the

community, and the poorest and most unpopular." Proceedings and Debates of the Virginia State Convention, of 1829–1830, p. 616 (1830). A judge's decision may affect an individual's "property, his reputation, his life, his all." *Ibid.* In the "exercise of these duties," the judge must "observe the utmost fairness." *Ibid.* The judge must be "perfectly and completely independent, with nothing to influence or contro[l] him but God and his conscience." *Ibid.* The "greatest scourge . . . ever inflicted," Marshall thought, "was an ignorant, a corrupt, or a dependent Judiciary." *Id.*, at 619.

Those who founded the Republic recognized the importance of these constitutional principles. See, *e. g.*, Wilson, Lectures on Law (1791), in 1 Works of James Wilson 363 (J. Andrews ed. 1896) (stating that judges should be "completely independent" in "their salaries, and in their offices"); McKean, Debate in Pennsylvania Ratifying Convention, Dec. 11, 1787, in 2 Debates on the Federal Constitution 539 (J. Elliot ed. 1836) (the security of undiminished compensation disposes judges to be "more easy and independent"); see also 1 Kent, *supra*, at *294 ("[P]ermanent support" and the "tenure of their office" "is well calculated . . . to give [judges] the requisite independence"). They are no less important today than in earlier times. And the fact that we overrule *Evans* does not, in our view, diminish their importance.

We also agree with *Evans* insofar as it holds that the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary. 253 U. S., at 254. Otherwise a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect.

Nonetheless, we disagree with *Evans*' application of Compensation Clause principles to the matter before it—a nondiscriminatory tax that treated judges the same way it treated other citizens. *Evans*' basic holding was that the

Compensation Clause forbids such a tax because the Clause forbids "all diminution," including "taxation," "whether for one purpose or another." *Id.*, at 255. The Federal Circuit relied upon this holding. 64 F. 3d, at 650. But, in our view, it is no longer sound law.

For one thing, the dissenters in *Evans* cast the majority's reasoning into doubt. Justice Holmes, joined by Justice Brandeis, wrote that the Compensation Clause offers "no reason for exonerating" a judge "from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." 253 U. S., at 265. Holmes analogized the "diminution" that a tax might bring about to the burden that a state law might impose upon interstate commerce. If "there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government from which parties were not exempted." *Id.*, at 267.

For another thing, this Court's subsequent law repudiated *Evans*' reasoning. In 1939, 14 years after *Miles* extended *Evans*' tax immunity to judges appointed after enactment of the tax, this Court retreated from that extension. See *O'Malley,* 307 U. S., at 283 (overruling *Miles*). And in so doing the Court, in an opinion announced by Justice Frankfurter, adopted the reasoning of the *Evans* dissent. The Court said that the question was whether judges are immune "from the incidences of taxation to which everyone else within the defined classes . . . is subjected." 307 U. S., at 282. Holding that judges are not "immun[e] from sharing with their fellow citizens the material burden of the government," *ibid.*, the Court pointed out that the legal profession had criticized *Evans*' contrary conclusion, and that courts outside the United States had resolved similar matters differently, 307 U. S., at 281. And the Court concluded that "a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution

of his salary within the prohibition of Article III." *Id.*, at 282. The Court conceded that *Miles* had reached the opposite conclusion, but it said that *Miles* "cannot survive." 307 U. S., at 283. Still later, this Court noted that "[b]ecause *Miles* relied on *Evans* v. *Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*." *United States* v. *Will*, 449 U. S. 200, 227, n. 31 (1980).

Finally, and most importantly, we believe that the reasoning of Justices Holmes and Brandeis, and of this Court in *O'Malley,* is correct. There is no good reason why a judge should not share the tax burdens borne by all citizens. We concede that this Court has held that the Legislature cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce *all* Government salaries. See 449 U. S., at 226. But a tax law, unlike a law mandating a salary reduction, affects compensation indirectly, not directly. See *ibid.* (distinguishing between measures that directly and those that indirectly diminish judicial compensation). And those prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here, where indirect taxation is at issue. In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence, the potential threats to judicial independence that underlie the Constitution's compensation guarantee cannot justify a special judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats.

For these reasons, we hold that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect. Insofar as *Evans* holds to the contrary, that case, in *O'Malley*'s words, "cannot survive." 307 U. S., at 283.

The Government points out that the Medicare tax is just such a nondiscriminatory tax. Neither the courts below, nor the federal judges here, argue to the contrary. Hence, insofar as the Court of Appeals found that application of the Medicare tax law to federal judges is unconstitutional, we reverse its decision.

IV

The Social Security tax is a different matter. Respondents argue that the 1983 law imposing that tax upon then-sitting judges violates the Compensation Clause, for it discriminates against judges in a manner forbidden by the Clause, even as interpreted in *O'Malley*, not *Evans*. Cf. *O'Malley*, *supra*, at 282 (stating question as whether judges are immune "from the incidences of taxation *to which everyone else within the defined classes* . . . is subjected" (emphasis added)). After examining the statute's details, we agree with the judges that it does discriminate in a manner that the Clause forbids. Four features of the law, taken together, lead us to this conclusion.

First, federal employees had remained outside the Social Security system for nearly 50 years prior to the passage of the 1983 law. Congress enacted the law pursuant to the Social Security Commission's recommendation to bring those employees within the law. See *supra*, at 562. And the law itself deals primarily with that subject. Thus, history, context, statutory purpose, and statutory language, taken together, indicate that the category of "federal employees" is the appropriate class against which we must measure the asserted discrimination.

Second, the law, as applied in practice, in effect imposed a new financial obligation upon sitting judges, but it did not impose a new financial burden upon any other group of (then) current federal employees. We have previously explained why that is so. See *supra*, at 562–564. The law required all newly hired federal employees to join Social Security and pay related taxes. It gave 96% of all current employees

(employed as of January 1, 1984, or earlier) total freedom to enter, or not to enter, the system as they chose. It gave the remaining 4% of all current employees the freedom to maintain their pre-1984 payroll deductions, provided that they were currently enrolled in a "covered" system. And it defined "covered" system in a way that included virtually all of that 4%, except for federal judges. See *supra*, at 563–564. The practical upshot is that the law permitted nearly every current federal employee, but not federal judges, to avoid the newly imposed financial obligation.

Third, the law, by including sitting judges in the system, adversely affected most of them. Inclusion meant a requirement to pay a tax of about $2,000 per year, deducted from a monthly salary check. App. 49. At the same time, 95% of the then-active judges had already qualified for Social Security (due to private sector employment) before becoming judges. See *id.*, at 115. And participation in Social Security as judges would benefit only a minority. See *id.*, at 116–119 (reviewing examples of individual judges and demonstrating that participation in Social Security primarily would benefit the minority of judges who had not worked the 40 quarters necessary to be fully insured). The new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them.

Fourth, when measured against Compensation Clause objectives, the Government's justification for the statutory distinction (between judges, who do, and other federal employees, who do not, incur additional financial obligations) is unsound. The sole justification, according to the Government, is one of "equaliz[ing]" the retirement-related obligations that pre-1983 law imposed upon judges with the retirement-related obligations that pre-1983 law imposed upon other current high-level federal employees. Brief for United States 40. Thus the Government says that the new financial burden imposed upon judges was meant to make up for the fact that the judicial retirement system is basically

a noncontributory system, while the system to which other federal employees belonged was a contributory system. *Id.*, at 39–40; Reply Brief for United States 16.

This rationale, however, is the Government's and not necessarily that of Congress, which was silent on the matter. Cf. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50 (1983) (expressing concern at crediting *post hoc* explanation of agency action).

More importantly, the judicial retirement system is noncontributory because it reflects the fact that the Constitution itself guarantees federal judges life tenure—thereby constitutionally permitting federal judges to draw a salary for life simply by continuing to serve. Cf. *Booth* v. *United States*, 291 U. S. 339, 352 (1934) (holding that Compensation Clause protects salary of judge who has retired). That fact means that a contributory system, in all likelihood, would not work. And, of course, as of 1982, the noncontributory pension salary benefits were themselves part of the judge's compensation. The 1983 statute consequently singles out judges for adverse treatment solely because of a feature required by the Constitution to preserve judicial independence. At the same time, the "equaliz[ation]" in question takes place not by offering all current federal employees (including judges) the same opportunities but by employing a statutory disadvantage which offsets a constitutionally guaranteed advantage. Hence, to accept the "justification" offered here is to permit, through similar reasoning, taxes which have the effect of weakening or eliminating those constitutional guarantees necessary to secure judicial independence, at least insofar as similar guarantees are not enjoyed by others. This point would be obvious were Congress, say, to deny some of the benefits of a tax reduction to those with constitutionally guaranteed life tenure to make up for the fact that other employees lack such tenure. Although the relationships

here—among advantages and disadvantages—are less distant and more complex, the principle is similar.

Nor does the statute "equaliz[e]" with any precision. On the one hand, the then-current retirement system open to all federal employees except judges required a typical employee to contribute 7% to 8% of his or her annual salary. See generally 5 U. S. C. § 8334(a)(1). In return it provided a Member of Congress, for instance, with a pension that vested after five years and increased in value (by 2.5% of the Member's average salary) with each year of service to a maximum of 80% of salary, and covered both employee and survivors. See 5 U. S. C. §§ 8339, 8341. On the other hand, the judges' retirement system (based on life tenure) required no contribution for a judge who retired at age 65 (and who met certain service requirements) to receive full salary. But the right to receive that salary did not vest until retirement. The system provided nothing for a judge who left office before age 65. Nor did the law provide any coverage for a judge's survivors. Indeed, in 1984, a judge had to contribute 4.5% of annual salary to obtain a survivor's annuity, which increased in value by 1.25% of the judge's salary per year to a maximum of 40% of salary. 28 U. S. C. §§ 376(b), (*l*) (1982 ed.).

These two systems were not equal either before or after Congress enacted the 1983 law. Before 1983, a typical married federal employee other than a judge had to contribute 7% to 8% of annual salary to receive benefits that were better in some respects (vesting period, spousal benefit) and worse in some respects (80% salary maximum) than his married judicial counterpart would receive in return for a 4.5% contribution. The 1983 law imposed an added 5.7% burden upon the judge, in return for which the typical judge received little, or no, financial benefit. Viewed purely in financial equalization terms, and as applied to typical judges, the new requirement seems to overequalize, putting the typical married judge at a financial disadvantage—though

perhaps it would produce greater equality when applied to other, less typical examples.

Taken together, these four characteristics reveal a law that is special—in its manner of singling out judges for disadvantageous treatment, in its justification as necessary to offset advantages related to constitutionally protected features of the judicial office, and in the degree of permissible legislative discretion that would have to underlie any determination that the legislation has "equalized" rather than gone too far. For these reasons the law before us is very different from the "non-discriminatory" tax that *O'Malley* upheld. 307 U. S., at 282. Were the Compensation Clause to permit Congress to enact a discriminatory law with these features, it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees—characteristics which, as we have said, see *supra*, at 568–569, the public needs to secure that judicial independence upon which its rights depend. We consequently conclude that the 1983 Social Security tax law discriminates against the Judicial Branch, in violation of the Compensation Clause.

The Government makes additional arguments in support of reversal. But we find them unconvincing. It suggests that Article III protects judges only against a reduction in stated salary, not against indirect measures that only reduce take-home pay. Brief for United States 28. In *O'Malley*, however, this Court, when upholding a "non-discriminatory" tax, strongly implied that the Compensation Clause would bar a discriminatory tax. 307 U. S., at 282. The commentators whose work *O'Malley* cited said so explicitly. See Fellman, The Diminution of Judicial Salaries, 24 Iowa L. Rev. 89, 99 (1938); see also Comment, 20 Ill. L. Rev. 376, 377 (1925); Corwin, Constitutional Law in 1919–1920, 14 Am. Pol. Sci. Rev. 635, 642 (1920). And in *Will*, the Court yet more strongly indicated that the Compensation Clause bars indirect efforts to reduce judges' salaries through taxes when

those taxes discriminate. 449 U. S., at 226. Indeed, the Government itself "assume[s] that discriminatory taxation of judges would contravene fundamental principles underlying Article III, if not the [Compensation] Clause itself." Brief for United States 37, n. 27.

The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently undermining that mutual respect that the Constitution demands. Cf. Wilson, Lectures on Law, in 1 Works of James Wilson, at 364 (stating that judges "should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by anything, except their own behavior and its consequences"). Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.

Finally, the Government correctly points out that the law disfavored not only judges but also the President of the United States and certain Legislative Branch employees. As far as we can determine, however, all Legislative Branch employees were free to join a covered system, and the record provides us with no example of any current Legislative Branch employee who had failed to do so. See Tr. of Oral Arg. 16–17, 37–38. The President's pension is noncontributory. See note following 3 U. S. C. § 102. And the President himself, like the judges, is protected against diminution in his "[c]ompensation." See U. S. Const., Art. II, § 1. These facts may help establish congressional good faith. But, as we have said, we do not doubt that good faith. And we do not see why, otherwise, the separate and special exam-

ple of that single individual, the President, should make a critical difference here.

We conclude that, insofar as the 1983 statute required then-sitting judges to join the Social Security system and pay Social Security taxes, that statute violates the Compensation Clause.

V

The second question presented is whether the

> "constitutional violation ended when Congress increased the statutory salaries of federal judges by an amount greater than the amount [of the Social Security] taxes deducted from respondents' judicial salaries." Pet. for Cert. I.

The Government argues for an affirmative answer. It points to a statutory salary increase that all judges received in 1984. It says that this increase, subsequent to the imposition of Social Security taxes on judges' salaries, cured any earlier unconstitutional diminution of salaries in a lesser amount. Otherwise, if "Congress improperly reduced judges' salaries from $140,000" per year "to $130,000" per year, the judges would be able to collect the amount of the improper reduction, here $10,000, forever—even if Congress cured the improper reduction by raising salaries $20,000, to $150,000, a year later. Reply Brief for United States 18. To avoid this consequence, the Government argues, we should simply look to the fact of a later salary increase "whether or not one of Congress's purposes in increasing the salaries" was "to terminate the constitutional violation." *Ibid.*

But how could we always decide whether a later salary increase terminates a constitutional violation without examining the purpose of that increase? Imagine a violation that affected only a few. To accept the Government's position would leave those few at a permanent salary disadvantage. If, for example, Congress reduced the salaries of one group

of judges by 20%, a later increase of 30% applicable to all judges would leave the first group permanently 20% behind. And a pay cut that left those judges at a permanent disadvantage would perpetuate the very harm that the Compensation Clause seeks to prevent.

The Court of Appeals consequently examined the context in which the later pay increases took place in order to determine their relation to the earlier Compensation Clause violation. It found "nothing to suggest" that the later salary increase at issue here sought "to make whole the losses sustained by the pre-1983 judges." 185 F. 3d, at 1362–1363. The Government presents no evidence to the contrary.

The relevant economic circumstances surrounding the 1984, and subsequent, salary increases include inflation sufficiently serious to erode the real value of judicial salaries and salary increases insufficient to maintain real salaries or real compensation parity with many other private-sector employees. See Report of 1989 Commission on Executive, Legislative, and Judicial Salaries, Hearings before the Senate Committee on Governmental Affairs, 101st Cong., 1st Sess., 12–13 (1989) (testimony of Lloyd Cutler regarding effect of inflation on judges' salaries since 1969). For instance, while consumer prices rose 363% between 1969 and 1999, salaries in the private sector rose 421%, and salaries for district judges rose 253%. See American Bar Association, Federal Judicial Pay Erosion 11 (Feb. 2001). These figures strongly suggest that the judicial salary increases simply reflected a congressional effort to restore both to judges and to Members of Congress themselves some, but not all, of the real compensation that inflation had eroded. Those salary increases amounted to a congressional effort to adjust judicial salaries to reflect "fluctuations in the value of money," The Federalist No. 79, at 473 (A. Hamilton)—the kind of adjustment that the Founders believed "may be requisite," McKean, Debate in Pennsylvania Ratifying Convention, Dec. 11, 1787, in 2 Debates on the Federal Constitution, at 539; see

also Rosenn, The Constitutional Guaranty Against Diminution of Judicial Compensation, 24 UCLA L. Rev. 308, 314–315 (1976).

We have found nothing to the contrary. And we therefore agree with the Court of Appeals' similar conclusion. 185 F. 3d, at 1363 ("[E]verything in the record" suggests that the increase was meant to halt "the slide in purchasing power resulting from continued and unadjusted-for inflation").

The Government says that a circumstance-specific approach may prove difficult to administer. Brief for United States 43. And we concede that examining the circumstances in order to determine whether there is or is not a relation between an earlier violation and a later increase is more complex than the Government's proposed automatic approach. But we see no reason why such relief as damages or an exemption from Social Security would prove unworkable.

Finally, the Government looks to our decision in *Will* for support. In that case, federal judges challenged the constitutionality of certain legislative "freezes" that Congress had imposed upon earlier enacted Government-wide cost-of-living salary adjustments. The Court found a Compensation Clause violation in respect to the freeze for what was designated Year One (where Congress had rescinded an earlier voted 4.8% salary increase). *Will*, 449 U. S., at 225–226. The Government points out that the *Will* Court "noted that Congress, later in that fiscal year, enacted a statutory increase in judges' salaries that exceeded the salaries that judges would have received" without the rescission. Brief for United States 41. And the Government adds that "it was unquestioned in *Will*" that the judges could not receive damages for the time subsequent to this later enactment. *Id.*, at 41–42.

The *Will* Year One example, however, shows only that, in the circumstances, and unlike the case before us, the later salary increase *was* related to the earlier salary diminishment. Regardless, the very fact that the matter was "un-

questioned" in *Will* shows that it was not argued. See 449 U. S., at 206, n. 3 (noting that the judges' complaint sought relief for Year One's diminution only up to the moment of the subsequent salary increase). Hence the Court did not decide the matter now before us.

We conclude that later statutory salary increases did not cure the preceding unconstitutional harm.

VI

Insofar as the Court of Appeals found the application of Medicare taxes to the salaries of judges taking office before 1983 unconstitutional, its judgment is reversed. Insofar as that court found the application of Social Security taxes to the salaries of judges taking office before 1984 unconstitutional, its judgment is affirmed. We also affirm the Court of Appeals' determination that the 1984 salary increase received by federal judges did not cure the Compensation Clause violation. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring in part and dissenting in part.

I agree with the Court that extending the Social Security tax to sitting Article III judges in 1984 violated Article III's Compensation Clause. I part paths with the Court on the issue of extending the Medicare tax to federal judges in 1983, which I think was also unconstitutional.[1]

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[1] I agree with the Court, see Part II, *ante*, that the law-of-the-case doctrine does not bar our consideration of the merits. I also join the Court in holding, see Part V, *ante*, that any constitutional violation was not remedied by subsequent salary increases.

I

As an initial matter, I think the Court is right in concluding that *Evans* v. *Gore*, 253 U. S. 245 (1920)—holding that new taxes of general applicability cannot be applied to sitting Article III judges—is no longer good law, and should be overruled. We went out of our way in *O'Malley* v. *Woodrough*, 307 U. S. 277, 280–281 (1939), to catalog criticism of *Evans*, and subsequently recognized, in *United States* v. *Will*, 449 U. S. 200, 227, and n. 31 (1980), that *O'Malley* had "undermine[d] the reasoning of *Evans*." The Court's decision today simply recognizes what should be obvious: that *Evans* has not only been undermined, but has in fact collapsed.

II

My disagreement with the Court arises from its focus upon the issue of discrimination, which turns out to be dispositive with respect to the Medicare tax. The Court holds "that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax . . . upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect." *Ante*, at 571. Since "the Medicare tax is just such a nondiscriminatory tax," the Court concludes that "application of [that] tax law to federal judges is [c]onstitutional." *Ante*, at 572.

But we are dealing here with a "Compensation Clause," not a "Discrimination Clause." See U. S. Const., Art. III, § 1 ("The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). As we have said, "the Constitution makes no exceptions for 'nondiscriminatory' reductions" in judicial compensation, *Will*, *supra*, at 226. A reduction in compensation is a reduction in compensation, even if all federal employees are subjected to the same cut. The discrimination criterion that the Court uses would make sense if the only purpose of the Compensation Clause were

to prevent invidious (and possibly coercive) action against judges. But as the Court acknowledges, the Clause "'promote[s] the public weal' . . . by helping to induce 'learned' men and women to 'quit the lucrative pursuits' of the private sector," *ante,* at 568 (quoting *Evans, supra,* at 248; 1 J. Kent, Commentaries on American Law *294). That inducement would not exist if Congress could cut judicial salaries so long as it did not do so discriminatorily.

What the question comes down to, then, is (1) whether exemption from a certain tax can constitute part of a judge's "compensation," and (2) if so, whether exemption from the Medicare tax was part of the judges' compensation here. The answer to the more general question seems to me obviously yes. Surely the term "compensation" refers to the entire "package" of benefits—not just cash, but retirement benefits, medical care, *and exemption from taxation if that is part of the employment package.* It is simply unreasonable to think that "$150,000 a year tax-free" (if that was the bargain struck) is not higher compensation than "$150,000 a year subject to taxes." Ask the employees of the World Bank.

The more difficult question—though far from an insoluble one—is *when* an exemption from tax constitutes compensation. In most cases, the presence or absence of taxation upon wages, like the presence or absence of many other factors within the control of government—inflation, for example, or the rates charged by government-owned utilities, or import duties that increase consumer prices—affects the *value* of compensation, but is not an element of compensation itself. The Framers had this distinction well in mind. Hamilton, for example, wrote that as a result of "the fluctuations in the value of money," "[i]t was . . . necessary to leave it to the discretion of the legislature to vary its provisions" for judicial compensation. The Federalist No. 79, p. 473 (C. Rossiter ed. 1961); see also *Will, supra,* at 227 (the Constitution "placed faith in the integrity and sound judgment of the elected representatives to enact increases" in judicial sala-

ries to account for inflation). Since Hamilton thought that the Compensation Clause "put it out of the power of [Congress] to change the condition of the individual [judge] for the worse," The Federalist No. 79, at 473, he obviously believed that inflation does not diminish compensation as that term is used in the Constitution.

This distinction between Government action affecting compensation and Government action affecting the *value* of compensation was the basis for our statement in *O'Malley*, *supra*, at 282, that "[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government . . . ." I agree with the Court, therefore, that *Evans* was wrongly decided—not, however, because in *Evans* there was no discrimination, but because in *Evans* the universal application of the tax *demonstrated* that the Government was not reducing the compensation of its judges but was acting as sovereign rather than employer, imposing a general tax.

But just as it is clear that a federal employee's sharing of a tax-free status that all citizens enjoy is not compensation (and elimination of that tax-free status not a reduction in compensation), so also it is clear that a tax-free status conditioned on federal employment *is* compensation, and its elimination a reduction. The Court apparently acknowledges that if a tax is *imposed* on the basis of federal employment (an income tax, for example, payable only by federal judges) it would constitute a *reduction* in compensation. It is impossible to understand why a tax that is *suspended* on the basis of federal employment (an exemption from federal income tax for federal judges) does not constitute the *conferral* of compensation—in which case its elimination is a *reduction*, whether or not federal judges end up being taxed just like other citizens. Only converting the Compensation

Clause into a Discrimination Clause can explain a contrary conclusion.

And this, of course, is what has been achieved by the targeted extension of the Medicare tax to federal employees who were previously exempt. It may well be that, in some abstract sense, they are not being "discriminated against," since they end up being taxed like other citizens; but this does not alter the fact that, since exemption from the tax was part of their employment package—since they had an employment expectation of a preferential exemption from taxation—their *compensation* was being reduced. One of the benefits of being a federal judge (or any federal employee) had, prior to 1982, been an exemption from the Medicare tax. This benefit Congress took away, much as a private employer might terminate a contractual commitment to pay Medicare taxes on behalf of its employees. The latter would clearly be a cut in compensation, and so is the former.[2] Had Congress simply imposed the Medicare tax on its own employees (including judges) at the time it introduced that tax for other working people, no benefit of federal employment would have been reduced, because, with respect to the newly introduced tax, none had ever existed. But an extension to federal employees of a tax from which they had previously been exempt *by reason of their employment status* seems to me a flat-out reduction of federal employment compensation.

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[2] As the Court explains, the purpose of the Medicare tax extension was to ensure that federal workers "bear a more equitable share of the costs of financing the benefits to which many of them eventually became entitled" by reason of their own or their spouses' private-sector employment. *Ante*, at 561 (internal quotation marks and citation omitted). As with the Social Security tax, therefore, the Medicare tax aspect of this case does not present the situation in which a tax exemption has been eliminated in return for some other benefit, different in kind but equivalent in value. Cf. *ante*, at 573 ("[P]articipation in Social Security as judges would benefit only a minority").

III

As should be clear from the above, though I agree with the Court that the extension of the Social Security tax to federal judges runs afoul of the Compensation Clause, I disagree with the Court's grounding of this holding on the discriminatory manner in which the extension occurred. In this part of its opinion, however, the Court's antidiscrimination rationale is slightly different from that which appeared in its discussion of the Medicare tax. There, the focus was on discrimination compared with ordinary citizens; here, the focus is on discrimination vis-à-vis other federal employees. (As the Court explains, federal judges, unlike nearly all other federal employees, were not given the opportunity to opt out of paying the tax.) On my analysis, it would not matter if every federal employee had been made subject to the Social Security tax along with judges, so long as one of the previous entitlements of their federal employment had been exemption from that tax. Federal judges, unlike all other federal employees except the President, see Art. II, § 1, cl. 7, cannot, consistent with the Constitution, have their compensation diminished. If this case involved salary cuts to pay for Social Security, rather than taxes to pay for Social Security, the irrelevance of whether other federal employees were covered by the operative legislation would be clear.

* * *

I join in the judgment that extension of the Social Security tax to sitting Article III judges was unconstitutional. I would affirm the Federal Circuit's holding that extension of the Medicare tax was unconstitutional as well.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

I believe this Court was correct in *Evans* v. *Gore*, 253 U. S. 245 (1920), when it held that any tax that reduces a judge's

net compensation violates Article III of the Constitution. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety.

Syllabus

THE WHARF (HOLDINGS) LTD. ET AL. *v.* UNITED INTERNATIONAL HOLDINGS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00–347. Argued March 21, 2001—Decided May 21, 2001

Petitioner The Wharf (Holdings) Limited orally granted respondent United International Holdings, Inc., an option to buy 10% of the stock in Wharf's Hong Kong cable system if United rendered certain services, but internal Wharf documents suggested that Wharf never intended to carry out its promise. United fulfilled its obligation, but Wharf refused to permit it to exercise the option. United sued in Federal District Court, claiming that Wharf's conduct violated, *inter alia*, § 10(b) of the Securities Exchange Act of 1934, which prohibits using "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security." 15 U. S. C. § 78j(b). A jury found for United, and the Tenth Circuit affirmed.

Held: Wharf's secret intent not to honor the option it sold United violates § 10(b). Pp. 592–597.

(a) The Court must assume that the "security" at issue is not the cable system stock, but the option to purchase that stock, because Wharf conceded this point below. That concession is consistent with the Act's language defining "security" to include both "any . . . option . . . on any security" and "any . . . right to . . . purchase" stock. § 78c(a)(10). Pp. 593–594.

(b) Wharf's claim that § 10(b) does not cover oral contracts of sale is rejected. This Court held in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, that the Act does not protect a person who did not actually buy securities, but who might have done so had the seller told the truth. But United is not a potential buyer; by providing Wharf with its services, it actually bought the option that Wharf sold. And *Blue Chip Stamps* did not suggest that oral purchases or sales fall outside the Act's scope. Neither is there any other convincing reason to interpret the Act to exclude oral contracts as a class. The Act itself says that it applies to "any contract" for a security's purchase or sale, §§ 78c(a)(13), (14), and oral contracts for the sale of securities are sufficiently common that the Uniform Commercial Code and statutes of frauds in every State consider them enforceable. Pp. 594–596.

(c) Also rejected is Wharf's argument that a secret reservation not to permit the exercise of an option falls outside § 10(b) because it does

not relate to the value of a security purchase or the consideration paid, and hence does not implicate § 10(b)'s full disclosure policy. Even were it the case that the Act covers only misrepresentations likely to affect the value of securities, Wharf's secret reservation was such a misrepresentation. To sell an option while secretly intending not to permit the option's exercise is misleading, because a buyer normally presumes good faith. Similarly, the secret reservation misled United about the option's value, which was, unbeknownst to United, valueless. P. 596.

(d) Finally, the Court rejects Wharf's claim that interpreting the Act to allow recovery in a case like this one will permit numerous plaintiffs to bring federal securities claims that are in reality no more than ordinary state breach-of-contract claims lying outside the Act's basic objectives. United's claim is not simply that Wharf failed to carry out a promise to sell it securities, but that Wharf sold it a security (the option) while secretly intending from the very beginning not to honor the option. Moreover, Wharf has not shown that its concern has proved serious as a practical matter in the past or that it is likely to prove serious in the future. Pp. 596–597.

210 F. 3d 1207, affirmed.

BREYER, J., delivered the opinion for a unanimous Court.

Paul M. Dodyk argued the cause for petitioners. With him on the briefs was *William R. Jentes.*

Louis R. Cohen argued the cause for respondents. With him on the brief were *Jonathan J. Frankel*, *David B. Wilson*, and *Jeffrey A. Chase.*

Matthew D. Roberts argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Underwood*, *Deputy Solicitor General Kneedler*, *David M. Becker*, *Meyer Eisenberg*, *Jacob H. Stillman*, *Katharine B. Gresham*, and *Susan S. McDonald.*

JUSTICE BREYER delivered the opinion of the Court.

This securities fraud action focuses upon a company that sold an option to buy stock while secretly intending never to honor the option. The question before us is whether this conduct violates § 10(b) of the Securities Exchange Act of

1934, which prohibits using "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security." 48 Stat. 891, 15 U. S. C. § 78j(b); see also 17 CFR § 240.10b–5 (2000). We conclude that it does.

I

Respondent United International Holdings, Inc., a Colorado-based company, sued petitioner The Wharf (Holdings) Limited, a Hong Kong firm, in Colorado's Federal District Court. United said that in October 1992 Wharf had sold it an option to buy 10% of the stock of a new Hong Kong cable television system. But, United alleged, at the time of the sale Wharf secretly intended not to permit United to exercise the option. United claimed that Wharf's conduct amounted to a fraud "in connection with the . . . sale of [a] security," prohibited by § 10(b), and violated numerous state laws as well. A jury found in United's favor. The Court of Appeals for the Tenth Circuit upheld that verdict. 210 F. 3d 1207 (2000). And we granted certiorari to consider whether the dispute fell within the scope of § 10(b).

The relevant facts, viewed in the light most favorable to the verdict winner, United, are as follows. In 1991, the Hong Kong Government announced that it would accept bids for the award of an exclusive license to operate a cable system in Hong Kong. Wharf decided to prepare a bid. Wharf's chairman, Peter Woo, instructed one of its managing directors, Stephen Ng, to find a business partner with cable system experience. Ng found United. And United sent several employees to Hong Kong to help prepare Wharf's application, negotiate contracts, design the system, and arrange financing.

United asked to be paid for its services with a right to invest in the cable system if Wharf should obtain the license. During August and September 1992, while United's employees were at work helping Wharf, Wharf and United negotiated about the details of that payment. Wharf prepared a

draft letter of intent that contemplated giving United the right to become a co-investor, owning 10% of the system. But the parties did not sign the letter of intent. And in September, when Wharf submitted its bid, it told the Hong Kong authorities that Wharf would be the system's initial sole owner, Lodging to App. AY–4, although Wharf would also "consider" allowing United to become an investor, *id.*, at AY–6.

In early October 1992, Ng met with a United representative, who told Ng that United would continue to help only if Wharf gave United an enforceable right to invest. Ng then orally granted United an option with the following terms: (1) United had the right to buy 10% of the future system's stock; (2) the price of exercising the option would be 10% of the system's capital requirements minus the value of United's previous services (including expenses); (3) United could exercise the option only if it showed that it could fund its 10% share of the capital required for at least the first 18 months; and (4) the option would expire if not exercised within six months of the date that Wharf received the license. The parties continued to negotiate about how to write documents that would embody these terms, but they never reduced the agreement to writing.

In May 1993, Hong Kong awarded the cable franchise to Wharf. United raised $66 million designed to help finance its 10% share. In July or August 1993, United told Wharf that it was ready to exercise its option. But Wharf refused to permit United to buy any of the system's stock. Contemporaneous internal Wharf documents suggested that Wharf had never intended to carry out its promise. For example, a few weeks before the key October 1992 meeting, Ng had prepared a memorandum stating that United wanted a right to invest that it could exercise if it was able to raise the necessary capital. A handwritten note by Wharf's Chairman Woo replied, "No, no, no, we don't accept that." App. DT–187; Lodging to App. AI–1. In September 1993, after

meeting with the Wharf board to discuss United's investment in the cable system, Ng wrote to another Wharf executive, "How do we get out?" *Id.*, at CY–1. In December 1993, after United had filed documents with the Securities and Exchange Commission (SEC) representing that United was negotiating the acquisition of a 10% interest in the cable system, an internal Wharf memo stated that "[o]ur next move should be to claim that our directors got quite *upset* over these representations . . . . Publicly, we *do not* acknowledge [United's] opportunity" to acquire the 10% interest. *Id.*, at DF–1 (emphasis in original). In the margin of a December 1993 letter from United discussing its expectation of investing in the cable system, Ng wrote, "[B]e careful, must deflect this! [H]ow?" *Id.*, at DI–1. Other Wharf documents referred to the need to "back ped[al]," *id.*, at DG–1, and "stall," *id.*, at DJ–1.

These documents, along with other evidence, convinced the jury that Wharf, through Ng, had orally sold United an option to purchase a 10% interest in the future cable system while secretly intending not to permit United to exercise the option, in violation of § 10(b) of the Securities Exchange Act and various state laws. The jury awarded United compensatory damages of $67 million and, in light of "circumstances of fraud, malice, or willful and wanton conduct," App. EM–18, punitive damages of $58.5 million on the state-law claims. As we have said, the Court of Appeals upheld the jury's award. 210 F. 3d 1207 (CA10 2000). And we granted certiorari to determine whether Wharf's oral sale of an option it intended not to honor is prohibited by § 10(b).

II

Section 10(b) of the Securities Exchange Act makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of

such rules and regulations as the [SEC] may prescribe." 15 U. S. C. § 78j.

Pursuant to this provision, the SEC has promulgated Rule 10b–5. That Rule forbids the use, "in connection with the purchase or sale of any security," of (1) "any device, scheme, or artifice to defraud"; (2) "any untrue statement of a material fact"; (3) the omission of "a material fact necessary in order to make the statements made . . . not misleading"; or (4) any other "act, practice, or course of business" that "operates . . . as a fraud or deceit." 17 CFR § 240.10b–5 (2000).

To succeed in a Rule 10b–5 suit, a private plaintiff must show that the defendant used, in connection with the purchase or sale of a security, one of the four kinds of manipulative or deceptive devices to which the Rule refers, and must also satisfy certain other requirements not at issue here. See, *e. g.*, 15 U. S. C. § 78j (requiring the "use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange"); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 193 (1976) (requiring scienter, meaning "intent to deceive, manipulate, or defraud"); *Basic Inc.* v. *Levinson*, 485 U. S. 224, 231–232 (1988) (requiring that any misrepresentation be material); *id.*, at 243 (requiring that the plaintiff sustain damages through reliance on the misrepresentation).

In deciding whether the Rule covers the circumstances present here, we must assume that the "security" at issue is not the cable system stock, but the option to purchase that stock. That is because the Court of Appeals found that Wharf conceded this point. 210 F. 3d, at 1221 ("Wharf does not contest on appeal the classification of the option as a security"). That concession is consistent with the language of the Securities Exchange Act, which defines "security" to include both "any . . . option . . . on any security" and "any . . . right to . . . purchase" stock. 15 U. S. C. § 78c(a)(10) (1994 ed., Supp. V); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 751 (1975) ("[H]olders of . . . options,

and other contractual rights or duties to purchase . . . securities" are "'purchasers' . . . of securities for purposes of Rule 10b–5"). And Wharf's current effort to deny the concession, by pointing to an ambiguous statement in its Court of Appeals reply brief, comes too late and is unconvincing. See Reply Brief for Petitioners 16, n. 8 (citing Reply Brief for Appellants in Nos. 97–1421, 98–1002 (CA10), pp. 5–6). Consequently, we must decide whether Wharf's secret intent not to honor the option it sold United amounted to a misrepresentation (or other conduct forbidden by the Rule) in connection with the sale of the option.

Wharf argues that its conduct falls outside the Rule's scope for two basic reasons. First, Wharf points out that its agreement to grant United an option to purchase shares in the cable system was an oral agreement. And it says that § 10(b) does not cover oral contracts of sale. Wharf points to *Blue Chip Stamps*, in which this Court construed the Act's "purchase or sale" language to mean that only "actual purchasers and sellers of securities" have standing to bring a private action for damages. See 421 U. S., at 730–731. Wharf notes that the Court's interpretation of the Act flowed in part from the need to protect defendants against lawsuits that "turn largely on which oral version of a series of occurrences the jury may decide to credit." *Id.*, at 742. And it claims that an oral purchase or sale would pose a similar problem of proof and thus should not satisfy the Rule's "purchase or sale" requirement.

Blue Chip Stamps, however, involved the very different question whether the Act protects a person who did not actually buy securities, but who might have done so had the seller told the truth. The Court held that the Act does not cover such a potential buyer, in part for the reason that Wharf states. But United is not a potential buyer; by providing Wharf with its services, it actually bought the option that Wharf sold. And *Blue Chip Stamps* said nothing to suggest that oral purchases or sales fall outside the scope of

the Act. Rather, the Court's concern was about "the abuse potential and proof problems inherent in suits by investors who neither bought nor sold, but asserted they would have traded absent fraudulent conduct by others." *United States* v. *O'Hagan*, 521 U. S. 642, 664 (1997). Such a "potential purchase" claim would rest on facts, including the plaintiff's state of mind, that might be "totally unknown and unknowable to the defendant," depriving the jury of "the benefit of weighing the plaintiff's version against the defendant's version." *Blue Chip Stamps*, *supra*, at 746. An actual sale, even if oral, would not create this problem, because both parties would be able to testify as to whether the relevant events had occurred.

Neither is there any other convincing reason to interpret the Act to exclude oral contracts as a class. The Act itself says that it applies to "any contract" for the purchase or sale of a security. 15 U. S. C. §§ 78c(a)(13), (14). Oral contracts for the sale of securities are sufficiently common that the Uniform Commercial Code and statutes of frauds in every State now consider them enforceable. See U. C. C. § 8–113 (Supp. 2000) ("A contract . . . for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought"); see also 2C U. L. A. 77–81 (Supp. 2000) (table of enactments of U. C. C. Revised Art. 8 (amended 1994)) (noting adoption of § 8–113, with minor variations, by all States except Rhode Island and South Carolina); R. I. Gen. Laws § 6A–8–322 (Supp. 1999) (repealed effective July 1, 2001) (making oral contracts for the sale of securities enforceable); § 6A–8–113 (2000 Cum. Supp.) (effective July 1, 2001) (same); S. C. Code Ann. § 36–8–113 (Supp. 2000) (same); U. C. C. § 8–113 Comment (Supp. 2000) ("[T]he statute of frauds is unsuited to the realities of the securities business"). Any exception for oral sales of securities would significantly limit the Act's coverage, thereby undermining its basic purposes.

Wharf makes a related but narrower argument that the Act does not encompass oral contracts of sale that are unenforceable under state law. But we do not reach that issue. The Court of Appeals held that Wharf's sale of the option was not covered by the then-applicable Colorado statute of frauds, Colo. Rev. Stat. § 4–8–319 (repealed 1996), and hence was enforceable under state law. Though Wharf disputes the correctness of that holding, we ordinarily will not consider such a state-law issue, and we decline to do so here.

Second, Wharf argues that a secret reservation not to permit the exercise of an option falls outside § 10(b) because it does not "relat[e] to the value of a security purchase or the consideration paid"; hence it does "not implicate [§ 10(b)'s] policy of full disclosure." Brief for Petitioners 25, 26 (emphasis deleted). But even were it the case that the Act covers only misrepresentations likely to affect the value of securities, Wharf's secret reservation was such a misrepresentation. To sell an option while secretly intending not to permit the option's exercise is misleading, because a buyer normally presumes good faith. Cf., *e. g.*, Restatement (Second) of Torts § 530, Comment *c* (1976) ("Since a promise necessarily carries with it the implied assertion of an intention to perform[,] it follows that a promise made without such an intention is fraudulent"). For similar reasons, the secret reservation misled United about the option's value. Since Wharf did not intend to honor the option, the option was, unbeknownst to United, valueless.

Finally, Wharf supports its claim for an exemption from the statute by characterizing this case as a "disput[e] over the ownership of securities." Brief for Petitioners 24. Wharf expresses concern that interpreting the Act to allow recovery in a case like this one will permit numerous plaintiffs to bring federal securities claims that are in reality no more than ordinary state breach-of-contract claims—actions that lie outside the Act's basic objectives. United's claim, however, is not simply that Wharf failed to carry out a prom-

ise to sell it securities. It is a claim that Wharf sold it a security (the option) while secretly intending from the very beginning not to honor the option. And United proved that secret intent with documentary evidence that went well beyond evidence of a simple failure to perform. Moreover, Wharf has not shown us that its concern has proved serious as a practical matter in the past. Cf. *Threadgill* v. *Black*, 730 F. 2d 810, 811–812 (CADC) *(per curiam)* (suggesting in 1984 that contracting to sell securities with the secret reservation not to perform one's obligations under the contract violates § 10(b)). Nor does Wharf persuade us that it is likely to prove serious in the future. Cf. Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, § 21D(b)(2), 109 Stat. 747, codified at 15 U. S. C. § 78u–4(b)(2) (1994 ed., Supp. V) (imposing, beginning in 1995, stricter pleading requirements in private securities fraud actions that, among other things, require that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required [fraudulent] state of mind").

For these reasons, the judgment of the Court of Appeals is

Affirmed.

Syllabus

BUCKHANNON BOARD & CARE HOME, INC., ET AL. *v.* WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99–1848. Argued February 27, 2001—Decided May 29, 2001

Buckhannon Board and Care Home, Inc., which operates assisted living residences, failed an inspection by the West Virginia fire marshal's office because some residents were incapable of "self-preservation" as defined by state law. After receiving orders to close its facilities, Buckhannon and others (hereinafter petitioners) brought suit in Federal District Court against the State and state agencies and officials (hereinafter respondents), seeking declaratory and injunctive relief that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA). Respondents agreed to stay the orders pending the case's resolution. The state legislature then eliminated the "self-preservation" requirement, and the District Court granted respondents' motion to dismiss the case as moot. Petitioners requested attorney's fees as the "prevailing party" under the FHAA and ADA, basing their entitlement on the "catalyst theory," which posits that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. As the Fourth Circuit had previously rejected the "catalyst theory," the District Court denied the motion, and the Fourth Circuit affirmed.

Held: The "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA and ADA. Under the "American Rule," parties are ordinarily required to bear their own attorney's fees, and courts follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority, *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 819. Congress has employed the legal term of art "prevailing party" in numerous statutes authorizing awards of attorney's fees. A "prevailing party" is one who has been awarded some relief by a court. See, *e. g.*, *Hanrahan* v. *Hampton*, 446 U. S. 754, 758. Both judgments on the merits and court-ordered consent decrees create a material alteration of the parties' legal relationship and thus permit an award. The "catalyst theory," however, allows an award where there is no judicially sanctioned change in the parties' legal relationship. A defendant's voluntary change in conduct, although per-

Syllabus

haps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. The legislative history cited by petitioners is at best ambiguous as to the availability of the "catalyst theory"; and, particularly in view of the "American Rule," such history is clearly insufficient to alter the clear meaning of "prevailing party" in the fee-shifting statutes. Given this meaning, this Court need not determine which way petitioners' various policy arguments cut. Pp. 602–610.

203 F. 3d 819, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 610. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 622.

Webster J. Arceneaux III argued the cause for petitioners. With him on the briefs was *Brian A. Glasser*.

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Waxman*, *Acting Solicitor General Underwood*, *Assistant Attorney General Lee*, *Jeffrey P. Minear*, *Jessica Dunsay Silver*, and *Kevin K. Russell*.

David P. Cleek, Senior Deputy Attorney General of West Virginia, argued the cause for respondents. With him on the brief was *Darrell V. McGraw, Jr.*, Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the Friends of the Earth et al. by *Bruce J. Terris*, *Carolyn Smith Pravlik*, and *Sarah A. Adams;* and for Public Citizen et al. by *Steven R. Shapiro*, *Harvey Grossman*, *Brian Wolfman*, and *Arthur B. Spitzer*.

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Maureen M. Dove* and *Andrew H. Baida*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Ne-

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Buckhannon Board and Care Home, Inc., which operates care homes that provide assisted living to their residents, failed an inspection by the West Virginia Office of the State Fire Marshal because some of the residents were incapable of "self-preservation" as defined under state law. See W. Va. Code §§ 16–5H–1, 16–5H–2 (1998) (requiring that all residents of residential board and care homes be capable of "self-preservation," or capable of moving themselves "from situations involving imminent danger, such as fire"); W. Va. Code of State Rules, tit. 87, ser. 1, § 14.07(1) (1995) (same). On October 28, 1997, after receiving cease-and-desist orders requiring the closure of its residential care facilities within 30 days, Buckhannon Board and Care Home, Inc., on behalf of itself and other similarly situated homes and residents (hereinafter petitioners), brought suit in the United States

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braska, *Philip T. McLaughlin* of New Hampshire, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, and *Mark L. Earley* of Virginia; for the Alliance of Automobile Manufacturers, Inc., by *Charles A. Newman* and *Jerome H. Block;* for Los Angeles County et al. by *Elwood Lui* and *Jeffrey S. Sutton;* for the National Conference of State Legislatures et al. by *Richard Ruda*, *James I. Crowley*, *Jacqueline G. Cooper*, and *Paul J. Watford;* and for the Pacific Legal Foundation by *M. Reed Hopper.*

District Court for the Northern District of West Virginia against the State of West Virginia, two of its agencies, and 18 individuals (hereinafter respondents), seeking declaratory and injunctive relief[1] that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA), 102 Stat. 1619, 42 U. S. C. § 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. § 12101 *et seq.*

Respondents agreed to stay enforcement of the cease-and-desist orders pending resolution of the case and the parties began discovery. In 1998, the West Virginia Legislature enacted two bills eliminating the "self-preservation" requirement, see S. 627, I 1998 W. Va. Acts 983–986 (amending regulations); H. R. 4200, II 1998 W. Va. Acts 1198–1199 (amending statute), and respondents moved to dismiss the case as moot. The District Court granted the motion, finding that the 1998 legislation had eliminated the allegedly offensive provisions and that there was no indication that the West Virginia Legislature would repeal the amendments.[2]

Petitioners requested attorney's fees as the "prevailing party" under the FHAA, 42 U. S. C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs"), and ADA, 42 U. S. C. § 12205 ("[T]he court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs"). Petitioners argued that they were entitled to attorney's fees under the "catalyst theory," which posits that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. Al-

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[1] The original complaint also sought money damages, but petitioners relinquished this claim on January 2, 1998. See App. to Pet. for Cert. A11.

[2] The District Court sanctioned respondents under Federal Rule of Civil Procedure 11 for failing to timely provide notice of the legislative amendment. App. 147.

though most Courts of Appeals recognize the "catalyst theory,"[3] the Court of Appeals for the Fourth Circuit rejected it in *S–1 and S–2* v. *State Bd. of Ed. of N. C.*, 21 F. 3d 49, 51 (1994) (en banc) ("A person may not be a 'prevailing party' . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought"). The District Court accordingly denied the motion and, for the same reason, the Court of Appeals affirmed in an unpublished, *per curiam* opinion. Judgt. order reported at 203 F. 3d 819 (CA4 2000).

To resolve the disagreement amongst the Courts of Appeals, we granted certiorari, 530 U. S. 1304 (2000), and now affirm.

In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). Under this "American Rule," we follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 819 (1994). Congress, however, has authorized the award of attorney's fees to the "prevailing party" in numerous statutes in addition to those at issue here, such as the Civil Rights Act of 1964, 78 Stat. 259, 42 U. S. C. §2000e–5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U. S. C. §1973*l*(e), and the Civil Rights Attorney's

[3] See, *e. g.*, *Stanton* v. *Southern Berkshire Regional School Dist.*, 197 F. 3d 574, 577, n. 2 (CA1 1999); *Marbley* v. *Bane*, 57 F. 3d 224, 234 (CA2 1995); *Baumgartner* v. *Harrisburg Housing Authority*, 21 F. 3d 541, 546–550 (CA3 1994); *Payne* v. *Board of Ed.*, 88 F. 3d 392, 397 (CA6 1996); *Zinn* v. *Shalala*, 35 F. 3d 273, 276 (CA7 1994); *Little Rock School Dist.* v. *Pulaski Cty. School Dist., #1*, 17 F. 3d 260, 263, n. 2 (CA8 1994); *Kilgour* v. *Pasadena*, 53 F. 3d 1007, 1010 (CA9 1995); *Beard* v. *Teska*, 31 F. 3d 942, 951–952 (CA10 1994); *Morris* v. *West Palm Beach*, 194 F. 3d 1203, 1207 (CA11 1999).

Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988. See generally *Marek* v. *Chesny*, 473 U. S. 1, 43–51 (1985) (Appendix to opinion of Brennan, J., dissenting).[4]

In designating those parties eligible for an award of litigation costs, Congress employed the term "prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed. 1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>. — Also termed *successful party*." This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases.[5]

In *Hanrahan* v. *Hampton*, 446 U. S. 754, 758 (1980) *(per curiam)*, we reviewed the legislative history of § 1988 and found that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Our "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail."

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[4] We have interpreted these fee-shifting provisions consistently, see *Hensley* v. *Eckerhart*, 461 U. S. 424, 433, n. 7 (1983), and so approach the nearly identical provisions at issue here.

[5] We have never had occasion to decide whether the term "prevailing party" allows an award of fees under the "catalyst theory" described above. Dictum in *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987), alluded to the possibility of attorney's fees where "voluntary action by the defendant . . . affords the plaintiff all or some of the relief . . . sought," but we expressly reserved the question, see *id.*, at 763 ("We need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award"). And though the Court of Appeals for the Fourth Circuit relied upon our decision in *Farrar* v. *Hobby*, 506 U. S. 103 (1992), in rejecting the "catalyst theory," *Farrar* "involved no catalytic effect." *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 194 (2000). Thus, there is language in our cases supporting both petitioners and respondents, and last Term we observed that it was an open question here. See *ibid.*

Hewitt v. *Helms*, 482 U. S. 755, 760 (1987). We have held that even an award of nominal damages suffices under this test. See *Farrar* v. *Hobby*, 506 U. S. 103 (1992).[6]

In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. See *Maher* v. *Gagne*, 448 U. S. 122 (1980). Although a consent decree does not always include an admission of liability by the defendant, see, *e. g.*, *id.*, at 126, n. 8, it nonetheless is a court-ordered "chang[e] [in] the legal relationship between [the plaintiff] and the defendant." *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 792 (1989) (citing *Hewitt*, *supra*, at 760–761, and *Rhodes* v. *Stewart*, 488 U. S. 1, 3–4 (1988) *(per curiam)*).[7] These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. 489 U. S., at 792–793; see also *Hanrahan*, *supra*, at 757 ("[I]t seems clearly to have been the intent of Congress to permit . . . an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the *trial court* or *on appeal*" (emphasis added)).

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[6] However, in some circumstances such a "prevailing party" should still not receive an award of attorney's fees. See *Farrar* v. *Hobby*, *supra*, at 115–116.

[7] We have subsequently characterized the *Maher* opinion as also allowing for an award of attorney's fees for private settlements. See *Farrar* v. *Hobby*, *supra*, at 111; *Hewitt* v. *Helms*, *supra*, at 760. But this dictum ignores that *Maher* only "held that fees *may* be assessed . . . after a case has been settled by the entry of a consent decree." *Evans* v. *Jeff D.*, 475 U. S. 717, 720 (1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375 (1994).

We think, however, the "catalyst theory" falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties. Even under a limited form of the "catalyst theory," a plaintiff could recover attorney's fees if it established that the "complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted." Brief for United States as *Amicus Curiae* 27. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary. Indeed, we held in *Hewitt* that an interlocutory ruling that reverses a dismissal for failure to state a claim "is not the stuff of which legal victories are made." 482 U. S., at 760. See also *Hanrahan*, *supra*, at 754 (reversal of a directed verdict for defendant does not make plaintiff a "prevailing party"). A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

The dissenters chide us for upsetting "long-prevailing *Circuit* precedent." *Post*, at 622 (opinion of GINSBURG, J.) (emphasis added). But, as JUSTICE SCALIA points out in his concurrence, several Courts of Appeals have relied upon dicta in our prior cases in approving the "catalyst theory." See *post*, at 621–622; see also *supra*, at 603, n. 5. Now that the issue is squarely presented, it behooves us to reconcile the plain language of the statutes with our prior *holdings*. We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, see, *e. g.*, *Farrar*, *supra*, at 112, or obtained a court-ordered consent decree, *Maher*, *supra*, at 129–130—we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed

verdict, see *Hanrahan*, 446 U. S., at 759, or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by "*judicial* relief," *Hewitt*, *supra*, at 760 (emphasis added). Never have we awarded attorney's fees for a nonjudicial "alteration of actual circumstances." *Post*, at 633 (dissenting opinion). While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the "merit" requirement of our prior cases and award attorney's fees where the plaintiff's claim "was at least colorable" and "not . . . groundless." *Post*, at 627 (internal quotation marks and citation omitted). We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief. *Post*, at 634 (internal quotation marks and citation omitted).[8]

[8] Although the dissenters seek support from *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884), that case involved costs, not attorney's fees. "[B]y the long established practice and universally recognized rule of the common law . . . the prevailing party is entitled to recover a judgment for costs," *id.*, at 387, but "the rule 'has long been that attorney's fees are not ordinarily recoverable,'" *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 257 (1975) (quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967)). Courts generally, and this Court in particular, then and now, have a presumptive rule for costs which the Court in its discretion may vary. See, *e. g.*, this Court's Rule 43.2 ("If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders"). In *Mansfield*, the defendants had successfully removed the case to federal court, successfully opposed the plaintiffs' motion to remand the case to state court, lost on the merits of the case, and then reversed course and successfully argued in this Court that the lower federal court had no jurisdiction. The Court awarded costs to the plaintiffs, even though they had lost and the defendants won on the jurisdictional issue, which was the only question this Court decided. In no ordinary sense of the word can the plaintiffs have been said to be the prevailing party here—they lost and their opponents won on the only litigated issue—so the Court's use of the term must be regarded as a figurative rather than a literal one, justifying the

Petitioners nonetheless argue that the legislative history of the Civil Rights Attorney's Fees Awards Act supports a broad reading of "prevailing party" which includes the "catalyst theory." We doubt that legislative history could overcome what we think is the rather clear meaning of "prevailing party"—the term actually used in the statute. Since we resorted to such history in *Garland*, 489 U. S., at 790, *Maher*, 448 U. S., at 129, and *Hanrahan*, *supra*, at 756–757, however, we do likewise here.

The House Report to § 1988 states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," H. R. Rep. No. 94–1558, p. 7 (1976), while the Senate Report explains that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," S. Rep. No. 94–1011, p. 5 (1976). Petitioners argue that these Reports and their reference to a 1970 decision from the Court of Appeals for the Eighth Circuit, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (1970), indicate Congress' intent to adopt the "catalyst theory."[9] We think the legislative his-

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departure from the presumptive rule allowing costs to the prevailing party because of the obvious equities favoring the plaintiffs. The Court employed its discretion to recognize that the plaintiffs had been the victims of the defendants' legally successful whipsawing tactics.

[9] Although the Court of Appeals in *Parham* awarded attorney's fees to the plaintiff because his "lawsuit acted as a catalyst which prompted the [defendant] to take action . . . seeking compliance with the requirements of Title VII," 433 F. 2d, at 429–430, it did so only after finding that the defendant had acted unlawfully, see *id.*, at 426 ("We hold as a matter of law that [plaintiff's evidence] established a violation of Title VII"). Thus, consistent with our holding in *Farrar*, *Parham* stands for the proposition that an enforceable judgment permits an award of attorney's fees. And like the consent decree in *Maher* v. *Gagne*, 448 U. S. 122 (1980), the Court of Appeals in *Parham* ordered the District Court to "retain jurisdiction over the matter for a reasonable period of time to insure the continued implementation of the appellee's policy of equal employment opportunities." 433 F. 2d, at 429. Clearly *Parham* does not

tory cited by petitioners is at best ambiguous as to the availability of the "catalyst theory" for awarding attorney's fees. Particularly in view of the "American Rule" that attorney's fees will not be awarded absent "explicit statutory authority," such legislative history is clearly insufficient to alter the accepted meaning of the statutory term. *Key Tronic*, 511 U. S., at 819; see also *Hanrahan*, *supra*, at 758 ("[O]nly when a party has prevailed on the merits of at least some of his claims . . . has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney" (quoting H. R. Rep. No. 94–1558, at 8)).

Petitioners finally assert that the "catalyst theory" is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees. They also claim that the rejection of the "catalyst theory" will deter plaintiffs with meritorious but expensive cases from bringing suit. We are skeptical of these assertions, which are entirely speculative and unsupported by any empirical evidence (*e. g.*, whether the number of suits brought in the Fourth Circuit has declined, in relation to other Circuits, since the decision in *S–1 and S–2*).

Petitioners discount the disincentive that the "catalyst theory" may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal. "The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits," *Evans* v. *Jeff D.*, 475 U. S. 717, 734 (1986), and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.

And petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the

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support a theory of fee shifting untethered to a material alteration in the legal relationship of the parties as defined by our precedents.

plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.[10] Even then, it is not clear how often courts will find a case mooted: "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000) (internal quotation marks and citations omitted). If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs. Cf. *Marek* v. *Chesny*, 473 U. S., at 7 ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff" (internal quotation marks and citation omitted)).

We have also stated that "[a] request for attorney's fees should not result in a second major litigation," *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983), and have accordingly avoided an interpretation of the fee-shifting statutes that would have "spawn[ed] a second litigation of significant dimension," *Garland*, *supra*, at 791. Among other things, a "catalyst theory" hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that "will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct."

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[10] Only States and state officers acting in their official capacity are immune from suits for damages in federal court. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651 (1974). Plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State, see *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977).

Brief for United States as *Amicus Curiae* 28. Although we do not doubt the ability of district courts to perform the nuanced "three thresholds" test required by the "catalyst theory"—whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct; whether the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense, see *post,* at 627–628 (dissenting opinion)—it is clearly not a formula for "ready administrability." *Burlington* v. *Dague,* 505 U. S. 557, 566 (1992).

Given the clear meaning of "prevailing party" in the fee-shifting statutes, we need not determine which way these various policy arguments cut. In *Alyeska,* 421 U. S., at 260, we said that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a "roving authority." For the reasons stated above, we hold that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA, 42 U. S. C. § 3613(c)(2), and ADA, 42 U. S. C. § 12205.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court in its entirety, and write to respond at greater length to the contentions of the dissent.

I

"Prevailing party" is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes.

"[B]y the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs . . . ." *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 387 (1884).

> "Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized. . . .
>
> "Weighed in the light of these several provisions in the Judiciary Act [of 1789], the conclusion appears to be clear that Congress intended to allow costs to the prevailing party, as incident to the judgment . . . ." *The Baltimore,* 8 Wall. 377, 388, 390 (1869).

The term has been found within the United States Statutes at Large since at least the Bankruptcy Act of 1867, which provided that "[t]he party prevailing in the suit shall be entitled to costs against the adverse party." Act of Mar. 2, 1867, ch. 176, § 24, 14 Stat. 528. See also Act of Mar. 3, 1887, ch. 359, § 15, 24 Stat. 508 ("If the Government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue"). A computer search shows that the term "prevailing party" appears at least 70 times in the current United States Code; it is no stranger to the law.

At the time 42 U. S. C. § 1988 was enacted, I know of no case, state or federal, in which—either under a statutory invocation of "prevailing party" or under the common-law rule—the "catalyst theory" was enunciated as the basis for awarding costs. Indeed, the dissent cites only one case in which (although the "catalyst theory" was not expressed)

costs were awarded for a reason that the catalyst theory would support, but today's holding of the Court would not: *Baldwin* v. *Chesapeake & Potomac Tel. Co.*, 156 Md. 552, 557, 144 A. 703, 705 (1929), where costs were awarded because "the granting of [appellee's] motion to dismiss the appeal has made it unnecessary to inquire into the merits of the suit, and the dismissal is based on an act of appellee performed after both the institution of the suit and the entry of the appeal." And that case is irrelevant to the meaning of "prevailing party," because it was a case *in equity.* While, as *Mansfield* observed, costs were awarded in actions *at law* to the "prevailing party," see 111 U. S., at 387, an equity court could award costs "as the equities of the case might require," *Getz* v. *Johnston*, 145 Md. 426, 433, 125 A. 689, 691 (1924). See also *Horn* v. *Bohn*, 96 Md. 8, 12–13, 53 A. 576, 577 (1902) ("The question of costs in equity cases is a matter resting in the sound discretion of the Court, from the exercise of which no appeal will lie" (internal quotation marks and citation omitted)).[1] The other state or state-law cases the dis-

[1] The jurisdiction that issued *Baldwin* has used the phrase "prevailing party" frequently (including in equity cases) to mean the party acquiring a judgment. See *Getz* v. *Johnston*, 145 Md. 426, 434, 125 A. 689, 691–692 (1924) (an equity decision noting that "on reversal, following the usual rule, the costs will generally go to the prevailing party, that is, to the appellant" (internal quotation marks and citation omitted)). See also, *e. g.*, *Hoffman* v. *Glock*, 20 Md. App. 284, 293, 315 A. 2d 551, 557 (1974) ("Md. Rule 604a provides: 'Unless otherwise provided by law, or ordered by the court, the prevailing party shall be entitled to the allowance of court costs, which shall be taxed by the clerk and embraced in the judgment' "); *Fritts* v. *Fritts*, 11 Md. App. 195, 197, 273 A. 2d 648, 649 (1971) ("We have viewed the evidence, as we must, in a light most favorable to appellee as the prevailing party below"); *Chillum-Adelphi Volunteer Fire Dept., Inc.* v. *Button & Goode, Inc.*, 242 Md. App. 509, 516, 219 A. 2d 801, 805 (1966) ("At common law, an arbitration award became a cause of action in favor of the prevailing party"); *Burch* v. *Scott*, 1829 WL 1006, *15 (Md. Ct. App., Dec. 1829) ("[T]he demurrer being set down to be argued, the court proceeds to affirm or reverse the decree, and the prevailing party takes the deposite").

sent cites as awarding costs despite the absence of a judgment all involve a judicial finding—or its equivalent, an acknowledgment by the defendant—of the merits of plaintiff's case.[2] Moreover, the dissent cites *not a single case* in

[2] Our decision to award costs in *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884), does not "tu[g] against the restrictive rule today's decision installs," *post*, at 630 (GINSBURG, J., dissenting). Defendants had removed the case to federal court, and after losing on the merits, sought to have us vacate the judgment because the basis for removal (diversity of citizenship) was absent. We concluded that because defendants were responsible for the improper removal in the first place, our judgment's "effect [was] to defeat the entire proceeding which they originated and have prosecuted," 111 U. S., at 388. In other words, plaintiffs "prevailed" because defendants' original position as to jurisdiction was defeated. In *Ficklen* v. *Danville*, 146 Va. 426, 438–439, 132 S. E. 705, 706 (1926), appellants were deemed to have "'substantially prevail[ed]'" on their appeal because appellees "abandoned their contention made before the lower court," *i. e.*, "abandoned their intention and desire to rely upon the correctness of the trial court's decree." In *Talmage* v. *Monroe*, 119 P. 526 (Cal. App. 1911), costs were awarded after the defendant complied with an alternative writ of mandamus; it was the writ, not the mere petition, which led to defendant's action.

Scatcherd v. *Love*, 166 F. 53 (CA6 1908), *Wagner* v. *Wagner*, 9 Pa. 214 (1848), and other cases cited by the dissent represent a rule adopted in some States that by settling a defendant "acknowledged his liability," *Scatcherd*, *supra*, at 56; see also *Wagner*, *supra*, at 215. That rule was hardly uniform among the States. Compare 15 C. J., Costs § 167, p. 89 (1918) (citing cases from 13 States which hold that a "settlement is equivalent to a confession of judgment"), with *id.*, at 89–90, § 168, and n. a (citing cases from 11 States which hold that under a settlement "plaintiff cannot recover costs," because "[c]osts . . . can only follow a judgment or final determination of the action" (internal quotation marks and citation omitted)). I do not think these state cases (and *Scatcherd*, a federal case applying state law) justify expanding the federal meaning of "prevailing party" (based on a "confession of judgment" fiction) to include the party accepting an out-of-court settlement—much less to expand it beyond settlements, to the domain of the "catalyst theory."

The only case cited by the dissent in which the conclusion of acknowledgment of liability was rested on something other than a settlement is *Board of Ed. of Madison Cty.* v. *Fowler*, 192 Ga. 35, 14 S. E. 2d 478 (1941), which, in one of the States that considered settlement an acknowledgment

which this Court—or even any other federal court applying federal law prior to enactment of the fee-shifting statutes at issue here—has regarded as the "prevailing party" a litigant who left the courthouse emptyhanded. If the term means what the dissent contends, that is a remarkable absence of authority.

That a judicial finding of liability was an understood requirement of "prevailing" is confirmed by many statutes that use the phrase in a context that *presumes* the existence of a judicial ruling. See, *e. g.*, 5 U. S. C. § 1221(g)(2) ("[i]f an employee . . . is the prevailing party . . . and the decision is based on a finding of a prohibited personnel practice"); § 1221(g)(3) (providing for an award of attorney's fees to the "prevailing party," "regardless of the basis of the decision"); § 7701(b)(2)(A) (allowing the prevailing party to obtain an interlocutory award of the "relief provided in the decision"); 8 U. S. C. § 1324b(h) (permitting the administrative law judge to award an attorney's fee to the prevailing party "if the losing party's argument is without reasonable foundation in law and fact"); 18 U. S. C. § 1864(e) (1994 ed., Supp. V) (allowing the district court to award the prevailing party its attorney's fee "in addition to monetary damages").

The dissent points out, *post*, at 629, that the Prison Litigation Reform Act of 1995 limits attorney's fees to an amount "proportionately related to the court ordered relief for the violation." This shows that *sometimes* Congress *does* explicitly "tightly bind fees to judgments," *ibid.*, inviting (the dissent believes) the conclusion that "prevailing party" does *not* fasten fees to judgments. That conclusion does not follow from the premise. What this statutory provision demonstrates, *at most*, is that use of the phrase "prevailing party" is not the *only* way to impose a requirement of court-ordered relief. That is assuredly true. But it would be no

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of liability, analogized compliance with what had been sought by a mandamus suit to a settlement. This is a slim reed upon which to rest the broad conclusion of a catalyst theory.

more rational to reject the normal meaning of "prevailing party" because some statutes produce the same result with different language, than it would be to conclude that, since there are many synonyms for the word "jump," the word "jump" must mean something else.

It is undoubtedly true, as the dissent points out by quoting a nonlegal dictionary, see *post*, at 633–634, that the word "prevailing" can have other meanings in other contexts: "prevailing winds" are the winds that predominate, and the "prevailing party" in an election is the party that wins the election. But when "prevailing party" is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally—and to my knowledge, prior to enactment of the first of the statutes at issue here, *invariably*—meant the party that wins the suit or obtains a finding (or an admission) of liability. Not the party that ultimately gets his way because his adversary dies before the suit comes to judgment; not the party that gets his way because circumstances so change that a victory on the legal point for the other side turns out to be a practical victory for him; and not the party that gets his way because the other side ceases (for whatever reason) its offensive conduct. If a nuisance suit is mooted because the defendant asphalt plant has gone bankrupt and ceased operations, one would not normally call the plaintiff the prevailing party. And it would make no difference, as far as the propriety of that characterization is concerned, if the plant did not go bankrupt but moved to a new location to avoid the expense of litigation. In one sense the plaintiff would have "prevailed"; but he would not be the prevailing party in the lawsuit. Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning.

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in

> the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

The cases cited by the dissent in which we have "not treated Black's Law Dictionary as preclusively definitive," *post*, at 628–629, are inapposite. In both *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993), and *United States* v. *Rodgers*, 466 U. S. 475 (1984), we rejected Black's definition because it conflicted with our precedent. See *Pioneer*, *supra*, at 395–396, n. 14; *Rodgers*, *supra*, at 480. We did not, as the dissent would do here, simply reject a relevant definition of a word tailored to judicial settings in favor of a more general definition from another dictionary.

II

The dissent distorts the term "prevailing party" beyond its normal meaning for policy reasons, but even those seem to me misguided. They rest upon the presumption that the catalyst theory applies when "*the suit's merit* led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint," *post*, at 622 (emphasis added). As the dissent would have it, by giving the term its normal meaning the Court today approves the practice of denying attorney's fees to a plaintiff with a proven claim of discrimination, simply because the very *merit* of his claim led the defendant to capitulate before judgment. That is not the case. To the contrary, the Court *approves* the result in *Parham* v. *Southwestern Bell Tel. Co.*, 433 F. 2d 421 (CA8 1970), where attorney's fees were awarded "after [a] finding that the defendant had acted unlawfully," *ante*, at 607–

608, and n. 9.[3] What the dissent's stretching of the term produces is something more, and something far less reasonable: an award of attorney's fees when the merits of the plaintiff's case remain unresolved—when, for all one knows, the defendant only "abandon[ed] the fray" because the cost of litigation—either financial or in terms of public relations—would be too great. In such a case, the plaintiff may have "prevailed" as Webster's defines that term—"gain[ed] victory by virtue of strength or superiority," see *post*, at 633. But I doubt it was greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit*, that Congress intended to reward.

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[3] The dissent incorrectly characterizes *Parham* as involving undifferentiated "findings or retention of jurisdiction," *post*, at 637, n. 11. In fact, *Parham* involved a finding that the defendant *had* discriminated, and jurisdiction was retained so that that finding could be given effect, in the form of injunctive relief, should the defendant ever backslide in its voluntary provision of relief to plaintiffs. Jurisdiction was not retained to determine whether there had been discrimination, and I do not read the Court's opinion as suggesting a fee award would be appropriate in *those* circumstances.

The dissent notes that two other cases were cited in Senate legislative history (*Parham* is cited in legislative history from both the Senate and House) which it claims support the catalyst theory. If legislative history in general is a risky interpretive tool, legislative history from only one legislative chamber—and consisting of the citation of Court of Appeals cases that surely few if any Members of Congress read—is virtually worthless. In any event, *Kopet* v. *Esquire Realty Co.*, 523 F. 2d 1005 (CA2 1975), does not support the catalyst theory because the defendant's voluntary compliance was not at issue. Fees were awarded on the dubious premise that discovery uncovered some documents of potential use in other litigation, making this more a case of an award of interim fees. *Thomas* v. *Honeybrook Mines*, 428 F. 2d 981 (CA3 1970), is also inapposite. There, the question was whether counsel for union members, whose fruitless efforts to sue the union had nonetheless spurred the union to sue the employer, should be paid out of a fund established by the union's victory. Whether the union members were "prevailing parties" in the union suit, or whether they were entitled to attorney's fees as "prevailing parties" in the earlier suit against the union, was not even at issue.

It could be argued, perhaps, that insofar as abstract justice is concerned, there is little to choose between the dissent's outcome and the Court's: If the former sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney's fees to some plaintiffs who are no less "deserving" of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exacting the payment of attorney's fees to the extortionist.

It is true that monetary settlements and consent decrees can be extorted as well, and we have approved the award of attorney's fees in cases resolved through such mechanisms. See *ante*, at 604 (citing cases). Our decision that the statute makes plaintiff a "prevailing party" under such circumstances was based entirely on language in a House Report, see *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980), and if this issue were to arise for the first time today, I doubt whether I would agree with that result. See *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987) (SCALIA, J.) (opining that "[r]espect for ordinary language requires that a plaintiff receive at least some relief *on the merits* of his claim before he can be said to prevail" (emphasis added)). But in the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action *in the lawsuit*. There is at least *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit*. Extending the holding of *Maher* to a case in which no judicial action whatever has been taken stretches the term "prevailing party" (and the potential injustice that *Maher* produces) beyond what the normal mean-

ing of that term in the litigation context can conceivably support.

The dissent points out that petitioners' object in bringing their suit was not to obtain "a judge's approbation," but to "stop enforcement of a [West Virginia] rule," *post*, at 634; see also *Hewitt*, *supra*, at 761. True enough. But not even the dissent claims that if a petitioner accumulated attorney's fees in preparing a threatened complaint, but *never filed it* prior to the defendant's voluntary cessation of its offending behavior, the wannabe-but-never-was plaintiff could recover fees; that would be countertextual, since the fee-shifting statutes require that there be an "action" or "proceeding," see 42 U. S. C. §§ 3613(d), 1988(b) (1994 ed., Supp. V)—which in legal parlance (though not in more general usage) means *a lawsuit*. See *post*, at 643 (concluding that a party should be deemed prevailing as a result of a "*postcomplaint* payment or change in conduct" (emphasis added)). Does that not leave achievement of the broad congressional purpose identified by the dissent just as unsatisfactorily incomplete as the failure to award fees when there is no decree? Just as the dissent rhetorically asks *why* (never mind the language of the statute) Congress would want to award fees when there is a judgment, but deny fees when the defendant capitulates on the eve of judgment; so also it is fair for us to ask *why* Congress would want to award fees when suit has been filed, but deny fees when the about-to-be defendant capitulates under the threat of filing. Surely, it cannot be because determination of whether suit was actually contemplated and threatened is too difficult. All the proof takes is a threatening letter and a batch of timesheets. Surely *that* obstacle would not deter the Congress that (according to the dissent) was willing to let district judges pursue that much more evasive will-o'-the-wisp called "catalyst." (Is this not why we *have* district courts?, asks the dissent, *post*, at 639–640.) My point is not that it would take no more twisting

of language to produce prelitigation attorney's fees than to produce the decreeless attorney's fees that the dissent favors (though that may well be true). My point is that the departure from normal usage that the dissent favors cannot be justified on the ground that it establishes a regime of logical evenhandedness. There *must* be a cutoff of seemingly equivalent entitlements to fees—either the failure to file suit in time or the failure to obtain a judgment in time. The term "prevailing party" suggests the latter rather than the former. One does not prevail in a suit that is never determined.

The dissent's ultimate worry is that today's opinion will "impede access to court for the less well-heeled," *post*, at 623. But, of course, the catalyst theory also harms the "less well-heeled," putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation. Since the fee-shifting statutes at issue here allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to *maximize* the quantity of "the enforcement of federal law by private attorneys general," *ibid.* Rather, Congress desired an *appropriate* level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail "on the merits," or at least to those who achieve an enforceable "alteration of the legal relationship of the parties," than by permitting the open-ended inquiry approved by the dissent.[4]

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[4] Even the legislative history relied upon by the dissent supports the conclusion that some merit is necessary to justify a fee award. See *post*, at 636, n. 9 (citing a House Report for the proposition that fee-shifting statutes are "'designed to give *['victims of civil rights violation']* access to the judicial process'" (emphasis added)); *ibid.* (citing a Senate Report: "'[I]f those *who violate the Nation's fundamental laws* are not to proceed with impunity,'" fee awards are necessary (emphasis added)). And for the reasons given by the Court, see *ante*, at 605, the catalyst theory's purported "merit test"—the ability to survive a motion to dismiss for failure to state a claim, or the absence of frivolousness—is scant protection for the innocent.

III

The dissent points out that the catalyst theory has been accepted by "the clear majority of Federal Circuits," *ibid.* But our disagreeing with a "clear majority" of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts. See, *e. g.*, *McNally* v. *United States*, 483 U. S. 350, 365 (1987) (STEVENS, J., dissenting) (the Court's decision contradicted "[e]very court to consider" the question).

The dissent's insistence that we defer to the "clear majority" of Circuit opinion is particularly peculiar in the present case, since that majority has been nurtured and preserved *by our own misleading dicta* (to which I, unfortunately, contributed). Most of the Court of Appeals cases cited by the dissent, *post*, at 627, and n. 5, as reaffirming the catalyst theory after our decision in *Farrar* v. *Hobby*, 506 U. S. 103 (1992), relied on our earlier opinion in *Hewitt*. See *Marbley* v. *Bane*, 57 F. 3d 224, 234 (CA2 1995) (relying on *Hewitt* to support catalyst theory); *Payne* v. *Board of Ed.*, 88 F. 3d 392, 397 (CA6 1996) (same); *Baumgartner* v. *Harrisburg Housing Auth.*, 21 F. 3d 541, 548 (CA3 1994) (explicitly rejecting *Farrar* in favor of *Hewitt*); *Zinn* v. *Shalala*, 35 F. 3d 273, 274–276 (CA7 1994) (same); *Beard* v. *Teska*, 31 F. 3d 942, 950–952 (CA10 1994) (same); *Morris* v. *West Palm Beach*, 194 F. 3d 1203, 1207 (CA11 1999) (same). Deferring to our colleagues' own error is bad enough; but enshrining the error that we ourselves have improvidently suggested and blaming it on the near-unanimous judgment of our colleagues would surely be unworthy.[5] Informing the Courts of Ap-

[5] That a few cases adopting the catalyst theory predate *Hewitt* v. *Helms*, 482 U. S. 755 (1987), see *post*, at 625–626, and n. 4, is irrelevant to my point. Absent our dicta in *Hewitt*, and in light of everything else we have said on this topic, see *ante*, at 603–604, it is unlikely that the catalyst theory would have achieved that universality of acceptance by the Courts of Appeals upon which the dissent relies.

peals that our ill-considered dicta have misled them displays, it seems to me, not "disrespect," but a most becoming (and well-deserved) humility.

* * *

The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U. S. C. §§ 1988, 3613(c)(2) (1994 ed. and Supp. V), unless there has been an enforceable "alteration of the legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning. Congress is free, of course, to revise these provisions—but it is my guess that if it does so it will not create the sort of inequity that the catalyst theory invites, but will require the court to determine that there was at least a substantial likelihood that the party requesting fees would have prevailed.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

The Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not "prevail," and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. A court-approved settlement will do.

The Court's insistence that there be a document filed in court—a litigated judgment or court-endorsed settlement—upsets long-prevailing Circuit precedent applicable to scores of federal fee-shifting statutes. The decision allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. Concomitantly, the Court's constricted

definition of "prevailing party," and consequent rejection of the "catalyst theory," impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.

In my view, the "catalyst rule," as applied by the clear majority of Federal Circuits, is a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights. Nothing in history, precedent, or plain English warrants the anemic construction of the term "prevailing party" the Court today imposes.

I

Petitioner Buckhannon Board and Care Home, Inc. (Buckhannon), operates residential care homes for elderly persons who need assisted living, but not nursing services. Among Buckhannon's residents in October 1996 was 102-year-old Dorsey Pierce. Pierce had resided at Buckhannon for some four years. Her daughter lived nearby, and the care provided at Buckhannon met Pierce's needs. Until 1998, West Virginia had a "self-preservation" rule prohibiting homes like Buckhannon from accommodating persons unable to exit the premises without assistance in the event of a fire. Pierce and two other Buckhannon residents could not get to a fire exit without aid. Informed of these residents' limitations, West Virginia officials proceeded against Buckhannon for noncompliance with the self-preservation rule. On October 18, 1996, three orders issued, each commanding Buckhannon to "cease operating . . . and to effect relocation of [its] existing population within thirty (30) days." App. 46–53.

Ten days later, Buckhannon and Pierce, together with an organization of residential homes and another Buckhannon resident (hereinafter plaintiffs), commenced litigation in Federal District Court to overturn the cease-and-desist orders and the self-preservation rule on which they rested. They sued the State, state agencies, and 18 officials (hereinafter defendants) alleging that the rule discriminated

against persons with disabilities in violation of the Fair Housing Amendments Act of 1988 (FHAA), 42 U. S. C. § 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12101 *et seq.* Plaintiffs sought an immediate order stopping defendants from closing Buckhannon's facilities, injunctive relief permanently barring enforcement of the self-preservation requirement, damages, and attorney's fees.

On November 1, 1996, at a hearing on plaintiffs' request for a temporary restraining order, defendants agreed to the entry of an interim order allowing Buckhannon to remain open without changing the individual plaintiffs' housing and care. Discovery followed. On January 2, 1998, facing the state defendants' sovereign immunity pleas, plaintiffs stipulated to dismissal of their demands for damages. In February 1998, in response to defendants' motion to dispose of the remainder of the case summarily, the District Court determined that plaintiffs had presented triable claims under the FHAA and ADA.

Less than a month after the District Court found that plaintiffs were entitled to a trial, the West Virginia Legislature repealed the self-preservation rule. Plaintiffs still allege, and seek to prove, that their suit triggered the statutory repeal. After the rule's demise, defendants moved to dismiss the case as moot, and plaintiffs sought attorney's fees as "prevailing parties" under the FHAA, 42 U. S. C. § 3613(c)(2), and the ADA, 42 U. S. C. § 12205.[1]

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[1] The FHAA provides: "In a civil action . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs." 42 U. S. C. § 3613(c)(2). Similarly, the ADA provides: "In any action . . . , the court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs . . . ." 42 U. S. C. § 12205. These ADA and FHAA provisions are modeled on other "prevailing party" statutes, notably the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (1994 ed. and Supp. V). See H. R. Rep. No. 101–485, pt. 2, p. 140 (1991) (ADA); H. R. Rep. No. 100–711, pp. 16–17, n. 20 (1988) (FHAA). Section 1988 was "patterned upon the

Finding no likelihood that West Virginia would reenact the self-preservation rule, the District Court agreed that the State's action had rendered the case moot. Turning to plaintiffs' application for attorney's fees, the District Court followed Fourth Circuit precedent requiring the denial of fees unless termination of the action was accompanied by a judgment, consent decree, or settlement.[2] Plaintiffs did not appeal the mootness determination, and the Fourth Circuit affirmed the denial of attorney's fees. In sum, plaintiffs were denied fees not because they failed to achieve the relief they sought. On the contrary, they gained the very change they sought through their lawsuit when West Virginia repealed the self-preservation rule that would have stopped Buckhannon from caring for people like Dorsey Pierce.[3]

Prior to 1994, every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue) concluded that plaintiffs in situations like Buckhannon's and

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attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a–3(b) and 2000e–5(k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U. S. C. § 1973*l*(e)." *Hensley* v. *Eckerhart*, 461 U. S. 424, 433, n. 7 (1983) (citing *Hanrahan* v. *Hampton*, 446 U. S. 754, 758, n. 4 (1980) *(per curiam)*). In accord with congressional intent, we have interpreted these fee-shifting provisions consistently across statutes. The Court so observes. See *ante*, at 603, n. 4. Notably, the statutes do not mandate fees, but provide for their award "in [the court's] discretion."

[2] On plaintiffs' motion, the District Court sanctioned defendants under Federal Rule of Civil Procedure 11 for failing timely to notify plaintiffs "that the proposed [repeal of the self-preservation rule] was progressing successfully at several stages . . . during the pendency of [the] litigation." App. 144. In their Rule 11 motion, plaintiffs requested fees and costs totaling $62,459 to cover the expense of litigating after defendants became aware, but did not disclose, that elimination of the rule was likely. In the alternative, plaintiffs sought $3,252 to offset fees and expenses incurred in litigating the Rule 11 motion. The District Court, stating that "the primary purpose of Rule 11 is to deter and not to compensate," awarded the smaller sum. App. 147.

[3] Pierce remained a Buckhannon resident until her death on January 3, 1999.

Pierce's could obtain a fee award if their suit acted as a "catalyst" for the change they sought, even if they did not obtain a judgment or consent decree.[4] The Courts of Appeals found it "clear that a party may be considered to have prevailed even when the legal action stops short of final . . . judgment due to . . . intervening mootness." *Grano* v. *Barry*, 783 F. 2d 1104, 1108 (CADC 1986). Interpreting the term "prevailing party" in "a practical sense," *Stewart* v. *Hannon*, 675 F. 2d 846, 851 (CA7 1982) (citation omitted), federal courts across the country held that a party "prevails" for fee-shifting purposes when "its ends are accomplished as a result of the litigation," *Associated Builders & Contractors* v. *Orleans Parish School Bd.*, 919 F. 2d 374, 378 (CA5 1990) (citation and internal quotation marks omitted).

In 1994, the Fourth Circuit en banc, dividing 6-to-5, broke ranks with its sister courts. The court declared that, in light of *Farrar* v. *Hobby*, 506 U. S. 103 (1992), a plaintiff could

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[4] *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279–281 (CA1 1978); *Gerena-Valentin* v. *Koch*, 739 F. 2d 755, 758–759 (CA2 1984); *Institutionalized Juveniles* v. *Secretary of Pub. Welfare*, 758 F. 2d 897, 910–917 (CA3 1985); *Bonnes* v. *Long*, 599 F. 2d 1316, 1319 (CA4 1979); *Robinson* v. *Kimbrough*, 652 F. 2d 458, 465–467 (CA5 1981); *Citizens Against Tax Waste* v. *Westerville City School Dist. Bd. of Ed.*, 985 F. 2d 255, 257–258 (CA6 1993); *Stewart* v. *Hannon*, 675 F. 2d 846, 851 (CA7 1982); *Williams* v. *Miller*, 620 F. 2d 199, 202 (CA8 1980); *American Constitutional Party* v. *Munro*, 650 F. 2d 184, 187–188 (CA9 1981); *J & J Anderson, Inc.* v. *Erie*, 767 F. 2d 1469, 1474–1475 (CA10 1985); *Doe* v. *Busbee*, 684 F. 2d 1375, 1379 (CA11 1982); *Grano* v. *Barry*, 783 F. 2d 1104, 1108–1110 (CADC 1986). All *twelve* of these decisions antedate *Hewitt* v. *Helms*, 482 U. S. 755 (1987). But cf. *ante*, at 621, and n. 5 (SCALIA, J., concurring) (maintaining that this Court's decision in *Hewitt* "improvidently suggested" the catalyst rule, and asserting that only "a few cases adopting the catalyst theory predate *Hewitt*"). *Hewitt* said it was "settled law" that when a lawsuit prompts a defendant's "voluntary action . . . that redresses the plaintiff's grievances," the plaintiff "is deemed to have prevailed despite the absence of a formal judgment in his favor." 482 U. S., at 760–761. That statement accurately conveyed the unanimous view then held by the Federal Circuits.

not become a "prevailing party" without "an enforceable judgment, consent decree, or settlement." *S–1 and S–2* v. *State Bd. of Ed. of N. C.*, 21 F. 3d 49, 51 (1994). As the Court today acknowledges, see *ante*, at 603, n. 5, and as we have previously observed, the language on which the Fourth Circuit relied was dictum: *Farrar* "involved no catalytic effect"; the issue plainly "was not presented for this Court's decision in *Farrar*." *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 194 (2000).

After the Fourth Circuit's en banc ruling, nine Courts of Appeals reaffirmed their own consistently held interpretation of the term "prevail."[5] On this predominant view, "[s]ecuring an enforceable decree or agreement may evidence prevailing party status, but the judgment or agreement simply embodies and enforces what is sought in bringing the lawsuit . . . . Victory can be achieved well short of a final judgment (or its equivalent) . . . . " *Marbley* v. *Bane*, 57 F. 3d 224, 234 (CA2 1995) (Jacobs, J.).

The array of federal-court decisions applying the catalyst rule suggested three conditions necessary to a party's qualification as "prevailing" short of a favorable final judgment or consent decree. A plaintiff first had to show that the defendant provided "some of the benefit sought" by the lawsuit. *Wheeler* v. *Towanda Area School Dist.*, 950 F. 2d 128, 131 (CA3 1991). Under most Circuits' precedents, a plaintiff had to demonstrate as well that the suit stated a genuine claim, *i. e.*, one that was at least "colorable," not "frivolous, unreasonable, or groundless." *Grano*, 783 F. 2d, at 1110 (internal

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[5] *Stanton* v. *Southern Berkshire Regional School Dist.*, 197 F. 3d 574, 577, n. 2 (CA1 1999); *Marbley* v. *Bane*, 57 F. 3d 224, 234 (CA2 1995); *Baumgartner* v. *Harrisburg Housing Auth.*, 21 F. 3d 541, 546–550 (CA3 1994); *Payne* v. *Board of Ed.*, 88 F. 3d 392, 397 (CA6 1996); *Zinn* v. *Shalala*, 35 F. 3d 273, 276 (CA7 1994); *Little Rock School Dist.* v. *Pulaski Cty. School Dist., #1*, 17 F. 3d 260, 263, n. 2 (CA8 1994); *Kilgour* v. *Pasadena*, 53 F. 3d 1007, 1010 (CA9 1995); *Beard* v. *Teska*, 31 F. 3d 942, 951–952 (CA10 1994); *Morris* v. *West Palm Beach*, 194 F. 3d 1203, 1207 (CA11 1999).

quotation marks and citation omitted). Plaintiff finally had to establish that her suit was a "substantial" or "significant" cause of defendant's action providing relief. *Williams* v. *Leatherbury*, 672 F. 2d 549, 551 (CA5 1982). In some Circuits, to make this causation showing, plaintiff had to satisfy the trial court that the suit achieved results "by threat of victory," not "by dint of nuisance and threat of expense." *Marbley*, 57 F. 3d, at 234–235; see also *Hooper* v. *Demco, Inc.*, 37 F. 3d 287, 293 (CA7 1994) (to render plaintiff "prevailing party," suit "must have prompted the defendant . . . to act or cease its behavior based on the strength of the case, not 'wholly gratuitously' "). One who crossed these three thresholds would be recognized as a "prevailing party" to whom the district court, "in its discretion," *supra*, at 624–625, n. 1, could award attorney's fees.

Developed over decades and in legions of federal-court decisions, the catalyst rule and these implementing standards deserve this Court's respect and approbation.

II

A

The Court today detects a "clear meaning" of the term prevailing party, *ante*, at 610, that has heretofore eluded the large majority of courts construing those words. "Prevailing party," today's opinion announces, means "one who has been awarded some relief by the court," *ante*, at 603. The Court derives this "clear meaning" principally from Black's Law Dictionary, which defines a "prevailing party," in critical part, as one "in whose favor a judgment is rendered," *ibid.* (quoting Black's Law Dictionary 1145 (7th ed. 1999)).

One can entirely agree with Black's Law Dictionary that a party "in whose favor a judgment is rendered" prevails, and at the same time resist, as most Courts of Appeals have, any implication that *only* such a party may prevail. In prior cases, we have not treated Black's Law Dictionary as preclu-

sively definitive; instead, we have accorded statutory terms, including legal "term[s] of art," *ante*, at 603 (opinion of the Court); *ante*, at 616 (SCALIA, J., concurring), a contextual reading. See, *e. g.*, *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380, 395–396, n. 14 (1993) (defining "excusable neglect," as used in Federal Rule of Bankruptcy Procedure 9006(b)(1), more broadly than Black's defines that term); *United States* v. *Rodgers*, 466 U. S. 475, 479–480 (1984) (adopting "natural, nontechnical" definition of word "jurisdiction," as that term is used in 18 U. S. C. § 1001, and declining to confine definition to "narrower, more technical meanings," citing Black's). Notably, this Court did not refer to Black's Law Dictionary in *Maher* v. *Gagne*, 448 U. S. 122 (1980), which held that a consent decree could qualify a plaintiff as "prevailing." The Court explained:

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of [42 U. S. C.] § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.*, at 129.

The spare "prevailing party" language of the fee-shifting provision applicable in *Maher*, and the similar wording of the fee-shifting provisions now before the Court, contrast with prescriptions that so tightly bind fees to judgments as to exclude the application of a catalyst concept. The Prison Litigation Reform Act of 1995, for example, directs that fee awards to prisoners under § 1988 be "proportionately related to the *court ordered relief* for the violation." 110 Stat. 1321–72, as amended, 42 U. S. C. § 1997e(d)(1)(B)(i) (1994 ed., Supp. V) (emphasis added). That statute, by its express terms, forecloses an award to a prisoner on a catalyst theory. But the FHAA and ADA fee-shifting prescriptions, modeled

on 42 U. S. C. § 1988 unmodified, see *supra*, at 624–625, n. 1, do not similarly staple fee awards to "court ordered relief." Their very terms do not foreclose a catalyst theory.

B

It is altogether true, as the concurring opinion points out, *ante*, at 610–611, that litigation costs other than attorney's fees traditionally have been allowed to the "prevailing party," and that a judgment winner ordinarily fits that description. It is not true, however, that precedent on costs calls for the judgment requirement the Court ironly adopts today for attorney's fees. Indeed, the first decision cited in the concurring opinion, *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884), see *ante*, at 611, tugs against the restrictive rule today's decision installs.

In *Mansfield*, plaintiffs commenced a contract action in state court. Over plaintiffs' objections, defendants successfully removed the suit to federal court. Plaintiffs prevailed on the merits there, and defendants obtained review here. See 111 U. S., at 380–381. This Court determined, on its own motion, that federal subject-matter jurisdiction was absent from the start. Based on that determination, the Court reversed the lower court's judgment for plaintiffs. Worse than entering and leaving this Courthouse equally "empty-handed," *ante*, at 614 (concurring opinion), the plaintiffs in *Mansfield* were stripped of the judgment they had won, including the "judicial finding . . . of the merits" in their favor, *ante*, at 613 (concurring opinion). The *Mansfield* plaintiffs did, however, achieve this small consolation: The Court awarded them costs here as well as below. Recognizing that defendants had "prevail[ed]" in a "formal and nominal sense," the *Mansfield* Court nonetheless concluded that "[i]n a true and proper sense" defendants were "the losing and not the prevailing party." 111 U. S., at 388.

While *Mansfield* casts doubt on the present majority's "formal and nominal" approach, that decision does not con-

sider whether costs would be in order for the plaintiff who obtains substantial relief, but no final judgment. Nor does "*a single case*" on which the concurring opinion today relies, *ante*, at 613 (emphasis in original).[6] There are, however, enlightening analogies. In multiple instances, state high courts have regarded plaintiffs as prevailing, for costs taxation purposes, when defendants' voluntary conduct, mooting the suit, provided the relief that plaintiffs sought.[7] The con-

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[6] *The Baltimore*, 8 Wall. 377 (1869), featured in the concurring opinion, see *ante*, at 611, does not run the distance to which that opinion would take it. In *The Baltimore*, there was a judgment in one party's favor. See 8 Wall., at 384. The Court did not address the question whether costs are available absent such a judgment. *The Baltimore*'s "incident to the judgment" language, which the concurrence emphasizes, *ante*, at 611 (citing 8 Wall., at 388, 390), likely related to the once-maintained rule that a court without jurisdiction may not award costs. See *Mayor* v. *Cooper*, 6 Wall. 247, 250–251 (1868). That ancient rule figured some years later in *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884); the Court noted the "universally recognized rule of the common law" that, absent jurisdiction, a "court can render no judgment for or against either party, [and therefore] cannot render a judgment even for costs." *Id.*, at 387. Receding from that rule, the Court awarded costs, even upon dismissal for lack of jurisdiction, because "there is a judgment or final order in the cause dismissing it for want of jurisdiction." *Ibid.*; see *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 21 (1994).

[7] See, *e. g.*, *Board of Ed. of Madison Cty.* v. *Fowler*, 192 Ga. 35, 36, 14 S. E. 2d 478, 479 (1941) (mandamus action dismissed as moot, but costs awarded to plaintiffs where "the purposes of the mandamus petition were accomplished by the subsequent acts of the defendants, thus obviating the necessity for further proceeding"); *Baldwin* v. *Chesapeake & Potomac Tel. Co.*, 156 Md. 552, 557, 144 A. 703, 705 (1929) (costs awarded to plaintiff after trial court granted defendant's demurrer and plaintiff's appeal was dismissed "based on an act of [defendant] performed after . . . entry of the appeal"; dismissal rendered "it unnecessary to inquire into the merits of the suit"); *Ficklen* v. *Danville*, 146 Va. 426, 438, 132 S. E. 705, 706 (1926) (costs on appeal awarded to plaintiffs, even though trial court denied injunctive relief and high court dismissed appeal due to mootness, because plaintiffs achieved the "equivalent to . . . 'substantially prevailing'" in "gain[ing] all they sought by the appeal"); cf. *Scatcherd* v. *Love*, 166 F. 53, 55, 56 (CA6 1908) (although "there was no judgment against the defendant

curring opinion labors unconvincingly to distinguish these state-law cases.[8] A similar federal practice has been observed in cases governed by Federal Rule of Civil Procedure 54(d), the default rule allowing costs "to the prevailing party unless the court otherwise directs." See 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2667, pp. 187–188 (2d ed. 1983) (When "the defendant alters its conduct so that plaintiff's claim [for injunctive relief] becomes moot before judgment is reached, costs may be allowed [under Rule 54(d)] if the court finds that the changes

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upon the merits," defendant "acknowledged its liability . . . by paying to the plaintiff the sum of $5,000," rendering plaintiff the "successful party" entitled to costs); *Talmage* v. *Monroe*, 119 P. 526 (Cal. App. 1911) (fees awarded to petitioner after court issued "alternative writ" directing respondent either to take specified action or to show cause for not doing so, and respondent chose to take the action).

[8] The concurrence urges that *Baldwin* is inapposite because it was an action "*in equity*," and equity courts could award costs as the equities required. *Ante*, at 612 (emphasis in original). The catalyst rule becomes relevant, however, only when a party seeks relief of a sort traditionally typed *equitable*, *i. e.*, a change of conduct, not damages. There is no such thing as an injunction *at law*, and therefore one cannot expect to find long-ago plaintiffs who quested after that mythical remedy and received voluntary relief. By the concurrence's reasoning, the paucity of precedent applying the catalyst rule to "prevailing parties" is an artifact of nothing more "remarkable," *ante*, at 614, than the historic law-equity separation.

The concurrence notes that the other cited cases "all involve a judicial finding—*or its equivalent, an acknowledgment by the defendant*—of the merits of plaintiff's case." *Ante*, at 613 (emphasis added). I agree. In *Fowler* and *Scatcherd*, however, the "acknowledgment" consisted of nothing more than the defendant's voluntary provision to the plaintiff of the relief that the plaintiff sought. See also, *e. g.*, *Jeffersonville R. R. Co.* v. *Weinman*, 39 Ind. 231 (1872) (costs awarded where defendant voluntarily paid damages; no admission or merits judgment); *Wagner* v. *Wagner*, 9 Pa. 214 (1848) (same); *Hudson* v. *Johnson*, 1 Va. 10 (1791) (same). Common-law courts thus regarded a defendant's voluntary compliance, by settlement or otherwise, as an "acknowledgment . . . of the merits" sufficient to warrant treatment of a plaintiff as prevailing. But cf. *ante*, at 604, n. 7 (opinion of the Court). One can only wonder why the concurring opinion would not follow the same practice today.

were the result, at least in part, of plaintiff's litigation.") (citing, *inter alia*, *Black Hills Alliance* v. *Regional Forester*, 526 F. Supp. 257 (SD 1981)).

In short, there is substantial support, both old and new, federal and state, for a costs award, "in [the court's] discretion," *supra*, at 625, n. 1, to the plaintiff whose suit prompts the defendant to provide the relief plaintiff seeks.

C

Recognizing that no practice set in stone, statute, rule, or precedent, see *infra*, at 643, dictates the proper construction of modern civil rights fee-shifting prescriptions, I would "assume . . . that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer*, 507 U. S., at 388 (defining "excusable neglect") (quoting *Perrin* v. *United States*, 444 U. S. 37, 42 (1979) (defining "bribery")); see also, *e. g.*, *Sutton* v. *United Air Lines, Inc.*, 527 U. S. 471, 491 (1999) (defining "substantially" in light of ordinary usage); *Rutledge* v. *United States*, 517 U. S. 292, 299–300, n. 10 (1996) (similarly defining "in concert"). In everyday use, "prevail" means "gain victory by virtue of strength or superiority: win mastery: triumph." Webster's Third New International Dictionary 1797 (1976). There are undoubtedly situations in which an individual's goal is to obtain approval of a judge, and in those situations, one cannot "prevail" short of a judge's formal declaration. In a piano competition or a figure skating contest, for example, the person who prevails is the person declared winner by the judges. However, where the ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential. Western democracies, for instance, "prevailed" in the Cold War even though the Soviet Union never formally surrendered. Among television viewers, John F. Kennedy "prevailed" in the first debate with Richard M. Nixon during the 1960 Presidential contest, even though moderator Howard K. Smith

never declared a winner. See T. White, The Making of the President 1960, pp. 293–294 (1961).

A lawsuit's ultimate purpose is to achieve actual relief from an opponent. Favorable judgment may be instrumental in gaining that relief. Generally, however, "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant . . . ." *Hewitt* v. *Helms*, 482 U. S. 755, 761 (1987). On this common understanding, if a party reaches the "sought-after destination," then the party "prevails" regardless of the "route taken." *Hennigan* v. *Ouachita Parish School Bd.*, 749 F. 2d 1148, 1153 (CA5 1985).

Under a fair reading of the FHAA and ADA provisions in point, I would hold that a party "prevails" in "a true and proper sense," *Mansfield*, 111 U. S., at 388, when she achieves, by instituting litigation, the practical relief sought in her complaint. The Court misreads Congress, as I see it, by insisting that, invariably, relief must be displayed in a judgment, and correspondingly that a defendant's voluntary action never suffices. In this case, Buckhannon's purpose in suing West Virginia officials was not narrowly to obtain a judge's approbation. The plaintiffs' objective was to stop enforcement of a rule requiring Buckhannon to evict residents like centenarian Dorsey Pierce as the price of remaining in business. If Buckhannon achieved that objective on account of the strength of its case, see *supra*, at 628—if it succeeded in keeping its doors open while housing and caring for Ms. Pierce and others similarly situated—then Buckhannon is properly judged a party who prevailed.

III

As the Courts of Appeals have long recognized, the catalyst rule suitably advances Congress' endeavor to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal.

The catalyst rule stemmed from modern legislation extending civil rights protections and enforcement measures. The Civil Rights Act of 1964 included provisions for fee awards to "prevailing parties" in Title II (public accommodations), 42 U. S. C. § 2000a–3(b), and Title VII (employment), § 2000e–5(k), but not in Title VI (federal programs). The provisions' central purpose was "to promote vigorous enforcement" of the laws by private plaintiffs; although using the two-way term "prevailing party," Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 417, 421 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant may obtain fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation").

Once the 1964 Act came into force, courts commenced to award fees regularly under the statutory authorizations, and sometimes without such authorization. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 262, 270–271, n. 46 (1975). In *Alyeska*, this Court reaffirmed the "American Rule" that a court generally may not award attorney's fees without a legislative instruction to do so. See *id.*, at 269. To provide the authorization *Alyeska* required for fee awards under Title VI of the 1964 Civil Rights Act, as well as under Reconstruction Era civil rights legislation, 42 U. S. C. §§ 1981–1983, 1985, 1986 (1994 ed. and Supp. V), and certain other enactments, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (1994 ed. and Supp. V).

As explained in the Reports supporting § 1988, civil rights statutes vindicate public policies "of the highest priority," S. Rep. No. 94–1011, p. 3 (1976) (quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam)*), yet "depend heavily upon private enforcement," S. Rep. No. 94–1011, at 2. Persons who bring meritorious civil rights claims, in this light, serve as "private attorneys

general." *Id.*, at 5; H. R. Rep. No. 94–1558, p. 2 (1976). Such suitors, Congress recognized, often "cannot afford legal counsel." *Id.*, at 1. They therefore experience "severe hardshi[p]" under the "American Rule." *Id.*, at 2. Congress enacted § 1988 to ensure that nonaffluent plaintiffs would have "effective access" to the Nation's courts to enforce civil rights laws. *Id.*, at 1.[9] That objective accounts for the fee-shifting provisions before the Court in this case, prescriptions of the FHAA and the ADA modeled on § 1988. See *supra*, at 624–625, n. 1.

Under the catalyst rule that held sway until today, plaintiffs who obtained the relief they sought through suit on genuine claims ordinarily qualified as "prevailing parties," so that courts had discretion to award them their costs and fees. Persons with limited resources were not impelled to "wage total law" in order to assure that their counsel fees would be paid. They could accept relief, in money or of another kind, voluntarily proffered by a defendant who sought to avoid a recorded decree. And they could rely on a judge then to determine, in her equitable discretion, whether counsel fees were warranted and, if so, in what amount.[10]

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[9] See H. R. Rep. No. 94–1558, at 1 ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. . . . [This statute] is designed to give such persons effective access to the judicial process . . . ."); S. Rep. No. 94–1011, at 2 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."), quoted in part in *Kay* v. *Ehrler*, 499 U. S. 432, 436, n. 8 (1991). See also *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401–402 (1968) *(per curiam)* ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . [Congress] enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief . . . .").

[10] Given the protection furnished by the catalyst rule, aggrieved individuals were not left to worry, and wrongdoers were not led to believe, that

Congress appears to have envisioned that very prospect. The Senate Report on the 1976 Civil Rights Attorney's Fees Awards Act states: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief.*" S. Rep. No. 94–1011, at 5 (emphasis added). In support, the Report cites cases in which parties recovered fees in the absence of any court-conferred relief.[11]

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strategic maneuvers by defendants might succeed in averting a fee award. Cf. *ante*, at 608 (opinion of the Court). Apt here is Judge Friendly's observation construing a fee-shifting statute kin to the provisions before us: "Congress clearly did not mean that where [a Freedom of Information Act] suit had gone to trial and developments made it apparent that the judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information." *Vermont Low Income Advocacy Council* v. *Usery*, 546 F. 2d 509, 513 (CA2 1976) (interpreting 5 U. S. C. § 552(a)(4)(E), allowing a complainant who "substantially prevails" to earn an attorney's fee); accord, *Cuneo* v. *Rumsfeld*, 553 F. 2d 1360, 1364 (CADC 1977).

[11] See S. Rep. No. 94–1011, at 5 (citing *Kopet* v. *Esquire Realty Co.*, 523 F. 2d 1005, 1008–1009 (CA2 1975) (partner sued his firm for release of documents, firm released the documents, court awarded fees because of the release, even though the partner's claims were "dismissed for lack of subject matter jurisdiction"), and *Thomas* v. *Honeybrook Mines, Inc.*, 428 F. 2d 981, 984, 985 (CA3 1970) (union committee twice commenced suit for pension fund payments, suits prompted recovery, and court awarded fees even though the first suit had been dismissed and the second had not yet been adjudicated)).

The Court features a case cited by the House as well as the Senate in the Reports on § 1988, *Parham* v. *Southwestern Bell Tel. Co.*, 433 F. 2d 421 (CA8 1970). The Court deems *Parham* consistent with its rejection of the catalyst rule, alternately because the Eighth Circuit made a "finding that the defendant had acted unlawfully," and because that court ordered the District Court to " 'retain jurisdiction over the matter . . . to insure the continued implementation of the [defendant's] policy of equal employment opportunities.' " *Ante*, at 607, n. 9 (quoting 433 F. 2d, at 429). Congress did not fix on those factors, however: Nothing in either Report suggests that judicial findings or retention of jurisdiction is essential to an award of fees. The courts in *Kopet* and *Thomas* awarded fees based on claims as to which they neither made "a finding" nor "retain[ed] jurisdic-

The House Report corroborates: "[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. *A court should still award fees* even though it might conclude, as a matter of equity, that *no formal relief*, such as an injunction, is needed." H. R. Rep. No. 94–1558, at 7 (emphases added). These Reports, Courts of Appeals have observed, are hardly ambiguous. Compare *ante*, at 607–608 ("legislative history . . . is at best ambiguous"), with, *e. g.*, *Dunn* v. *The Florida Bar*, 889 F. 2d 1010, 1013 (CA11 1989) (legislative history "evinces a clear Congressional intent" to permit award "even when no formal judicial relief is obtained" (internal quotation marks omitted)); *Robinson* v. *Kimbrough*, 652 F. 2d 458, 465 (CA5 1981) (same); *American Constitutional Party* v. *Munro*, 650 F. 2d 184, 187 (CA9 1981) (Senate Report "directs" fee award under catalyst rule). Congress, I am convinced, understood that "'[v]ictory' in a civil rights suit is typically a practical, rather than a strictly legal matter." *Exeter-West Greenwich Regional School Dist.* v. *Pontarelli*, 788 F. 2d 47, 51 (CA1 1986) (citation omitted).

IV

The Court identifies several "policy arguments" that might warrant rejection of the catalyst rule. See *ante*, at 608–610. A defendant might refrain from altering its conduct, fearing liability for fees as the price of voluntary action. See *ante*, at 608. Moreover, rejection of the catalyst rule has limited impact: Desisting from the challenged conduct will not render a case moot where damages are sought, and even when the plaintiff seeks only equitable relief, a defendant's voluntary cessation of a challenged practice does not render the case moot "unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Ante*, at 609 (quoting *Friends of Earth, Inc.*, 528

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tion." (It nonetheless bears attention that, in line with the Court's description of *Parham*, a plaintiff could qualify as the "prevailing party" based on a finding or retention of jurisdiction.)

U. S., at 189). Because a mootness dismissal is not easily achieved, the defendant may be impelled to settle, negotiating fees less generous than a court might award. See *ante*, at 609. Finally, a catalyst rule would "require analysis of the defendant's subjective motivations," and thus protract the litigation. *Ibid.*

The Court declines to look beneath the surface of these arguments, placing its reliance, instead, on a meaning of "prevailing party" that other jurists would scarcely recognize as plain. See *ante*, at 603. Had the Court inspected the "policy arguments" listed in its opinion, I doubt it would have found them impressive.

In opposition to the argument that defendants will resist change in order to stave off an award of fees, one could urge that the catalyst rule may lead defendants promptly to comply with the law's requirements: the longer the litigation, the larger the fees. Indeed, one who knows noncompliance will be expensive might be encouraged to conform his conduct to the legal requirements before litigation is threatened. Cf. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 Vand. L. Rev. 1069, 1121 (1993) ("fee shifting in favor of prevailing plaintiffs enhances both incentives to comply with legal rules *and* incentives to settle disputes"). No doubt, a mootness dismissal is unlikely when recurrence of the controversy is under the defendant's control. But, as earlier observed, see *supra*, at 636, why should this Court's fee-shifting rulings drive a plaintiff prepared to accept adequate relief, though out-of-court and unrecorded, to litigate on and on? And if the catalyst rule leads defendants to negotiate not only settlement terms but also allied counsel fees, is that not a consummation to applaud, not deplore?

As to the burden on the court, is it not the norm for the judge to whom the case has been assigned to resolve fee disputes (deciding whether an award is in order, and if it is, the amount due), thereby clearing the case from the calendar? If factfinding becomes necessary under the catalyst

rule, is it not the sort that "the district courts, in their fact-finding expertise, deal with on a regular basis"? *Baumgartner* v. *Harrisburg Housing Auth.*, 21 F. 3d 541, 548 (CA3 1994). Might not one conclude overall, as Courts of Appeals have suggested, that the catalyst rule "saves judicial resources," *Paris* v. *Department of Housing and Urban Development*, 988 F. 2d 236, 240 (CA1 1993), by encouraging "plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought"? *Morris* v. *West Palm Beach*, 194 F. 3d 1203, 1207 (CA11 1999).

The concurring opinion adds another argument against the catalyst rule: That opinion sees the rule as accommodating the "extortionist" who obtains relief because of "greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit.*" *Ante*, at 617, 618 (emphasis in original). This concern overlooks both the character of the rule and the judicial superintendence Congress ordered for all fee allowances. The catalyst rule was auxiliary to fee-shifting statutes whose primary purpose is "to promote the vigorous enforcement" of the civil rights laws. *Christiansburg Garment Co.*, 434 U. S., at 422. To that end, courts deemed the conduct-altering catalyst that counted to be the substance of the case, not merely the plaintiff's atypically superior financial resources, media ties, or political clout. See *supra*, at 628. And Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise "discretion." See *supra*, at 624–625, n. 1. So viewed, the catalyst rule provided no berth for nuisance suits, see *Hooper*, 37 F. 3d, at 292, or "thinly disguised forms of extortion," *Tyler* v. *Corner Constr. Corp.*, 167 F. 3d 1202, 1206 (CA8 1999) (citation omitted).[12]

[12] The concurring opinion notes, correctly, that "[t]here *must* be a cutoff of seemingly equivalent entitlements to fees—either the failure to file suit in time or the failure to obtain a judgment in time." *Ante*, at 620 (empha-

V

As to our attorney's fee precedents, the Court correctly observes, "[w]e have never had occasion to decide whether the term 'prevailing party' allows an award of fees under the 'catalyst theory,'" and "there is language in our cases supporting both petitioners and respondents." *Ante*, at 603, n. 5. It bears emphasis, however, that in determining whether fee shifting is in order, the Court in the past has placed greatest weight not on any "judicial *imprimatur*," *ante*, at 605, but on the practical impact of the lawsuit.[13] In *Maher* v. *Gagne*, 448 U. S. 122 (1980), in which the Court held fees could be awarded on the basis of a consent decree, the opinion nowhere relied on the presence of a formal judgment. See *supra*, at 629; *infra*, at 642–643, n. 14. Some years

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sis in original). The former cutoff, the Court has held, is impelled both by "plain language" requiring a legal "action" or "proceeding" antecedent to a fee award, and by "legislative history . . . replete with references to [enforcement] 'in suits,' 'through the courts' and by 'judicial process.'" *North Carolina Dept. of Transp.* v. *Crest Street Community Council, Inc.*, 479 U. S. 6, 12 (1986) (citations omitted). The latter cutoff, requiring "a judgment in time," is not similarly impelled by text or legislative history.

The concurring opinion also states that a prevailing party must obtain relief "*in the lawsuit.*" *Ante*, at 615, 618. One can demur to that elaboration of the statutory text and still adhere to the catalyst rule. Under the rule, plaintiff's suit raising genuine issues must trigger defendant's voluntary action; plaintiff will not prevail under the rule if defendant "ceases . . . [his] offensive conduct" by dying or going bankrupt. See *ante*, at 615. A behavior-altering event like dying or bankruptcy occurs outside the lawsuit; a change precipitated by the lawsuit's claims and demand for relief is an occurrence brought about "through" or "in" the suit.

[13] To qualify for fees in any case, we have held, relief must be real. See *Rhodes* v. *Stewart*, 488 U. S. 1, 4 (1988) *(per curiam)* (a plaintiff who obtains a formal declaratory judgment, but gains no real "relief whatsoever," is not a "prevailing party" eligible for fees); *Hewitt* v. *Helms*, 482 U. S., at 761 (an interlocutory decision reversing a dismissal for failure to state a claim, although stating that plaintiff's rights were violated, does not entitle plaintiff to fees; to "prevail," plaintiff must gain relief of "substance," *i. e.*, more than a favorable "judicial statement that does not affect the relationship between the plaintiff and the defendant").

later, in *Hewitt* v. *Helms*, 482 U. S. 755 (1987), the Court suggested that fees might be awarded the plaintiff who "obtain[ed] relief without [the] benefit of a formal judgment." *Id.*, at 760. The Court explained: "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced," or "if the defendant, under pressure of [a suit for declaratory judgment], alters his conduct (or threatened conduct) towards the plaintiff," *i. e.*, conduct "that was the basis for the suit, the plaintiff will have prevailed." *Id.*, at 761. I agree, and would apply that analysis to this case.

The Court posits a "'merit' requirement of our prior cases." *Ante*, at 606. *Maher*, however, affirmed an award of attorney's fees based on a consent decree that "did not purport to adjudicate [plaintiff's] statutory or constitutional claims." 448 U. S., at 126, n. 8. The decree in *Maher* "explicitly stated that 'nothing [therein was] intended to constitute an admission of fault by either party.'" *Ibid.* The catalyst rule, in short, conflicts with none of "our prior *holdings*," *ante*, at 605.[14]

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[14] The Court repeatedly quotes passages from *Hanrahan* v. *Hampton*, 446 U. S., at 757–758, stating that to "prevail," plaintiffs must receive relief "on the merits." *Ante*, at 603, 604, 608. Nothing in *Hanrahan*, however, declares that relief "on the merits" requires a "judicial *imprimatur*." *Ante*, at 605. As the Court acknowledges, *Hanrahan* concerned an interim award of fees, after plaintiff succeeded in obtaining nothing more than reversal of a directed verdict. See *ante*, at 605. At that juncture, plaintiff had obtained no change in defendant's behavior, and the suit's ultimate winner remained undetermined. There is simply no inconsistency between *Hanrahan*, denying fees when a plaintiff might yet obtain no real benefit, and the catalyst rule, allowing fees when a plaintiff obtains the practical result she sought in suing. Indeed, the harmony between the catalyst rule and *Hanrahan* is suggested by *Hanrahan* itself; like *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980), *Hanrahan* quoted the Senate Report recognizing that parties may prevail "through a consent judgment *or* without formally obtaining relief." 446 U. S., at 757 (quoting S. Rep. No. 94–1011, at 5) (emphasis added). *Hanrahan* also selected for citation

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The Court states that the term "prevailing party" in fee-shifting statutes has an "accepted meaning." *Ante*, at 608. If that is so, the "accepted meaning" is not the one the Court today announces. It is, instead, the meaning accepted by every Court of Appeals to address the catalyst issue before our 1987 decision in *Hewitt*, see *supra*, at 626, n. 4, and disavowed since then only by the Fourth Circuit, see *supra*, at 627, n. 5. A plaintiff prevails, federal judges have overwhelmingly agreed, when a litigated judgment, consent decree, out-of-court settlement, or the defendant's voluntary, postcomplaint payment or change in conduct in fact affords redress for the plaintiff's substantial grievances.

When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a co-

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the influential elaboration of the catalyst rule in *Nadeau* v. *Helgemoe*, 581 F. 2d, at 279–281. See 446 U. S., at 757.

The Court additionally cites *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), which held, unanimously, that a plaintiff could become a "prevailing party" without obtaining relief on the "central issue in the suit." *Id.*, at 790. *Texas State Teachers* linked fee awards to a "material alteration of the legal relationship of the parties," *id.*, at 792–793, but did not say, as the Court does today, that the change must be "court-ordered," *ante*, at 604. The parties' legal relationship does change when the defendant stops engaging in the conduct that furnishes the basis for plaintiff's civil action, and that action, which both parties would otherwise have litigated, is dismissed.

The decision with language most unfavorable to the catalyst rule, *Farrar* v. *Hobby*, 506 U. S. 103 (1992), does not figure prominently in the Court's opinion—and for good reason, for *Farrar* "involved no catalytic effect." See *ante*, at 603, n. 5 (quoting *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 194 (2000) (internal quotation marks omitted)); *supra*, at 627. *Farrar* held that a plaintiff who sought damages of $17 million, but received damages of $1, was a "prevailing party" nonetheless not entitled to fees. 506 U. S., at 113–116. In reinforcing the link between the right to a fee award and the "degree of success obtained," *id.*, at 114 (quoting *Hensley* v. *Eckerhart*, 461 U. S., at 436), *Farrar*'s *holding* is consistent with the catalyst rule.

gent explanation. Today's decision does not provide one. The Court's narrow construction of the words "prevailing party" is unsupported by precedent and unaided by history or logic. Congress prescribed fee-shifting provisions like those included in the FHAA and ADA to encourage private enforcement of laws designed to advance civil rights. Fidelity to that purpose calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure. I would so hold and therefore dissent from the judgment and opinion of the Court.

Syllabus

ATKINSON TRADING CO., INC. *v.* SHIRLEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00–454. Argued March 27, 2001—Decided May 29, 2001

In *Montana* v. *United States,* 450 U. S. 544, this Court held that, with two limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. Petitioner's trading post on such land within the Navajo Nation Reservation is subject to a hotel occupancy tax that the Tribe imposes on any hotel room located within the reservation's boundaries. The Federal District Court upheld the tax, and the Tenth Circuit affirmed. Relying in part on *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, the latter court complemented *Montana*'s framework with a case-by-case approach that balanced the land's non-Indian fee status with the Tribe's sovereign powers, its interests, and the impact that the exercise of its powers had on the nonmembers' interests. The court concluded that the tax fell under *Montana*'s first exception.

Held: The Navajo Nation's imposition of a hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation is invalid. Pp. 649–659.

(a) *Montana*'s general rule applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land. Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, tribes must rely upon their retained or inherent sovereignty. Their power over nonmembers on non-Indian fee land is sharply circumscribed. *Montana* noted only two exceptions: (1) a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health or welfare. 450 U. S., at 565–566. *Montana*'s rule applies to a tribe's regulatory authority, *id.,* at 566, and adjudicatory authority, *Strate* v. *A–1 Contractors,* 520 U. S. 438, 453. Citing *Merrion,* respondents submit that *Montana* and *Strate* do not restrict a tribe's power to impose revenue-raising taxes. However, because *Merrion* noted that a tribe's inherent taxing power only extended to transactions occurring on trust lands and involving the tribe or its members, 455 U. S., at 137, it is easily reconcilable with the *Montana-Strate* line of authority. A tribe's sovereign power to tax reaches no

further than tribal land. Thus, *Merrion* does not exempt taxation from *Montana*'s general rule, and *Montana* is applied straight up. Because Congress had not authorized the tax at issue through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, the Navajo Nation must establish the existence of one of *Montana*'s exceptions. Pp. 649–654.

(b) *Montana*'s exceptions do not obtain here. Neither petitioner nor its hotel guests have entered into a consensual relationship with the Navajo Nation justifying the tax's imposition. Such a relationship must stem from commercial dealing, contracts, leases, or other arrangements, *Montana*, *supra*, at 565, and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. Nor is petitioner's status as an "Indian trader" licensed by the Indian Affairs Commissioner sufficient by itself to support the tax's imposition. As to *Montana*'s second exception, petitioner's operation of a hotel on non-Indian fee land does not threaten or have a direct effect on the tribe's political integrity, economic security, or health or welfare. Contrary to respondents' argument, the judgment in *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 440, did not give Indian tribes broad authority over nonmembers where the acreage of non-Indian fee land is minuscule in relation to the surrounding tribal land. Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s second exception grants tribes nothing beyond what is necessary to protect tribal self-government or control internal relations. *Strate*, *supra*, at 459. Whatever effect petitioner's operation of its trading post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity. Pp. 654–659.

210 F. 3d 1247, reversed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. SOUTER, J., filed a concurring opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 659.

Charles G. Cole argued the cause for petitioner. With him on the briefs were *Shannen W. Coffin* and *William J. Darling*.

Marcelino R. Gomez argued the cause and filed a brief for respondents.

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Underwood*, *Acting Assistant*

Attorney General Cruden, *Deputy Solicitor General Kneedler*, *Edward C. DuMont*, *E. Ann Peterson*, and *William B. Lazarus*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Montana* v. *United States*, 450 U. S. 544 (1981), we held that, with limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation. The question with which we are presented is whether this general rule applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land. We hold that it does and that neither of *Montana*'s exceptions obtains here.

In 1916, Hubert Richardson, lured by the possibility of trading with wealthy Gray Mountain Navajo cattlemen, built the Cameron Trading Post just south of the Little Colorado River near Cameron, Arizona. G. Richardson, Navajo Trader 136–137 (1986). Richardson purchased the land

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*Briefs of *amici curiae* urging reversal were filed for the State of South Dakota et al. by *Mark W. Barnett*, Attorney General of South Dakota, and *John Patrick Guhin*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Ken Salazar* of Colorado, *Robert A. Butterworth* of Florida, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, and *Jan Graham* of Utah; for the Association of American Railroads by *Lynn H. Slade*, *Walter E. Stern*, and *William C. Scott;* for the Interstate Natural Gas Association of America by *Michael E. Webster* and *Neil G. Westesen;* for Proper Economic Resource Management, Inc., by *Randy V. Thompson;* and for Roberta Bugenig et al. by *James S. Burling*.

Briefs of *amici curiae* urging affirmance were filed for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation et al. by *William R. Perry* and *Arthur Lazarus, Jr.;* for the Colorado River Indian Tribes et al. by *Susan M. Williams;* for the Confederated Tribes of the Umatilla Indian Reservation et al. by *Michael L. Roy* and *Jeffrey D. Lerner;* and for the Shakopee Mdewakanton Sioux (Dakota) Community et al. by *Andrew M. Small* and *Steven F. Olson*.

directly from the United States, but the Navajo Nation Reservation, which had been established in 1868, see 15 Stat. 667, was later extended eight miles south so that the Cameron Trading Post fell within its exterior boundaries. See Act of June 14, 1934, ch. 521, 48 Stat. 960–962. This 1934 enlargement of the Navajo Reservation—which today stretches across northeast Arizona, northwest New Mexico, and southeast Utah—did not alter the status of the property: It is, like millions of acres throughout the United States, non-Indian fee land within a tribal reservation.

Richardson's "drafty, wooden store building and four small, one-room-shack cabins overlooking the bare river canyon," Richardson, *supra,* at 135, have since evolved into a business complex consisting of a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and recreational vehicle facility. The current owner, petitioner Atkinson Trading Company, Inc., benefits from the Cameron Trading Post's location near the intersection of Arizona Highway 64 (which leads west to the Grand Canyon) and United States Highway 89 (which connects Flagstaff on the south with Glen Canyon Dam to the north). A significant portion of petitioner's hotel business stems from tourists on their way to or from the Grand Canyon National Park.

In 1992, the Navajo Nation enacted a hotel occupancy tax, which imposes an 8 percent tax upon any hotel room located within the exterior boundaries of the Navajo Nation Reservation. See 24 Navajo Nation Code §§ 101–142 (1995), App. to Pet. for Cert. 102a–124a. Although the legal incidence of the tax falls directly upon the guests, the owner or operator of the hotel must collect and remit it to respondents, members of the Navajo Tax Commission. §§ 104, 107. The nonmember guests at the Cameron Trading Post pay approximately $84,000 in taxes to respondents annually.

Petitioner's challenge under *Montana* to the Navajo Nation's authority to impose the hotel occupancy tax was rejected by both the Navajo Tax Commission and the Navajo

Supreme Court. Petitioner then sought relief in the United States District Court for the District of New Mexico, which also upheld the tax. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. See 210 F. 3d 1247 (2000).

Although the Court of Appeals agreed with petitioner that our cases in this area "did make an issue of the fee status of the land in question," *id.*, at 1256, it nonetheless concluded that the status of the land as "fee land or tribal land is simply one of the factors a court should consider" when determining whether civil jurisdiction exists, *id.*, at 1258 (citing 18 U. S. C. § 1151). Relying in part upon our decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982), the court "complement[ed]" *Montana*'s framework with a "case-by-case approach" that balanced the non-Indian fee status of the land with "the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved." 210 F. 3d, at 1255, 1257, 1261. The Court of Appeals then likened the Navajo hotel occupancy tax to similar taxes imposed by New Mexico and Arizona, concluding that the tax fell under *Montana*'s first exception because a "consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the [tax]." 210 F. 3d, at 1263 (citing *Buster* v. *Wright*, 135 F. 947, 949 (CA8 1905)). The dissenting judge would have applied *Montana* without "any language or 'factors' derived from *Merrion*" and concluded that, based upon her view of the record, none of the *Montana* exceptions applied. 210 F. 3d, at 1269 (Briscoe, J., dissenting).

We granted certiorari, 531 U. S. 1009 (2000), and now reverse.

Tribal jurisdiction is limited: For powers not expressly conferred upon them by federal statute or treaty, Indian tribes

must rely upon their retained or inherent sovereignty. In *Montana*, the most exhaustively reasoned of our modern cases addressing this latter authority, we observed that Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed. At issue in *Montana* was the Crow Tribe's attempt to regulate nonmember fishing and hunting on non-Indian fee land within the reservation. Although we "readily agree[d]" that the 1868 Fort Laramie Treaty authorized the Crow Tribe to prohibit nonmembers from hunting or fishing on tribal land, 450 U. S., at 557, we held that such "power cannot apply to lands held in fee by non-Indians." *Id.*, at 559. This delineation of members and nonmembers, tribal land and non-Indian fee land, stemmed from the dependent nature of tribal sovereignty. Surveying our cases in this area dating back to 1810, see *Fletcher* v. *Peck*, 6 Cranch 87, 147 (1810) (Johnson, J., concurring) (stating that Indian tribes have lost any "right of governing every person within their limits except themselves"), we noted that "through their original incorporation into the United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty." 450 U. S., at 563.[1] We concluded that the inherent sovereignty of Indian tribes was limited to "their members and their territory": "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal rela-

[1] We also noted that nearly 90 million acres of non-Indian fee land had been acquired as part of the Indian General Allotment Act, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*, which authorized the issuance of patents in fee to individual Indian allottees who, after holding the patent for 25 years, could then transfer the land to non-Indians. Although Congress repudiated the practice of allotment in the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, we nonetheless found significant that Congress equated alienation "with the dissolution of tribal affairs and jurisdiction." *Montana*, 450 U. S., at 559, n. 9. We thus concluded that it "defie[d] common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction." *Ibid.*

tions is inconsistent with the dependent status of the tribes." *Id.*, at 564 (citing *United States* v. *Wheeler*, 435 U. S. 313, 326 (1978) ("[T]he dependent status of Indian tribes . . . is necessarily inconsistent with their freedom to determine their external relations" (emphasis deleted))).

Although we extracted from our precedents "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U. S., at 565, we nonetheless noted in *Montana* two possible bases for tribal jurisdiction over non-Indian fee land. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Ibid.* Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 566. Applying these precepts, we found that the nonmembers at issue there had not subjected themselves to "tribal civil jurisdiction" through any agreements or dealings with the Tribe and that hunting and fishing on non-Indian fee land did not "imperil the subsistence or welfare of the Tribe." *Ibid.* We therefore held that the Crow Tribe's regulations could not be enforced.

The framework set forth in *Montana* "broadly addressed the concept of 'inherent sovereignty.'" *Strate* v. *A–1 Contractors*, 520 U. S. 438, 453 (1997) (quoting *Montana*, *supra*, at 563). In *Strate*, we dealt with the Three Affiliated Tribes' assertion of judicial jurisdiction over an automobile accident involving two nonmembers traveling on a state highway within the reservation. Although we did not question the ability of tribal police to patrol the highway, see 520 U. S., at 456, n. 11, we likened the public right-of-way to non-Indian fee land because the Tribes lacked the power to

"assert a landowner's right to occupy and exclude," *id.*, at 456. Recognizing that *Montana* "immediately involved regulatory authority,"[2] we nonetheless concluded that its reasoning had "delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" 520 U. S., at 453 (quoting *Montana*, *supra*, at 565). We accordingly held that *Montana* governed tribal assertions of adjudicatory authority over non-Indian fee land within a reservation. See 520 U. S., at 453 ("Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the *civil authority* of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe'" (emphasis added) (quoting *Montana*, *supra*, at 565)).

Citing our decision in *Merrion*, respondents submit that *Montana* and *Strate* do not restrict an Indian tribe's power to impose revenue-raising taxes.[3] In *Merrion*, just one year after our decision in *Montana*, we upheld a severance tax imposed by the Jicarilla Apache Tribe upon non-Indian lessees authorized to extract oil and gas from tribal land. In so doing, we noted that the power to tax derives not solely from an Indian tribe's power to exclude non-Indians from tribal land, but also from an Indian tribe's "general authority, as sovereign, to control economic activity within its jurisdiction." 455 U. S., at 137. Such authority, we held, was incident to the benefits conferred upon nonmembers: "They benefit from the provision of police protection and other governmental services, as well as from '"the advantages of a civilized society"' that are assured by the existence of tribal

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[2] See also *South Dakota* v. *Bourland*, 508 U. S. 679 (1993); *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408 (1989).

[3] Respondents concede that regulatory taxes fall under the *Montana* framework. See 450 U. S., at 565 ("A tribe may regulate, through taxation, . . . the activities of nonmembers").

government." *Id.*, at 137–138 (quoting *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 228 (1980)).

Merrion, however, was careful to note that an Indian tribe's inherent power to tax only extended to "'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" 455 U. S., at 137 (emphasis added) (quoting *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 152 (1980)). There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above.[4] But *Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling. See *Merrion*, *supra*, at 142 ("[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land.[5]

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[4] *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982), for example, referenced the decision of the Court of Appeals for the Eighth Circuit in *Buster* v. *Wright*, 135 F. 947 (1905). But we have never endorsed *Buster*'s statement that an Indian tribe's "jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Id.*, at 951. Accordingly, beyond any guidance it might provide as to the type of consensual relationship contemplated by the first exception of *Montana* v. *United States*, 450 U. S. 544, 566 (1981), *Buster* is not an authoritative precedent.

[5] We find misplaced the Court of Appeals' reliance upon 18 U. S. C. § 1151, a statute conferring upon Indian tribes jurisdiction over certain criminal acts occurring in "Indian country," or "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." See also *Duro* v. *Reina*, 495 U. S. 676, 680, n. 1 (1990). Although § 1151 has been relied upon to demarcate state, federal, and tribal jurisdiction over criminal and civil matters, see *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 427, n. 2 (1975) ("While § 1151 is concerned, on its face, only

We therefore do not read *Merrion* to exempt taxation from *Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land. Accordingly, as in *Strate*, we apply *Montana* straight up. Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions.

Respondents argue that both petitioner and its hotel guests have entered into a consensual relationship with the Navajo Nation justifying the imposition of the hotel occupancy tax.[6] Echoing the reasoning of the Court of Appeals, respondents note that the Cameron Trading Post benefits from the numerous services provided by the Navajo Nation. The record reflects that the Arizona State Police and the Navajo Tribal Police patrol the portions of United States

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with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction [citing cases]"), we do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land.

At least in the context of non-Indian fee land, we also find inapt the Court of Appeals' analogy to state taxing authority. Our reference in *Merrion* to a State's ability to tax activities with which it has a substantial nexus was made in the context of describing an Indian tribe's authority over *tribal land.* See 455 U. S., at 137–138 (citing *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 228 (1980); *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 445 (1979)). Only full territorial sovereigns enjoy the "power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," and Indian tribes "can no longer be described as sovereigns in this sense." *Duro* v. *Reina*, *supra*, at 685.

[6] Because the legal incidence of the tax falls directly upon the guests, not petitioner, it is unclear whether the Tribe's relationship with petitioner is at all relevant. We need not, however, decide this issue since the hotel occupancy tax exceeds the Tribe's authority even considering petitioner's contacts with the Navajo Nation.

Highway 89 and Arizona Highway 64 traversing the reservation; that the Navajo Tribal Police and the Navajo Tribal Emergency Medical Services Department will respond to an emergency call from the Cameron Trading Post; and that local Arizona Fire Departments and the Navajo Tribal Fire Department provide fire protection to the area.[7] Although we do not question the Navajo Nation's ability to charge an appropriate fee for a particular service actually rendered,[8] we think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land.

The consensual relationship must stem from "commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U. S., at 565, and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the "advantages of a civilized society" offered by the Indian tribe. *Merrion*, *supra*, at 137–138 (internal quotation marks and citation omitted). Such a result does not square with our precedents; indeed, we implicitly rejected this argument in *Strate*,[9] where we held that the nonmembers had not consented to the Tribes' adjudicatory authority by availing themselves of the benefit of tribal police protection while traveling within the reservation. See 520 U. S., at 456–457, and n. 11. We therefore reject respondents' broad reading of *Montana*'s first exception, which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power.

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[7] The Navajo Tribal Fire Department has responded to a fire at the Cameron Trading Post. See App. to Pet. for Cert. 57a.

[8] The Navajo Nation charges for its emergency medical services (a flat call-out fee of $300 and a mileage fee of $6.25 per mile). See App. 127–129.

[9] See Reply Brief for Petitioners 13–14 and Brief for United States as *Amicus Curiae* 29 in *Strate* v. *A–1 Contractors*, O. T. 1996, No. 95–1872.

Respondents and their principal *amicus*, the United States, also argue that petitioner consented to the tax by becoming an "Indian trader." Congress has authorized the Commissioner of Indian Affairs "to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U. S. C. § 261. Petitioner has acquired the requisite license to transact business with the Navajo Nation and therefore is subject to the regulatory strictures promulgated by the Indian Affairs Commissioner. See 25 CFR pt. 141 (2000).[10] But whether or not the Navajo Nation could impose a tax on activities arising out of this relationship, an issue not before us, it is clear that petitioner's "Indian trader" status by itself cannot support the imposition of the hotel occupancy tax.

Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. In *Strate*, for example, even though respondent A–1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember "was not a party to the subcontract, and the [T]ribes were strangers to the accident." 520 U. S., at 457 (internal quotation marks and citation omitted). A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not "in for a penny, in for a Pound." E. Ravenscroft, The Canterbury Guests; Or A Bargain Broken, act v, sc. 1. The hotel occupancy tax at issue here is grounded in petitioner's relationship with its nonmember hotel guests, who can reach the Cameron Trading Post on United States Highway 89 and

[10] Although the regulations do not "preclude" the Navajo Nation from imposing upon "Indian traders" such "fees or taxes [it] may deem appropriate," the regulations do not contemplate or authorize the hotel occupancy tax at issue here. 25 CFR § 141.11 (2000).

Arizona Highway 64, non-Indian public rights-of-way. Petitioner cannot be said to have consented to such a tax by virtue of its status as an "Indian trader."

Although the Court of Appeals did not reach *Montana*'s second exception, both respondents and the United States argue that the hotel occupancy tax is warranted in light of the direct effects the Cameron Trading Post has upon the Navajo Nation. Again noting the Navajo Nation's provision of tribal services and petitioner's status as an "Indian trader," respondents emphasize that petitioner employs almost 100 Navajo Indians; that the Cameron Trading Post derives business from tourists visiting the reservation; and that large amounts of tribal land surround petitioner's isolated property.[11] Although we have no cause to doubt respondents' assertion that the Cameron Chapter of the Navajo Nation possesses an "overwhelming Indian character," Brief for Respondents 13–14, we fail to see how petitioner's operation of a hotel on non-Indian fee land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, *supra*, at 566.[12]

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[11] The record does not reflect the amount of non-Indian fee land within the Navajo Nation. A 1995 study commissioned by the United States Department of Commerce states that 96.3 percent of the Navajo Nation's 16,224,896 acres is tribally owned, with allotted land comprising 762,749 acres, or 4.7 percent, of the reservation. See Economic Development Administration, V. Tiller, American Indian Reservations and Indian Trust Areas 214 (1995). The 1990 Census reports that that 96.6 percent of residents on the Navajo Nation are Indian. Joint Lodging 182. The Cameron Chapter of the Navajo Nation, in which petitioner's land lies, has a non-Indian population of 2.3 percent. See *id.*, at 181.

[12] Although language in *Merrion* referred to taxation as "necessary to tribal self-government and territorial management," 455 U. S., at 141, it did not address assertions of tribal jurisdiction over non-Indian fee land. Just as with *Montana*'s first exception, incorporating *Merrion*'s reasoning here would be tantamount to rejecting *Montana*'s general rule. In *Strate* v. *A–1 Contractors*, 520 U. S. 438, 459 (1997), we stated that *Montana*'s second exception "can be misperceived." The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly

We find unpersuasive respondents' attempt to augment this claim by reference to *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 440 (1989) (opinion of STEVENS, J.). In this portion of *Brendale*, per the reasoning of two Justices, we held that the Yakima Nation had the authority to zone a small, non-Indian parcel located "in the heart" of over 800,000 acres of closed and largely uninhabited tribal land. *Ibid.* Respondents extrapolate from this holding that Indian tribes enjoy broad authority over nonmembers wherever the acreage of non-Indian fee land is minuscule in relation to the surrounding tribal land. But we think it plain that the judgment in *Brendale* turned on both the closed nature of the non-Indian fee land[13] and the fact that its development would place the entire area "in jeopardy." *Id.*, at 443 (internal quotation marks and citation omitted).[14] Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s second exception grants Indian tribes nothing " 'beyond what is necessary to

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permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually "imperil[s]" the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands. *Montana*, 450 U. S., at 566. Petitioner's hotel has no such adverse effect upon the Navajo Nation.

[13] JUSTICE STEVENS' opinion in *Brendale* sets out in some detail the restrictive nature of "closed area" surrounding the non-Indian fee land. See 492 U. S., at 438–441. Pursuant to the powers reserved it in an 1855 treaty with the United States, the Yakima Nation closed this forested area to the public and severely limited the activities of those who entered the land through a "courtesy permit system." *Id.*, at 439 (internal quotation marks and citation omitted). The record here establishes that, save a few natural areas and parks not at issue, the Navajo Reservation is open to the general public. App. 61.

[14] See *Strate* v. *A–1 Contractors*, *supra*, at 447, n. 6 (noting that the Yakima Nation "retained zoning authority . . . only in the closed area"); *Duro* v. *Reina*, 495 U. S., at 688 (noting that zoning "is vital to the maintenance of tribal integrity and self-determination").

protect tribal self-government or to control internal relations.'" *Strate*, 520 U. S., at 459 (quoting *Montana*, 450 U. S., at 564). Whatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity. See *Brendale*, *supra*, at 431 (opinion of White, J.) (holding that the impact of the nonmember's conduct "must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe").

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," but their dependent status generally precludes extension of tribal civil authority beyond these limits. *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is, therefore, presumptively invalid. Because respondents have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political integrity, the presumption ripens into a holding. The judgment of the Court of Appeals for the Tenth Circuit is accordingly

Reversed.

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring.

If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana* v. *United States*, 450 U. S. 544 (1981), and it is in light of that case that I join the Court's opinion. Under *Montana*, the status of territory within a reservation's boundaries as tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the exceptions to *Montana*'s "general proposition" that "the inherent sover-

eign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.*, at 565. That general proposition is, however, the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe.

Syllabus

PGA TOUR, INC. *v.* MARTIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–24. Argued January 17, 2001—Decided May 29, 2001

Petitioner sponsors professional golf tournaments conducted on three annual tours. A player may gain entry into the tours in various ways, most commonly through successfully competing in a three-stage qualifying tournament known as the "Q-School." Any member of the public may enter the Q-School by submitting two letters of recommendation and paying a $3,000 entry fee to cover greens fees and the cost of golf carts, which are permitted during the first two stages, but have been prohibited during the third stage since 1997. The rules governing competition in tour events include the "Rules of Golf," which apply at all levels of amateur and professional golf and do not prohibit the use of golf carts, and the "hard card," which applies specifically to petitioner's professional tours and requires players to walk the golf course during tournaments, except in "open" qualifying events for each tournament and on petitioner's senior tour. Respondent Martin is a talented golfer afflicted with a degenerative circulatory disorder that prevents him from walking golf courses. His disorder constitutes a disability under the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12101 *et seq.* When Martin turned pro and entered the Q-School, he made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. Petitioner refused, and Martin filed this action under Title III of the ADA, which, among other things, requires an entity operating "public accommodations" to make "reasonable modifications" in its policies "when . . . necessary to afford such . . . accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature* of such . . . accommodations," § 12182(b)(2)(A)(ii) (emphasis added). In denying petitioner summary judgment, the Magistrate Judge rejected its contention, among others, that the play areas of its tour competitions are not places of "public accommodation" within Title III's scope. After trial, the District Court entered a permanent injunction requiring petitioner to permit Martin to use a cart. Among its rulings, that court found that the walking rule's purpose was to inject fatigue into the skill of shotmaking, but that the fatigue injected by walking a golf course cannot be deemed significant under normal

circumstances; determined that even with the use of a cart, the fatigue Martin suffers from coping with his disability is greater than the fatigue his able-bodied competitors endure from walking the course; and concluded that it would not fundamentally alter the nature of petitioner's game to accommodate Martin. The Ninth Circuit affirmed, concluding, *inter alia*, that golf courses, including play areas, are places of public accommodation during professional tournaments and that permitting Martin to use a cart would not "fundamentally alter" the nature of those tournaments.

Held:

1. Title III of the ADA, by its plain terms, prohibits petitioner from denying Martin equal access to its tours on the basis of his disability. Cf. *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 209. That Title provides, as a general rule, that "[n]o individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the . . . privileges . . . of any place of public accommodation." § 12182(a). The phrase "public accommodation" is defined in terms of 12 extensive categories, § 12181(7), which the legislative history indicates should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled. Given the general rule and the comprehensive definition of "public accommodation," it is apparent that petitioner's golf tours and their qualifying rounds fit comfortably within Title III's coverage, and Martin within its protection. The events occur on "golf course[s]," a type of place specifically identified as a public accommodation. § 12181(7)(L). And, at all relevant times, petitioner "leases" and "operates" golf courses to conduct its Q-School and tours. § 12182(a). As a lessor and operator, petitioner must not discriminate against any "individual" in the "full and equal enjoyment of the . . . privileges" of those courses. *Ibid.* Among those "privileges" are competing in the Q-School and playing in the tours; indeed, the former is a privilege for which thousands of individuals from the general public pay, and the latter is one for which they vie. Martin is one of those individuals. The Court rejects petitioner's argument that competing golfers are not members of the class protected by Title III—*i. e.*, "clients or customers of the covered public accommodation," § 12182(b)(1)(A)(iv)—but are providers of the entertainment petitioner sells, so that their "job-related" discrimination claims may only be brought under Title I. Even if Title III's protected class were so limited, it would be entirely appropriate to classify the golfers who pay petitioner $3,000 for the chance to compete in the Q-School and, if successful, in the subsequent tour events, as petitioner's

clients or customers. This conclusion is consistent with case law in the analogous context of Title II of the Civil Rights Act of 1964. See, *e. g.*, *Daniel* v. *Paul*, 395 U. S. 298, 306. Pp. 674–681.

2. Allowing Martin to use a golf cart, despite petitioner's walking requirement, is not a modification that would "fundamentally alter the nature" of petitioner's tours or the third stage of the Q-School. In theory, a modification of the tournaments might constitute a fundamental alteration in these ways: (1) It might alter such an essential aspect of golf, *e. g.*, the diameter of the hole, that it would be unacceptable even if it affected all competitors equally; or (2) a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and therefore fundamentally alter the character of the competition. The Court is not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense. The use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shotmaking. The walking rule contained in petitioner's hard cards is neither an essential attribute of the game itself nor an indispensable feature of tournament golf. The Court rejects petitioner's attempt to distinguish golf as it is generally played from the game at the highest level, where, petitioner claims, the waiver of an "outcome-affecting" rule such as the walking rule would violate the governing principle that competitors must be subject to identical substantive rules, thereby fundamentally altering the nature of tournament events. That argument's force is mitigated by the fact that it is impossible to guarantee that all golfers will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome. Further, the factual basis of petitioner's argument—that the walking rule is "outcome affecting" because fatigue may adversely affect performance—is undermined by the District Court's finding that the fatigue from walking during a tournament cannot be deemed significant. Even if petitioner's factual predicate is accepted, its legal position is fatally flawed because its refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the ADA's requirement that an individualized inquiry be conducted. Cf. *Sutton* v. *United Air Lines, Inc.*, 527 U. S. 471, 483. There is no doubt that allowing Martin to use a cart would not fundamentally alter the nature of petitioner's tournaments, given the District Court's uncontested finding that Martin endures greater fatigue with a cart than his able-bodied competitors do by walking. The waiver of a peripheral tournament

rule that does not impair its purpose cannot be said to fundamentally alter the nature of the athletic event. Pp. 681–691.

204 F. 3d 994, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 691.

H. Bartow Farr III argued the cause for petitioner. With him on the briefs were *Richard G. Taranto*, *William J. Maledon*, and *Andrew D. Hurtiwz.*

Roy L. Reardon argued the cause for respondent. With him on the brief was *Joseph M. McLaughlin.*

Deputy Solicitor General Underwood argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Lee*, *Patricia A. Millett*, *Jessica Dunsay Silver*, and *Thomas E. Chandler.**

JUSTICE STEVENS delivered the opinion of the Court.

This case raises two questions concerning the application of the Americans with Disabilities Act of 1990, 104 Stat. 328, 42 U. S. C. § 12101 *et seq.*, to a gifted athlete: first, whether the Act protects access to professional golf tournaments by a qualified entrant with a disability; and second, whether a

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*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Ann Elizabeth Reesman;* for ATP Tour, Inc., et al. by *Bradley I. Ruskin;* for the United States Golf Association by *Roy T. Englert, Jr.*, *Lee N. Abrams*, *James C. Schroeder*, *Robert M. Dow, Jr.*, and *John W. Vardaman;* and for Kenneth R. Green II by *Gregory D. Smith.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of Adapted Sports Programs et al. by *Anita M. Moorman* and *Lisa Pike Masteralexis;* for the K–T Support Group by *Brian D. Shannon;* for the National Association of Protection and Advocacy Systems et al. by *Sharon Masling*, *Samuel R. Bagenstos*, and *Neil V. McKittrick;* and for Robert J. Dole et al. by *Robert L. Burgdorf, Jr.*, and *George G. Olsen.*

disabled contestant may be denied the use of a golf cart because it would "fundamentally alter the nature" of the tournaments, § 12182(b)(2)(A)(ii), to allow him to ride when all other contestants must walk.

I

Petitioner PGA TOUR, Inc., a nonprofit entity formed in 1968, sponsors and cosponsors professional golf tournaments conducted on three annual tours. About 200 golfers participate in the PGA TOUR; about 170 in the NIKE TOUR;[1] and about 100 in the SENIOR PGA TOUR. PGA TOUR and NIKE TOUR tournaments typically are 4-day events, played on courses leased and operated by petitioner. The entire field usually competes in two 18-hole rounds played on Thursday and Friday; those who survive the "cut" play on Saturday and Sunday and receive prize money in amounts determined by their aggregate scores for all four rounds. The revenues generated by television, admissions, concessions, and contributions from cosponsors amount to about $300 million a year, much of which is distributed in prize money.

There are various ways of gaining entry into particular tours. For example, a player who wins three NIKE TOUR events in the same year, or is among the top-15 money winners on that tour, earns the right to play in the PGA TOUR. Additionally, a golfer may obtain a spot in an official tournament through successfully competing in "open" qualifying rounds, which are conducted the week before each tournament. Most participants, however, earn playing privileges in the PGA TOUR or NIKE TOUR by way of a three-stage qualifying tournament known as the "Q-School."

Any member of the public may enter the Q-School by paying a $3,000 entry fee and submitting two letters of reference

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[1] After the trial of the case, the name of the NIKE TOUR was changed to the Buy.com TOUR.

from, among others, PGA TOUR or NIKE TOUR members. The $3,000 entry fee covers the players' greens fees and the cost of golf carts, which are permitted during the first two stages, but which have been prohibited during the third stage since 1997. Each year, over a thousand contestants compete in the first stage, which consists of four 18-hole rounds at different locations. Approximately half of them make it to the second stage, which also includes 72 holes. Around 168 players survive the second stage and advance to the final one, where they compete over 108 holes. Of those finalists, about a fourth qualify for membership in the PGA TOUR, and the rest gain membership in the NIKE TOUR. The significance of making it into either tour is illuminated by the fact that there are about 25 million golfers in the country.[2]

Three sets of rules govern competition in tour events. First, the "Rules of Golf," jointly written by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland, apply to the game as it is played, not only by millions of amateurs on public courses and in private country clubs throughout the United States and worldwide, but also by the professionals in the tournaments conducted by petitioner, the USGA, the Ladies' Professional Golf Association, and the Senior Women's Golf Association. Those rules do not prohibit the use of golf carts at any time.[3]

Second, the "Conditions of Competition and Local Rules," often described as the "hard card," apply specifically to petitioner's professional tours. The hard cards for the PGA

[2] Generally, to maintain membership in a tour for the succeeding year, rather than go through the Q-School again, a player must perform at a certain level.

[3] Instead, Appendix I to the Rules of Golf lists a number of "optional" conditions, among them one related to transportation: "If it is desired to require players to walk in a competition, the following condition is suggested:

"Players shall walk at all times during a stipulated round." App. 125.

TOUR and NIKE TOUR require players to walk the golf course during tournaments, but not during open qualifying rounds.[4] On the SENIOR PGA TOUR, which is limited to golfers age 50 and older, the contestants may use golf carts. Most seniors, however, prefer to walk.[5]

Third, "Notices to Competitors" are issued for particular tournaments and cover conditions for that specific event. Such a notice may, for example, explain how the Rules of Golf should be applied to a particular water hazard or manmade obstruction. It might also authorize the use of carts to speed up play when there is an unusual distance between one green and the next tee.[6]

The basic Rules of Golf, the hard cards, and the weekly notices apply equally to all players in tour competitions. As one of petitioner's witnesses explained with reference to "the Masters Tournament, which is golf at its very highest level, . . . the key is to have everyone tee off on the first hole under exactly the same conditions and all of them be tested over that 72-hole event under the conditions that exist during those four days of the event." App. 192.

II

Casey Martin is a talented golfer. As an amateur, he won 17 Oregon Golf Association junior events before he was 15,

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[4] The PGA TOUR hard card provides: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." *Id.*, at 127. The NIKE TOUR hard card similarly requires walking unless otherwise permitted. *Id.*, at 129. Additionally, as noted, golf carts have not been permitted during the third stage of the Q-School since 1997. Petitioner added this recent prohibition in order to "approximat[e] a PGA TOUR event as closely as possible." *Id.*, at 152.

[5] 994 F. Supp. 1242, 1251 (Ore. 1998).

[6] See, *e. g.*, App. 156–160 (Notices to Competitors for 1997 Bob Hope Chrysler Classic, 1997 AT&T Pebble Beach National Pro-Am, and 1997 Quad City Classic).

and won the state championship as a high school senior. He played on the Stanford University golf team that won the 1994 National Collegiate Athletic Association (NCAA) championship. As a professional, Martin qualified for the NIKE TOUR in 1998 and 1999, and based on his 1999 performance, qualified for the PGA TOUR in 2000. In the 1999 season, he entered 24 events, made the cut 13 times, and had 6 top-10 finishes, coming in second twice and third once.

Martin is also an individual with a disability as defined in the Americans with Disabilities Act of 1990 (ADA or Act).[7] Since birth he has been afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. The disease is progressive; it causes severe pain and has atrophied his right leg. During the latter part of his college career, because of the progress of the disease, Martin could no longer walk an 18-hole golf course.[8] Walking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required. For these reasons, Stanford made written requests to the Pacific 10 Conference and the NCAA to waive for Martin their rules requiring players to walk and carry their own clubs. The requests were granted.[9]

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[7] Title 42 U. S. C. § 12102 provides, in part:

"The term 'disability' means, with respect to an individual—

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ."

[8] Before then, even when Martin was in extreme pain, and was offered a cart, he declined. Tr. 564–565.

[9] When asked about the other teams' reaction to Martin's use of a cart, the Stanford coach testified:

"Q. Was there any complaint ever made to you by the coaches when he was allowed a cart that that gave a competitive advantage over the—

"A. Any complaints? No sir, there were exactly—exactly the opposite. Everybody recognized Casey for the person he was, and what he was

When Martin turned pro and entered petitioner's Q-School, the hard card permitted him to use a cart during his successful progress through the first two stages. He made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. Petitioner refused to review those records or to waive its walking rule for the third stage. Martin therefore filed this action. A preliminary injunction entered by the District Court made it possible for him to use a cart in the final stage of the Q-School and as a competitor in the NIKE TOUR and PGA TOUR. Although not bound by the injunction, and despite its support for petitioner's position in this litigation, the USGA voluntarily granted Martin a similar waiver in events that it sponsors, including the U. S. Open.

III

In the District Court, petitioner moved for summary judgment on the ground that it is exempt from coverage under Title III of the ADA as a "private clu[b] or establishmen[t],"[10] or alternatively, that the play areas of its tour competitions do not constitute places of "public accommodation" within the scope of that Title.[11] The Magistrate Judge concluded that petitioner should be viewed as a commercial enterprise operating in the entertainment industry for the economic benefit of its members rather than as a private

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doing with his life, and every coach, to my knowledge, and every player wanted Casey in the tournament and they welcomed him there.

"Q. Did anyone contend that that constituted an alteration of the competition to the extent that it didn't constitute the game to your level, the college level?

"A. Not at all, sir." App. 208.

[10] Title 42 U. S. C. § 12187 provides: "The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964 (42 U. S. C. § 2000–a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship."

[11] See § 12181(7).

club. Furthermore, after noting that the statutory definition of public accommodation included a "golf course,"[12] he rejected petitioner's argument that its competitions are only places of public accommodation in the areas open to spectators. The operator of a public accommodation could not, in his view, "create private enclaves within the facility . . . and thus relegate the ADA to hop-scotch areas." 984 F. Supp. 1320, 1326–1327 (Ore. 1998). Accordingly, he denied petitioner's motion for summary judgment.

At trial, petitioner did not contest the conclusion that Martin has a disability covered by the ADA, or the fact "that his disability prevents him from walking the course during a round of golf." 994 F. Supp. 1242, 1244 (Ore. 1998). Rather, petitioner asserted that the condition of walking is a substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition. Petitioner's evidence included the testimony of a number of experts, among them some of the greatest golfers in history. Arnold Palmer,[13] Jack Nicklaus,[14] and Ken Venturi[15] explained that fatigue can be

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[12] § 12181(7)(L).

[13] "Q. And fatigue is one of the factors that can cause a golfer at the PGA Tour level to lose one stroke or more?

"A. Oh, it is. And it has happened.

"Q. And can one stroke be the difference between winning and not winning a tournament at the PGA Tour level?

"A. As I said, I've lost a few national opens by one stroke." App. 177.

[14] "Q. Mr. Nicklaus, what is your understanding of the reason why in these competitive events . . . that competitors are required to walk the course?

"A. Well, in my opinion, physical fitness and fatigue are part of the game of golf." *Id.*, at 190.

[15] "Q. So are you telling the court that this fatigue factor tends to accumulate over the course of the four days of the tournament?

"A. Oh definitely. There's no doubt.

. . . . . .

"Q. Does this fatigue factor that you've talked about, Mr. Venturi, affect the manner in which you—you perform as a professional out on the golf course?

a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum. Their testimony makes it clear that, in their view, permission to use a cart might well give some players a competitive advantage over other players who must walk. They did not, however, express any opinion on whether a cart would give Martin such an advantage.[16]

Rejecting petitioner's argument that an individualized inquiry into the necessity of the walking rule in Martin's case would be inappropriate, the District Court stated that it had "the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule" and thereby fundamentally altering the nature of petitioner's tournaments. *Id.*, at 1246. The judge found that the purpose of the rule was to inject fatigue into the skill of shotmaking, but that the fatigue injected "by walking the course cannot be deemed significant under normal circumstances." *Id.*, at 1250. Furthermore, Martin presented evidence, and the judge found, that even with the use of a cart, Martin must walk over a mile during

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"A. Oh, there's no doubt, again, but that, that fatigue does play a big part. It will influence your game. It will influence your shot-making. It will influence your decisions." *Id.*, at 236–237.

[16] "Q. Based on your experience, do you believe that it would fundamentally alter the nature of the competition on the PGA Tour and the Nike Tour if competitors in those events were permitted to use golf carts?

"A. Yes, absolutely.

"Q. Why do you say so, sir?

"A. It would—it would take away the fatigue factor in many ways. It would—it would change the game.

. . . . .

"Q. Now, when you say that the use of carts takes away the fatigue factor, it would be an aid, et cetera, again, as I understand it, you are not testifying now about the plaintiff. You are just talking in general terms?

. . . . .

"A. Yes, sir." *Id.*, at 238. See also *id.*, at 177–178 (Palmer); *id.*, at 191 (Nicklaus).

an 18-hole round,[17] and that the fatigue he suffers from coping with his disability is "undeniably greater" than the fatigue his able-bodied competitors endure from walking the course. *Id.*, at 1251. As the judge observed:

> "[P]laintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality." *Id.*, at 1251–1252.

As a result, the judge concluded that it would "not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart." *Id.*, at 1252. The judge accordingly entered a permanent injunction requiring petitioner to permit Martin to use a cart in tour and qualifying events.

On appeal to the Ninth Circuit, petitioner did not challenge the District Court's rejection of its claim that it was exempt as a "private club," but it renewed the contention that during a tournament the portion of the golf course " 'behind the ropes' is not a public accommodation because the public has no right to enter it." 204 F. 3d 994, 997 (2000). The Court of Appeals viewed that contention as resting on the incorrect assumption that the competition among participants was not itself public. The court first pointed out that, as with a private university, "the fact that users of a facility are highly selected does not mean that the facility cannot be

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[17] "In the first place, he does walk while on the course—even with a cart, he must move from cart to shot and back to the cart. In essence, he still must walk approximately 25% of the course. On a course roughly five miles in length, Martin will walk 1¼ miles." 994 F. Supp., at 1251.

a public accommodation." *Id.*, at 998.[18] In its opinion, the competition to enter the select circle of PGA TOUR and NIKE TOUR golfers was comparable because "[a]ny member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in the qualifying school." *Id.*, at 999. The court saw "no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation." *Ibid.* Nor did it find a basis for distinguishing between "use of a place of public accommodation for pleasure and use in the pursuit of a living." *Ibid.* Consequently, the Court of Appeals concluded that golf courses remain places of public accommodation during PGA tournaments. *Ibid.*

On the merits, because there was no serious dispute about the fact that permitting Martin to use a golf cart was both a reasonable and a necessary solution to the problem of providing him access to the tournaments, the Court of Appeals regarded the central dispute as whether such permission would "fundamentally alter" the nature of the PGA TOUR or NIKE TOUR. Like the District Court, the Court of Appeals viewed the issue not as "whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so." *Id.*, at 1001. That issue turned on "an intensively fact-based inquiry," and, the court concluded, had been correctly resolved by the trial judge. In its words, "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability." *Id.*, at 1000.

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[18] It explained: "For example, Title III includes in its definition 'secondary, undergraduate, or post-graduate private school[s].' 42 U. S. C. § 12181(7)(J). The competition to enter the most elite private universities is intense, and a relatively select few are admitted. That fact clearly does not remove the universities from the statute's definition as places of public accommodation." 204 F. 3d, at 998.

The day after the Ninth Circuit ruled in Martin's favor, the Seventh Circuit came to a contrary conclusion in a case brought against the USGA by a disabled golfer who failed to qualify for "America's greatest—and most democratic—golf tournament, the United States Open." *Olinger* v. *United States Golf Assn.*, 205 F. 3d 1001 (2000).[19] The Seventh Circuit endorsed the conclusion of the District Court in that case that "the nature of the competition would be fundamentally altered if the walking rule were eliminated because it would remove stamina (at least a particular type of stamina) from the set of qualities designed to be tested in this competition." *Id.*, at 1006 (internal quotation marks omitted). In the Seventh Circuit's opinion, the physical ordeals endured by Ken Venturi and Ben Hogan when they walked to their Open victories in 1964 and 1950 amply demonstrated the importance of stamina in such a tournament.[20] As an alternative basis for its holding, the court also concluded that the ADA does not require the USGA to bear "the administrative burdens of evaluating requests to waive the walking rule and permit the use of a golf cart." *Id.*, at 1007.

Although the Seventh Circuit merely assumed that the ADA applies to professional golf tournaments, and therefore did not disagree with the Ninth on the threshold coverage issue, our grant of certiorari, 530 U. S. 1306 (2000), encompasses that question as well as the conflict between those courts.

IV

Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. In studying the need for such legislation, Congress found that "historically, society has tended to isolate and segregate individuals with

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[19] The golfer in the Seventh Circuit case, Ford Olinger, suffers from bilateral avascular necrosis, a degenerative condition that significantly hinders his ability to walk.

[20] For a description of the conditions under which they played, see *Olinger* v. *United States Golf Assn.*, 205 F. 3d, at 1006–1007.

disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U. S. C. § 12101(a)(2); see § 12101(a)(3) ("[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"). Congress noted that the many forms such discrimination takes include "outright intentional exclusion" as well as the "failure to make modifications to existing facilities and practices." § 12101(a)(5). After thoroughly investigating the problem, Congress concluded that there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals, and to integrate them "into the economic and social mainstream of American life." S. Rep. No. 101–116, p. 20 (1989); H. R. Rep. No. 101–485, pt. 2, p. 50 (1990).

In the ADA, Congress provided that broad mandate. See 42 U. S. C. § 12101(b). In fact, one of the Act's "most impressive strengths" has been identified as its "comprehensive character," Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of Attorney General Thornburgh), and accordingly the Act has been described as "a milestone on the path to a more decent, tolerant, progressive society," *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 375 (2001) (KENNEDY, J., concurring). To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act),[21] public services (Title II),[22] and public accommodations (Title III).[23] At issue now, as a threshold matter, is

[21] 42 U. S. C. §§ 12111–12117.

[22] §§ 12131–12165.

[23] §§ 12181–12189.

the applicability of Title III to petitioner's golf tours and qualifying rounds, in particular to petitioner's treatment of a qualified disabled golfer wishing to compete in those events.

Title III of the ADA prescribes, as a "[g]eneral rule":

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U. S. C. § 12182(a).

The phrase "public accommodation" is defined in terms of 12 extensive categories,[24] which the legislative history indicates "should be construed liberally" to afford people with disabili-

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[24] "(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

"(B) a restaurant, bar, or other establishment serving food or drink;

"(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

"(D) an auditorium, convention center, lecture hall, or other place of public gathering;

"(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

"(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

"(G) a terminal, depot, or other station used for specified public transportation;

"(H) a museum, library, gallery, or other place of display or collection;

"(I) a park, zoo, amusement park, or other place of recreation;

"(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

"(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

"(L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation." § 12181(7) (emphasis added).

ties "equal access" to the wide variety of establishments available to the nondisabled.[25]

It seems apparent, from both the general rule and the comprehensive definition of "public accommodation," that petitioner's golf tours and their qualifying rounds fit comfortably within the coverage of Title III, and Martin within its protection. The events occur on "golf course[s]," a type of place specifically identified by the Act as a public accommodation. § 12181(7)(L). In addition, at all relevant times, petitioner "leases" and "operates" golf courses to conduct its Q-School and tours. § 12182(a). As a lessor and operator of golf courses, then, petitioner must not discriminate against any "individual" in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of those courses. *Ibid.* Certainly, among the "privileges" offered by petitioner on the courses are those of competing in the Q-School and playing in the tours; indeed, the former is a privilege for which thousands of individuals from the general public pay, and the latter is one for which they vie. Martin, of course, is one of those individuals. It would therefore appear that Title III of the ADA, by its plain terms, prohibits petitioner from denying Martin equal access to its tours on the basis of his disability. Cf. *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 209 (1998) (holding that text of Title II's prohibition of discrimination by "public entities" against disabled individuals "unmistakably includes State prisons and prisoners within its coverage").

Petitioner argues otherwise. To be clear about its position, it does not assert (as it did in the District Court) that it is a private club altogether exempt from Title III's coverage. In fact, petitioner admits that its tournaments are conducted at places of public accommodation.[26] Nor does petitioner contend (as it did in both the District Court and

[25] S. Rep. No. 101–116, p. 59 (1989); H. R. Rep. No. 101–485, pt. 2, p. 100 (1990).

[26] Reply Brief for Petitioner 1–2.

the Court of Appeals) that the competitors' area "behind the ropes" is not a public accommodation, notwithstanding the status of the rest of the golf course. Rather, petitioner reframes the coverage issue by arguing that the competing golfers are not members of the class protected by Title III of the ADA.[27]

According to petitioner, Title III is concerned with discrimination against "clients and customers" seeking to obtain "goods and services" at places of public accommodation, whereas it is Title I that protects persons who work at such places.[28] As the argument goes, petitioner operates not a "golf course" during its tournaments but a "place of exhibition or entertainment," 42 U. S. C. § 12181(7)(C), and a professional golfer such as Martin, like an actor in a theater production, is a provider rather than a consumer of the entertainment that petitioner sells to the public. Martin therefore cannot bring a claim under Title III because he is not one of the "'*clients or customers* of the covered public accommodation.'"[29] Rather, Martin's claim of discrimination is "job-related"[30] and could only be brought under Title I—but that Title does not apply because he is an independent contractor (as the District Court found) rather than an employee.

The reference to "clients or customers" that petitioner quotes appears in 42 U. S. C. § 12182(b)(1)(A)(iv), which

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[27] Martin complains that petitioner's failure to make this exact argument below precludes its assertion here. However, the Title III coverage issue was raised in the lower courts, petitioner advanced this particular argument in support of its position on the issue in its petition for certiorari, and the argument was fully briefed on the merits by both parties. Given the importance of the issue, we exercise our discretion to consider it. See *Harris Trust and Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U. S. 238, 245–246, n. 2 (2000); *Carlson* v. *Green*, 446 U. S. 14, 17, n. 2 (1980).

[28] Brief for Petitioner 10, 11.

[29] *Id.*, at 19 (quoting 42 U. S. C. § 12182(b)(1)(A)(iv)).

[30] Brief for Petitioner 15; see also *id.*, at 16 (Martin's claim "is nothing more than a straightforward discrimination-in-the-workplace complaint").

states: "For purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." Clauses (i) through (iii) of the subparagraph prohibit public accommodations from discriminating against a disabled "individual or class of individuals" in certain ways[31] either directly or indirectly through contractual arrangements with other entities. Those clauses make clear on the one hand that their prohibitions cannot be avoided by means of contract, while clause (iv) makes clear on the other hand that contractual relationships will not expand a public accommodation's obligations under the subparagraph beyond its own clients or customers.

As petitioner recognizes, clause (iv) is not literally applicable to Title III's general rule prohibiting discrimination against disabled individuals.[32] Title III's broad general rule contains no express "clients or customers" limitation, § 12182(a), and § 12182(b)(1)(A)(iv) provides that its limitation is only "[f]or purposes of" the clauses in that separate subparagraph. Nevertheless, petitioner contends that clause (iv)'s restriction of the subparagraph's coverage to the clients or customers of public accommodations fairly describes the scope of Title III's protection as a whole.

We need not decide whether petitioner's construction of the statute is correct, because petitioner's argument falters even on its own terms. If Title III's protected class were limited to "clients or customers," it would be entirely appropriate to classify the golfers who pay petitioner $3,000 for the chance to compete in the Q-School and, if successful, in the subsequent tour events, as petitioner's clients or custom-

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[31] Clause (i) prohibits the denial of participation, clause (ii) participation in unequal benefits, and clause (iii) the provision of separate benefits.

[32] Brief for Petitioner 20 (clause (iv) "applies directly just to subsection 12182(b)"); Reply Brief for Petitioner 4, n. 1 (clause (iv) "does not apply directly to the general provision prohibiting discrimination").

ers. In our view, petitioner's tournaments (whether situated at a "golf course" or at a "place of exhibition or entertainment") simultaneously offer at least two "privileges" to the public—that of watching the golf competition and that of competing in it. Although the latter is more difficult and more expensive to obtain than the former, it is nonetheless a privilege that petitioner makes available to members of the general public. In consideration of the entry fee, any golfer with the requisite letters of recommendation acquires the opportunity to qualify for and compete in petitioner's tours. Additionally, any golfer who succeeds in the open qualifying rounds for a tournament may play in the event. That petitioner identifies one set of clients or customers that it serves (spectators at tournaments) does not preclude it from having another set (players in tournaments) against whom it may not discriminate. It would be inconsistent with the literal text of the statute as well as its expansive purpose to read Title III's coverage, even given petitioner's suggested limitation, any less broadly.[33]

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[33] Contrary to the dissent's suggestion, our view of the Q-School does not make "everyone who seeks a job" at a public accommodation, through "an open tryout" or otherwise, "a customer." *Post*, at 697 (opinion of SCALIA, J.). Unlike those who successfully apply for a job at a place of public accommodation, or those who successfully bid for a contract, the golfers who qualify for petitioner's tours play at their own pleasure (perhaps, but not necessarily, for prize money), and although they commit to playing in at least 15 tournaments, they are not bound by any obligations typically associated with employment. See, *e. g.*, App. 260 (trial testimony of PGA commissioner Timothy Finchem) (petitioner lacks control over when and where tour members compete, and over their manner of performance outside the rules of competition). Furthermore, unlike athletes in "other professional sports, such as baseball," *post*, at 697, in which players are employed by their clubs, the golfers on tour are not employed by petitioner or any related organizations. The record does not support the proposition that the purpose of the Q-School "is to hire," *ibid.*, rather than to narrow the field of participants in the sporting events that petitioner sponsors at places of public accommodation.

Our conclusion is consistent with case law in the analogous context of Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a *et seq.* Title II of that Act prohibits public accommodations from discriminating on the basis of race, color, religion, or national origin. § 2000a(a). In *Daniel* v. *Paul*, 395 U. S. 298, 306 (1969), applying Title II to the Lake Nixon Club in Little Rock, Arkansas, we held that the definition of a "place of exhibition or entertainment," as a public accommodation, covered participants "in some sport or activity" as well as "spectators or listeners." We find equally persuasive two lower court opinions applying Title II specifically to golfers and golf tournaments. In *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 477 (ED Va. 1966), a class action brought to require a commercial golf establishment to permit black golfers to play on its course, the District Court held that Title II "is not limited to spectators if the place of exhibition or entertainment provides facilities for the public to participate in the entertainment."[34] And in *Wesley* v. *Savannah*, 294 F. Supp. 698 (SD Ga. 1969), the District Court found that a private association violated Title II when it limited entry in a golf tournament on a municipal course to its own members but permitted all (and only) white golfers who paid the membership and entry fees to compete.[35] These cases support our conclusion that, as a public accommodation during its tours and qualifying rounds, petitioner may not discriminate against either spectators or competitors on the basis of disability.

V

As we have noted, 42 U. S. C. § 12182(a) sets forth Title III's general rule prohibiting public accommodations from

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[34] Title II of the Civil Rights Act of 1964 includes in its definition of "public accommodation" a "place of exhibition or entertainment" but does not specifically list a "golf course" as an example. See 42 U. S. C. § 2000a(b).

[35] Under petitioner's theory, Title II would not preclude it from discriminating against golfers on racial grounds. App. 197; Tr. of Oral Arg. 11–12.

discriminating against individuals because of their disabilities. The question whether petitioner has violated that rule depends on a proper construction of the term "discrimination," which is defined by Title III to include

> "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages, or accommodations." § 12182(b)(2)(A)(ii) (emphasis added).

Petitioner does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary. In this case, however, the narrow dispute is whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q-School, is a modification that would "fundamentally alter the nature" of those events.

In theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification.[36] Alternatively, a less significant change that has only a peripheral

[36] Cf. *post*, at 701 (SCALIA, J., dissenting) ("I suppose there is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game").

impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition.[37] We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense.[38]

As an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.[39] That essential aspect of the game

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[37] Accord, *post*, at 703 (SCALIA, J., dissenting) ("The statute seeks to assure that a disabled person's disability will not deny him *equal access* to (among other things) competitive sporting events—not that his disability will not deny him an *equal chance to win* competitive sporting events").

[38] As we have noted, the statute contemplates three inquiries: whether the requested modification is "reasonable," whether it is "necessary" for the disabled individual, and whether it would "fundamentally alter the nature of" the competition. 42 U. S. C. § 12182(b)(2)(A)(ii). Whether one question should be decided before the others likely will vary from case to case, for in logic there seems to be no necessary priority among the three. In routine cases, the fundamental alteration inquiry may end with the question whether a rule is essential. Alternatively, the specifics of the claimed disability might be examined within the context of what is a reasonable or necessary modification. Given the concession by petitioner that the modification sought is reasonable and necessary, and given petitioner's reliance on the fundamental alteration provision, we have no occasion to consider the alternatives in this case.

[39] Golf is an ancient game, tracing its ancestry to Scotland, and played by such notables as Mary Queen of Scots and her son James. That shotmaking has been the essence of golf since early in its history is reflected in the first recorded rules of golf, published in 1744 for a tournament on the Leith Links in Edinburgh:

"*Articles & Laws in Playing at Golf*

"1. You must Tee your Ball, within a Club's length of the [previous] Hole.

"2. Your Tee must be upon the Ground.

"3. You are not to change the Ball which you Strike off the Tee.

[Footnote 39 is continued on p. 684]

is still reflected in the very first of the Rules of Golf, which declares: "The Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the rules." Rule 1–1, Rules of Golf, App. 104 (emphasis in original). Over the years, there have been many changes in the players' equipment, in golf course design, in the Rules of Golf, and in the method of transporting clubs from hole to hole.[40] Originally, so few clubs were used that each player could carry them without

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"4. You are not to remove, Stones, Bones or any Break Club for the sake of playing your Ball, Except upon the fair Green/& that only/ within a Club's length of your Ball.

"5. If your Ball comes among Water, or any Watery Filth, you are at liberty to take out your Ball & bringing it behind the hazard and Teeing it, you may play it with any Club and allow your Adversary a Stroke for so getting out your Ball.

"6. If your Balls be found anywhere touching one another, You are to lift the first Ball, till you play the last.

"7. At Holling, you are to play your Ball honestly for the Hole, and, not to play upon your Adversary's Ball, not lying in your way to the Hole.

"8. If you should lose your Ball, by its being taken up, or any other way, you are to go back to the Spot, where you struck last & drop another Ball, And allow your Adversary a Stroke for the misfortune.

"9. No man at Holling his Ball, is to be allowed, to mark his way to the Hole with his Club or, any thing else.

"10. If a Ball be stopp'd by any person, Horse, Dog, or any thing else, The Ball so stop'd must be play'd where it lyes.

"11. If you draw your Club, in order to Strike & proceed so far in the Stroke, as to be bringing down your Club; If then, your Club shall break, in, any way, it is to be Accounted a Stroke.

"12. He, whose Ball lyes farthest from the Hole is obliged to play first.

"13. Neither Trench, Ditch, or Dyke, made for the preservation of the Links, nor the Scholar's Holes or the Soldier's Lines, Shall be accounted a Hazard; But the Ball is to be taken out/Teed/and play'd with any Iron Club." K. Chapman, Rules of the Green 14–15 (1997).

[40] See generally M. Campbell, The Random House International Encyclopedia of Golf 9–57 (1991); Golf Magazine's Encyclopedia of Golf 1–17 (2d ed. 1993).

a bag. Then came golf bags, caddies, carts that were pulled by hand, and eventually motorized carts that carried players as well as clubs. "Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers."[41] There is nothing in the Rules of Golf that either forbids the use of carts or penalizes a player for using a cart. That set of rules, as we have observed, is widely accepted in both the amateur and professional golf world as the rules of the game.[42] The walking rule that is contained in petitioner's hard cards, based on an optional condition buried in an appendix to the Rules of Golf,[43] is not an essential attribute of the game itself.

Indeed, the walking rule is not an indispensable feature of tournament golf either. As already mentioned, petitioner permits golf carts to be used in the SENIOR PGA TOUR, the open qualifying events for petitioner's tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well. See *supra*, at 665–667. Moreover, petitioner allows the use of carts during certain tournament rounds in both the PGA TOUR and the NIKE

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[41] *Olinger* v. *United States Golf Assn.*, 205 F. 3d 1001, 1003 (CA7 2000).

[42] On this point, the testimony of the immediate past president of the USGA (and one of petitioner's witnesses at trial) is illuminating:

"Tell the court, if you would, Ms. Bell, who it is that plays under these Rules of Golf . . . ?

"A. Well, these are the rules of the game, so all golfers. These are for all people who play the game.

"Q. So the two amateurs that go out on the weekend to play golf together would—would play by the Rules of Golf?

"A. We certainly hope so.

"Q. Or a tournament that is conducted at a private country club for its members, is it your understanding that that would typically be conducted under the Rules of Golf?

"A. Well, that's—that's right. If you want to play golf, you need to play by these rules." App. 239.

[43] See n. 3, *supra*.

TOUR. See *supra*, at 667, and n. 6. In addition, although the USGA enforces a walking rule in most of the tournaments that it sponsors, it permits carts in the Senior Amateur and the Senior Women's Amateur championships.[44]

Petitioner, however, distinguishes the game of golf as it is generally played from the game that it sponsors in the PGA TOUR, NIKE TOUR, and (at least recently) the last stage of the Q-School—golf at the "highest level." According to petitioner, "[t]he goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules."[45] The waiver of any possibly "outcome-affecting" rule for a contestant would violate this principle and therefore, in petitioner's view, fundamentally alter the nature of the highest level athletic event.[46] The walking rule is one such rule, petitioner submits, because its purpose is "to inject the element of fatigue into the skill of shot-making,"[47] and thus its effect may be the critical loss of a stroke. As a consequence, the reasonable modification Martin seeks would fundamentally alter the nature of petitioner's highest level tournaments even if he were the only person in the world who has both the talent to compete in those elite events and a disability sufficiently serious that he cannot do so without using a cart.

The force of petitioner's argument is, first of all, mitigated by the fact that golf is a game in which it is impossible to guarantee that all competitors will play under exactly the

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[44] Furthermore, the USGA's handicap system, used by over 4 million amateur golfers playing on courses rated by the USGA, does not consider whether a player walks or rides in a cart, or whether she uses a caddy or carries her own clubs. Rather, a player's handicap is determined by a formula that takes into account the average score in the 10 best of her 20 most recent rounds, the difficulty of the different courses played, and whether or not a round was a "tournament" event.

[45] Brief for Petitioner 13.

[46] *Id.*, at 37.

[47] 994 F. Supp., at 1250.

same conditions or that an individual's ability will be the sole determinant of the outcome. For example, changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two.[48] Whether such happenstance events are more or less probable than the likelihood that a golfer afflicted with Klippel-Trenaunay-Weber Syndrome would one day qualify for the NIKE TOUR and PGA TOUR, they at least demonstrate that pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule.

Further, the factual basis of petitioner's argument is undermined by the District Court's finding that the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant. The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in walking a golf course (about five miles) to be approximately 500 calories—"'nutritionally . . . less than a Big Mac.'" 994 F. Supp., at 1250. What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking.

Moreover, when given the option of using a cart, the majority of golfers in petitioner's tournaments have chosen to

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[48] A drive by Andrew Magee earlier this year produced a result that he neither intended nor expected. While the foursome ahead of him was still on the green, he teed off on a 322-yard par four. To his surprise, the ball not only reached the green, but also bounced off Tom Byrum's putter and into the hole. Davis, Magee Gets Ace on Par-4, Ariz. Republic, Jan. 26, 2001, p. C16, 2001 WL 8510792.

walk, often to relieve stress or for other strategic reasons.[49] As NIKE TOUR member Eric Johnson testified, walking allows him to keep in rhythm, stay warmer when it is chilly, and develop a better sense of the elements and the course than riding a cart.[50]

Even if we accept the factual predicate for petitioner's argument—that the walking rule is "outcome affecting" because fatigue may adversely affect performance—its legal position is fatally flawed. Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, 42 U. S. C. § 12101(b)(1), and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered, § 12182(b)(2)(A)(ii). To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. See S. Rep. No. 101–116, at 61; H. R. Rep. No. 101–485, pt. 2, at 102 (public accommodations "are required to make decisions based on facts applicable to individuals"). Cf. *Sutton* v. *United Air Lines, Inc.*, 527 U. S. 471, 483 (1999) ("[W]hether a person has a disability under the ADA is an individualized inquiry").

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[49] That has been so not only in the SENIOR PGA TOUR and the first two stages of the Q-School, but also, as Martin himself noticed, in the third stage of the Q-School after petitioner permitted everyone to ride rather than just waiving the walking rule for Martin as required by the District Court's injunction.

[50] App. 201. See also *id.*, at 179–180 (deposition testimony of Gerry Norquist); *id.*, at 225–226 (trial testimony of Harry Toscano).

To be sure, the waiver of an essential rule of competition for anyone would fundamentally alter the nature of petitioner's tournaments. As we have demonstrated, however, the walking rule is at best peripheral to the nature of petitioner's athletic events, and thus it might be waived in individual cases without working a fundamental alteration. Therefore, petitioner's claim that all the substantive rules for its "highest-level" competitions are sacrosanct and cannot be modified under any circumstances is effectively a contention that it is exempt from Title III's reasonable modification requirement. But that provision carves out no exemption for elite athletics, and given Title III's coverage not only of places of "exhibition or entertainment" but also of "golf course[s]," 42 U. S. C. §§ 12181(7)(C), (L), its application to petitioner's tournaments cannot be said to be unintended or unexpected, see §§ 12101(a)(1), (5). Even if it were, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S., at 212 (internal quotation marks omitted).[51]

[51] Hence, petitioner's questioning of the ability of courts to apply the reasonable modification requirement to athletic competition is a complaint more properly directed to Congress, which drafted the ADA's coverage broadly, than to us. Even more misguided is JUSTICE SCALIA's suggestion that Congress did not place that inquiry into the hands of the courts at all. According to the dissent, the game of golf as sponsored by petitioner is, like all sports games, the sum of its "arbitrary rules," and no one, including courts, "can pronounce one or another of them to be 'nonessential' if the rulemaker (here the PGA TOUR) deems it to be essential." *Post*, at 700. Whatever the merit of JUSTICE SCALIA's postmodern view of "What Is [Sport]," *ibid.*, it is clear that Congress did not enshrine it in Title III of the ADA. While Congress expressly exempted "private clubs or establishments" and "religious organizations or entities" from Title III's coverage, 42 U. S. C. § 12187, Congress made no such exception for athletic competitions, much less did it give sports organizations *carte blanche* authority to exempt themselves from the fundamental alteration inquiry by deeming any rule, no matter how peripheral to the competition, to be

Under the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis, we have no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of petitioner's tournaments. As we have discussed, the purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments. Even if the rule does serve that purpose, it is an uncontested finding of the District Court that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." 994 F. Supp., at 1252. The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for, and compete in, the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires.[52] As a result, Martin's request for a waiver of the walking rule should have been granted.

The ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities.[53] But surely, in a case of this kind,

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essential. In short, JUSTICE SCALIA's reading of the statute renders the word "fundamentally" largely superfluous, because it treats the alteration of any rule governing an event at a public accommodation to be a fundamental alteration.

[52] On this fundamental point, the dissent agrees. See *post*, at 699 ("The PGA TOUR cannot deny respondent *access* to that game because of his disability").

[53] However, we think petitioner's contention that the task of assessing requests for modifications will amount to a substantial burden is overstated. As Martin indicates, in the three years since he requested the

Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In my view today's opinion exercises a benevolent compassion that the law does not place it within our power to impose. The judgment distorts the text of Title III, the structure of the ADA, and common sense. I respectfully dissent.

I

The Court holds that a professional sport is a place of public accommodation and that respondent is a "custome[r]" of "competition" when he practices his profession. *Ante*, at 679–680. It finds, *ante*, at 680, that this strange conclusion is compelled by the "literal text" of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12101 *et seq.*, by the "expansive purpose" of the ADA, and by the fact that Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000a(a), has been applied to an amusement park and public golf courses. I disagree.

The ADA has three separate titles: Title I covers employment discrimination, Title II covers discrimination by

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use of a cart, no one else has sued the PGA, and only two other golfers (one of whom is Olinger) have sued the USGA for a waiver of the walking rule. In addition, we believe petitioner's point is misplaced, as nowhere in § 12182(b)(2)(A)(ii) does Congress limit the reasonable modification requirement only to requests that are easy to evaluate.

government entities, and Title III covers discrimination by places of public accommodation. Title II is irrelevant to this case. Title I protects only "employees" of employers who have 15 or more employees, §§ 12112(a), 12111(5)(A). It does not protect independent contractors. See, *e. g.*, *Birchem* v. *Knights of Columbus*, 116 F. 3d 310, 312–313 (CA8 1997); cf. *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322–323 (1992). Respondent claimed employment discrimination under Title I, but the District Court found him to be an independent contractor rather than an employee.

Respondent also claimed protection under § 12182 of Title III. That section applies only to particular places and persons. The place must be a "place of public accommodation," and the person must be an "individual" seeking "enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of the covered place. § 12182(a). Of course a court indiscriminately invoking the "sweeping" and "expansive" purposes of the ADA, *ante*, at 675, 680, could argue that when a place of public accommodation denied *any* "individual," on the basis of his disability, *anything* that might be called a "privileg[e]," the individual has a valid Title III claim. Cf. *ante*, at 677. On such an interpretation, the employees and independent contractors of every place of public accommodation come within Title III: The employee enjoys the "privilege" of employment, the contractor the "privilege" of the contract.

For many reasons, Title III will not bear such an interpretation. The provision of Title III at issue here (§ 12182, its principal provision) is a public-accommodation law, and it is the traditional understanding of public-accommodation laws that they provide rights for *customers*. "At common law, innkeepers, smiths, and others who made profession of a public employment, were prohibited from refusing, without good reason, to serve a customer." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 571 (1995) (internal quotation marks omitted). See also

Heart of Atlanta Motel, Inc. v. *United States*, 379 U. S. 241 (1964). This understanding is clearly reflected in the text of Title III itself. Section 12181(7) lists 12 specific types of entities that qualify as "public accommodations," with a follow-on expansion that makes it clear what the "enjoyment of the goods, services, etc.," of those entities consists of—and it plainly envisions that the person "enjoying" the "public accommodation" will be a *customer*. For example, Title III is said to cover an "auditorium" or "other place of public gathering," § 12181(7)(D). Thus, "gathering" is the distinctive enjoyment derived from an auditorium; the persons "gathering" at an auditorium are presumably covered by Title III, but those contracting to clean the auditorium are not. Title III is said to cover a "zoo" or "other place of recreation," § 12181(7)(I). The persons "recreat[ing]" at a "zoo" are presumably covered, but the animal handlers bringing in the latest panda are not. The one place where Title III specifically addresses discrimination by places of public accommodation through "contractual" arrangements, it makes clear that discrimination against the other party to the contract is not covered, but only discrimination against "clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." § 12182(b)(1)(A)(iv). And finally, the regulations promulgated by the Department of Justice reinforce the conclusion that Title III's protections extend only to customers. "The purpose of the ADA's public accommodations requirements," they say, "is to ensure accessibility to the goods offered by a public accommodation." 28 CFR, ch. 1, pt. 36, App. B, p. 650 (2000). Surely this has nothing to do with employees and independent contractors.

If there were any doubt left that § 12182 covers only clients and customers of places of public accommodation, it is eliminated by the fact that a contrary interpretation would make a muddle of the ADA as a whole. The words of Title III must be read "in their context and with a view to their

place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Congress expressly excluded employers of fewer than 15 employees from Title I. The mom-and-pop grocery store or laundromat need not worry about altering the nonpublic areas of its place of business to accommodate handicapped employees—or about the litigation that failure to do so will invite. Similarly, since independent contractors are not covered by Title I, the small business (or the large one, for that matter) need not worry about making special accommodations for the painters, electricians, and other independent workers whose services are contracted for from time to time. It is an entirely unreasonable interpretation of the statute to say that these exemptions so carefully crafted in Title I are entirely eliminated by Title III (for the many businesses that are places of public accommodation) because employees and independent contractors "enjoy" the employment and contracting that such places provide. The only *distinctive* feature of places of public accommodation is that they accommodate the *public*, and Congress could have no conceivable reason for according the employees and independent contractors of such businesses protections that employees and independent contractors of other businesses do not enjoy.

The United States apparently agrees that employee claims are not cognizable under Title III, see Brief for United States as *Amicus Curiae* 18–19, n. 17, but despite the implications of its own regulations, see 28 CFR, ch. 1, pt. 36, App. B, at 650, appears to believe (though it does not explicitly state) that claims of independent contractors are cognizable. In a discussion littered with entirely vague statements from the legislative history, cf. *ante*, at 674–675, the United States argues that Congress presumably wanted independent contractors with private entities covered under Title III because independent contractors with governmental entities are covered by Title II, see Brief for United States as *Amicus Curiae* 18, and n. 17—a line of reasoning

that does not commend itself to the untutored intellect. But since the United States does not provide (and I cannot conceive of) any possible construction of the *terms* of Title III that will exclude employees while simultaneously covering independent contractors, its concession regarding employees effectively concedes independent contractors as well. Title III applies only to customers.

The Court, for its part, assumes that conclusion for the sake of argument, *ante*, at 679–680, but pronounces respondent to be a "customer" of the PGA TOUR or of the golf courses on which it is played. That seems to me quite incredible. The PGA TOUR is a professional sporting event, staged for the entertainment of a live and TV audience, the receipts from whom (the TV audience's admission price is paid by advertisers) pay the expenses of the tour, including the cash prizes for the winning golfers. The professional golfers on the tour are no more "enjoying" (the statutory term) the entertainment that the tour provides, or the facilities of the golf courses on which it is held, than professional baseball players "enjoy" the baseball games in which they play or the facilities of Yankee Stadium. To be sure, professional ballplayers *participate* in the games, and *use* the ballfields, but no one in his right mind would think that they are *customers* of the American League or of Yankee Stadium. They are themselves the entertainment that the customers pay to watch. And professional golfers are no different. It makes not a bit of difference, insofar as their "customer" status is concerned, that the remuneration for their performance (unlike most of the remuneration for ballplayers) is not fixed but contingent—viz., the purses for the winners in the various events, and the compensation from product endorsements that consistent winners are assured. The compensation of *many* independent contractors is contingent upon their success—real estate brokers, for example, or insurance salesmen.

As the Court points out, the ADA specifically identifies golf courses as one of the covered places of public accommodation. See § 12181(7)(L) ("a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation"); and the distinctive "goo[d], servic[e], facilit[y], privileg[e], advantag[e], or accommodatio[n]" identified by that provision as distinctive to that category of place of public accommodation is "exercise or recreation." Respondent did not seek to "exercise" or "recreate" at the PGA TOUR events; he sought to make money (which is why he is called a *professional* golfer). He was not a customer *buying* recreation or entertainment; he was a professional athlete *selling* it. That is the reason (among others) the Court's reliance upon Civil Rights Act cases like *Daniel* v. *Paul*, 395 U. S. 298 (1969), see *ante*, at 681, is misplaced. A professional golfer's practicing his profession is not comparable to John Q. Public's frequenting "a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar." *Daniel*, *supra*, at 301.

The Court relies heavily upon the Q-School. It says that petitioner offers the golfing public the "privilege" of "competing in the Q-School and playing in the tours; indeed, the former is a privilege for which thousands of individuals from the general public pay, and the latter is one for which they vie." *Ante*, at 677. But the Q-School is no more a "privilege" offered for the general public's "enjoyment" than is the California Bar Exam.[1] It is a competition for entry into the PGA TOUR—an open tryout, no different in principle from open casting for a movie or stage production, or walk-on try-

[1] The California Bar Exam is covered by the ADA, by the way, because a separate provision of Title III applies to "examinations . . . related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes." 42 U. S. C. § 12189. If open tryouts were "privileges" under § 12182, and participants in the tryouts "customers," § 12189 would have been unnecessary.

outs for other professional sports, such as baseball. See, *e. g.*, Amateurs Join Pros for New Season of HBO's "Sopranos," Detroit News, Dec. 22, 2000, p. 2 (20,000 attend open casting for "The Sopranos"); Bill Zack, Atlanta Braves, Sporting News, Feb. 6, 1995 (1,300 would-be players attended an open tryout for the Atlanta Braves). It may well be that some amateur golfers enjoy trying to make the grade, just as some amateur actors may enjoy auditions, and amateur baseball players may enjoy open tryouts (I hesitate to say that amateur lawyers may enjoy taking the California Bar Exam). But the purpose of holding those tryouts is not to provide entertainment; it is to hire. At bottom, open tryouts for performances to be held at a place of public accommodation are no different from open bidding on contracts to cut the grass at a place of public accommodation, or open applications for any job at a place of public accommodation. Those bidding, those applying—and those trying out—are not converted into customers. By the Court's reasoning, a business exists not only to sell goods and services to the public, but to provide the "privilege" of employment to the public; wherefore it follows, like night the day, that everyone who seeks a job is a customer.[2]

[2] The Court suggests that respondent is not an independent contractor because he "play[s] at [his] own pleasure," and is not subject to PGA TOUR control "over [his] manner of performance," *ante*, at 680, n. 33. But many independent contractors—composers of movie music, portrait artists, script writers, and even (some would say) plumbers—retain at least as much control over when and how they work as does respondent, who agrees to play in a minimum of 15 of the designated PGA TOUR events, and to play by the rules that the PGA TOUR specifies. Cf. *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 751–753 (1989) (discussing independent contractor status of a sculptor). Moreover, although, as the Court suggests in the same footnote, in rare cases a PGA TOUR winner will choose to forgo the prize money (in order, for example, to preserve amateur status necessary for continuing participation in college play) he is contractually *entitled* to the prize money if he demands it, which is all that a contractual relationship requires.

II

Having erroneously held that Title III applies to the "customers" of professional golf who consist of its practitioners, the Court then erroneously answers—or to be accurate simply ignores—a second question. The ADA requires covered businesses to make such reasonable modifications of "policies, practices, or procedures" as are necessary to "afford" goods, services, and privileges to individuals with disabilities; but it explicitly does not require "modifications [that] would fundamentally alter the nature" of the goods, services, and privileges. § 12182(b)(2)(A)(ii). In other words, disabled individuals must be given *access* to the same goods, services, and privileges that others enjoy. The regulations state that Title III "does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate use by, individuals with disabilities." 28 CFR § 36.307 (2000); see also 28 CFR, ch. 1, pt. 36, App. B, at 650. As one Court of Appeals has explained:

> "The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intention clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide whether shoestores should sell single shoes to one-legged persons and if so at what price, or how many Braille books the Borders or Barnes and Noble bookstore chains should stock in each of their stores." *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F. 3d 557, 560 (CA7 1999).

Since this is so, even if respondent here is a consumer of the "privilege" of the PGA TOUR competition, see *ante*, at 677, I see no basis for considering whether the rules of that competition must be altered. It is as irrelevant to the PGA TOUR's compliance with the statute whether walking is essential to the game of golf as it is to the shoe store's compliance whether "pairness" is essential to the nature of shoes. If a shoe store wishes to sell shoes only in pairs it may; and if a golf tour (or a golf course) wishes to provide only walk-around golf, it may. The PGA TOUR cannot deny respondent *access* to that game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else.

Since it has held (or assumed) professional golfers to be customers "enjoying" the "privilege" that consists of PGA TOUR golf; and since it inexplicably regards the rules of PGA TOUR golf as merely "policies, practices, or procedures" by which access to PGA TOUR golf is provided, the Court must then confront the question whether respondent's requested modification of the supposed policy, practice, or procedure of walking would "fundamentally alter the nature" of the PGA TOUR game, § 12182(b)(2)(A)(ii). The Court attacks this "fundamental alteration" analysis by asking two questions: first, whether the "essence" or an "essential aspect" of the sport of golf has been altered; and second, whether the change, even if not essential to the game, would give the disabled player an advantage over others and thereby "fundamentally alter the character of the competition." *Ante*, at 683. It answers no to both.

Before considering the Court's answer to the first question, it is worth pointing out that the assumption which underlies that question is false. Nowhere is it writ that PGA TOUR golf must be classic "essential" golf. Why cannot the PGA TOUR, if it wishes, promote a new game, with distinctive rules (much as the American League promotes a game of baseball in which the pitcher's turn at the plate can be

taken by a "designated hitter")? If members of the public do not like the new rules—if they feel that these rules do not truly test the individual's skill at "real golf" (or the team's skill at "real baseball") they can withdraw their patronage. But the rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be "nonessential" if the rulemaker (here the PGA TOUR) deems it to be essential.

If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf—and if one assumes the correctness of all the other wrong turns the Court has made to get to this point—then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States," U. S. Const., Art. I, §8, cl. 3, to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.

Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question. To say that something is "essential" is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very

nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game's arbitrary rules is "essential." Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields—all are arbitrary and none is essential. The only support for any of them is tradition and (in more modern times) insistence by what has come to be regarded as the ruling body of the sport—both of which factors support the PGA TOUR's position in the present case. (Many, indeed, consider walking to be *the central feature* of the game of golf—hence Mark Twain's classic criticism of the sport: "a good walk spoiled.") I suppose there is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game. If the PGA TOUR competitors were required to dribble a large, inflated ball and put it through a round hoop, the game could no longer reasonably be called golf. But this criterion—destroying recognizability as the same generic game—is surely not the test of "essentialness" or "fundamentalness" that the Court applies, since it apparently thinks that merely changing the diameter of the *cup* might "fundamentally alter" the game of golf, *ante*, at 682.

Having concluded that dispensing with the walking rule would not violate federal-Platonic "golf" (and, implicitly, that it is federal-Platonic golf, and no other, that the PGA TOUR can insist upon), the Court moves on to the second part of its test: the competitive effects of waiving this nonessential rule. In this part of its analysis, the Court first finds that the effects of the change are "mitigated" by the fact that in the game of golf weather, a "lucky bounce," and "pure chance" provide different conditions for each competitor and individual ability may not "be the sole determinant of the outcome." *Ante*, at 687. I guess that is why those who follow professional golfing consider Jack Nicklaus the *luckiest* golfer of all time, only to be challenged of late by

the phenomenal *luck* of Tiger Woods. The Court's empiricism is unpersuasive. "Pure chance" is randomly distributed among the players, but allowing respondent to use a cart gives him a "lucky" break every time he plays. Pure chance also only matters at the margin—a stroke here or there; the cart substantially improves this respondent's competitive prospects beyond a couple of strokes. But even granting that there are significant nonhuman variables affecting competition, that fact does not justify adding another variable that always favors one player.

In an apparent effort to make its opinion as narrow as possible, the Court relies upon the District Court's finding that even with a cart, respondent will be at least as fatigued as everyone else. *Ante,* at 690. This, the Court says, *proves* that competition will not be affected. Far from thinking that reliance on this finding cabins the effect of today's opinion, I think it will prove to be its most expansive and destructive feature. Because step one of the Court's two-part inquiry into whether a requested change in a sport will "fundamentally alter [its] nature," § 12182(b)(2)(A)(ii), consists of an utterly unprincipled ontology of sports (pursuant to which the Court is not even sure whether golf's "essence" requires a 3-inch hole), there is every reason to think that in future cases involving requests for special treatment by would-be athletes the second step of the analysis will be determinative. In resolving that second step—determining whether waiver of the "nonessential" rule will have an impermissible "competitive effect"—by measuring the athletic capacity of the requesting individual, and asking whether the special dispensation would do no more than place him on a par (so to speak) with other competitors, the Court guarantees that future cases of this sort will have to be decided on the basis of individualized factual findings. Which means that future cases of this sort will be numerous, and a rich source of lucrative litigation. One can envision the parents of a Little

League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)

The statute, of course, provides no basis for this individualized analysis that is the Court's last step on a long and misguided journey. The statute seeks to assure that a disabled person's disability will not deny him *equal access* to (among other things) competitive sporting events—not that his disability will not deny him an *equal chance to win* competitive sporting events. The latter is quite impossible, since the very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers—and artificially to "even out" that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game. That is why the "handicaps" that are customary in social games of golf—which, by adding strokes to the scores of the good players and subtracting them from scores of the bad ones, "even out" the varying abilities—are *not* used in professional golf. In the Court's world, there is one set of rules that is "fair with respect to the able-bodied" but "individualized" rules, mandated by the ADA, for "talented but disabled athletes." *Ante,* at 691. The ADA mandates no such ridiculous thing. Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration—these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-

given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.

* * *

My belief that today's judgment is clearly in error should not be mistaken for a belief that the PGA TOUR clearly *ought not* allow respondent to use a golf cart. *That* is a close question, on which even those who compete in the PGA TOUR are apparently divided; but it is a *different* question from the one before the Court. Just as it is a different question whether the Little League *ought* to give disabled youngsters a fourth strike, or some other waiver from the rules that makes up for their disabilities. In both cases, whether they *ought* to do so depends upon (1) how central to the game that they have organized (and over whose rules they are the master) they deem the waived provision to be, and (2) how competitive—how strict a test of raw athletic ability in all aspects of the competition—they want their game to be. But whether Congress has said they *must* do so depends upon the answers to the legal questions I have discussed above—not upon what this Court sententiously decrees to be "'decent, tolerant, [and] progressive,'" *ante*, at 675 (quoting *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 375 (2001) (KENNEDY, J., concurring)).

And it should not be assumed that today's decent, tolerant, and progressive judgment will, in the long run, accrue to the benefit of sports competitors with disabilities. Now that it is clear courts will review the rules of sports for "fundamentalness," organizations that value their autonomy have every incentive to defend vigorously the necessity of every regulation. They may still be second-guessed in the end as to the Platonic requirements of the sport, but they will *assuredly* lose if they have at all wavered in their enforcement. The lesson the PGA TOUR and other sports organizations should take from this case is to make sure that the same written

rules are set forth for all levels of play, and never voluntarily to grant any modifications. The second lesson is to end open tryouts. I doubt that, in the long run, even disabled athletes will be well served by these incentives that the Court has created.

Complaints about this case are not "properly directed to Congress," *ante,* at 689, n. 51. They are properly directed to this Court's Kafkaesque determination that professional sports organizations, and the fields they rent for their exhibitions, are "places of public accommodation" to the competing athletes, and the athletes themselves "customers" of the organization that pays them; its Alice in Wonderland determination that there are such things as judicially determinable "essential" and "nonessential" rules of a made-up game; and its Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability (or at least no one's lack of ability so pronounced that it amounts to a disability) will be a handicap. The year was 2001, and "everybody was finally equal." K. Vonnegut, Harrison Bergeron, in Animal Farm and Related Readings 129 (1997).

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99–1815. Argued February 21, 2001—Decided May 29, 2001

When co-respondent labor union petitioned the National Labor Relations Board to represent a unit of employees at respondent's residential care facility, respondent objected to the inclusion of its registered nurses in the unit, arguing that they were "supervisors" under § 2(11) of the National Labor Relations Act (Act), 29 U. S. C. § 152(11), and hence excluded from the Act's protections. At the representation hearing, the Board's Regional Director placed the burden of proving supervisory status on respondent, found that respondent had not carried its burden, and included the nurses in the unit. Thereafter, respondent refused to bargain with the union, leading the Board's General Counsel to file an unfair labor practice complaint. The Board granted the General Counsel summary judgment on the basis of the representation determination, but the Sixth Circuit refused to enforce the Board's order. It rejected the Board's interpretation of "independent judgment" in § 2(11)'s test for supervisory status, and held that the Board had erred in placing the burden of proving supervisory status on respondent.

Held:

1. Respondent carries the burden of proving the nurses' supervisory status in the representation hearing and unfair labor practice proceeding. The Act does not expressly allocate the burden of proving or disproving supervisory status, but the Board has consistently placed the burden on the party claiming that the employee is a supervisor. That rule is both reasonable and consistent with the Act, which makes supervisors an exception to the general class of employees. It is not contrary to the requirement that the Board must prove the elements of an unfair labor practice, because supervisory status is not an element of the Board's refusal-to-bargain charge. The Board must prove that the employer refused to bargain with the representative of a properly certified unit; the unit was not properly certified only if respondent successfully showed at the certification stage that some employees in the unit were supervisors. Pp. 710–712.

2. The Board's test for determining supervisory status is inconsistent with the Act. The Act deems employees to be "supervisors" if they

Syllabus

(1) exercise 1 of 12 listed supervisory functions, including "responsibly direct[ing]" other employees, (2) use "independent judgment" in exercising their authority, and (3) hold their authority in the employer's interest, § 2(11). The Board rejected respondent's proof of supervisory status on the ground that employees do not use "independent judgment" under § 2(11) when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." Brief for Petitioner 11. This interpretation, by distinguishing different kinds of judgment, introduces a categorical exclusion into statutory text that does not suggest its existence. The text permits questions regarding the degree of discretion an employee exercises, but the Board's interpretation renders determinative factors that have nothing to do with degree: even a significant judgment only loosely constrained by the employer will not be independent if it is "professional or technical." The Board limits its categorical exclusion with a qualifier that is no less striking: only professional judgment applied in directing less skilled employees to deliver services is not "independent judgment." Hence, the exclusion would apply to only 1 of the listed supervisory functions—"responsibly to direct"—though all 12 require using independent judgment. Contrary to the Board's contention, Congress did not incorporate the Board's categorical restrictions on "independent judgment" when it first added "supervisor" to the Act in 1947. The Board's policy concern regarding the proper balance of labor-management power cannot be given effect through this statutory text. Because this Court may not enforce the Board's order by applying a legal standard the Board did not adopt, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 289–290, the Board's error precludes the Court from enforcing its order. Pp. 712–722.

193 F. 3d 444, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I and III, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 722.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were former *Solicitor General Waxman*, *Matthew D. Roberts*, *Leonard R. Page*, *John H. Ferguson*, *Norton J. Come*, and *John Emad Arbab*. *Thomas J. Schulz*, *Jonathan P. Hiatt*, *James B. Coppess*, and

Laurence Gold filed briefs for Kentucky State District Council of Carpenters as respondent under this Court's Rule 12.6 in support of petitioner.

Michael W. Hawkins argued the cause for respondent Kentucky River Community Care, Inc. With him on the brief were *Louise S. Brock* and *Cheryl E. Bruner.**

JUSTICE SCALIA delivered the opinion of the Court.

Under the National Labor Relations Act, employees are deemed to be "supervisors" and thereby excluded from the protections of the Act if, *inter alia*, they exercise "independent judgment" in "responsibly . . . direct[ing]" other employees "in the interest of the employer." 29 U. S. C. § 152(11). This case presents two questions: which party in an unfair-labor-practice proceeding bears the burden of proving or disproving an employee's supervisory status; and whether judgment is not "independent judgment" to the extent that it is informed by professional or technical training or experience.

I

In Pippa Passes, Kentucky, respondent Kentucky River Community Care, Inc., operates a care facility for residents who suffer from mental retardation and mental illness. The facility, named the Caney Creek Developmental Complex (Caney Creek), employs approximately 110 professional and nonprofessional employees in addition to roughly a dozen concededly managerial or supervisory employees. In 1997, the Kentucky State District Council of Carpenters (a labor

*Briefs of *amici curiae* urging reversal were filed for the American Nurses Association by *Barbara J. Sapin* and *Woody N. Peterson;* and for the Service Employees International Union et al. by *Judith A. Scott*, *Diana O. Ceresi*, *Robert E. Funk, Jr.*, *David J. Strom*, *Jack Dempsey*, and *Larry Weinberg.*

Briefs of *amici curiae* urging affirmance were filed for the American Health Care Association by *Thomas V. Walsh* and *Thomas P. McDonough;* and for Human Resource Management et al. by *G. Roger King.*

union that is co-respondent here, supporting petitioner) petitioned the National Labor Relations Board to represent a single unit of all 110 potentially eligible employees at Caney Creek. See National Labor Relations Act (Act) § 9(c), 49 Stat. 453, 29 U. S. C. § 159(c).

At the ensuing representation hearing, respondent objected to the inclusion of Caney Creek's six registered nurses in the bargaining unit, arguing that they were "supervisors" under § 2(11) of the Act, 29 U. S. C. § 152(11), and therefore excluded from the class of "employees" subject to the Act's protection and includable in the bargaining unit. See § 2(3), 29 U. S. C. § 152(3). The Board's Regional Director, to whom the Board has delegated its initial authority to determine an appropriate bargaining unit, see § 3(b), 29 U. S. C. § 153(b); 29 CFR § 101.21 (2000), placed the burden of proving supervisory status on respondent, found that respondent had not carried its burden, and therefore included the nurses in the bargaining unit. The Regional Director accordingly directed an election to determine whether the union would represent the unit. See § 9(c)(1), 29 U. S. C. § 159(c)(1). The Board denied respondent's request for review of the Regional Director's decision and direction of election, and the union won the election and was certified as the representative of the Caney Creek employees.

Because direct judicial review of representation determinations is unavailable, *AFL* v. *NLRB*, 308 U. S. 401, 409–411 (1940), respondent sought indirect review by refusing to bargain with the union, thereby inducing the General Counsel of the Board to file an unfair labor practice complaint under §§ 8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§ 158(a)(1), (5). The Board granted summary judgment to the General Counsel pursuant to regulations providing that, absent newly developed evidence, the propriety of a bargaining unit may not be relitigated in an unfair labor practice hearing predicated on a challenge to the representation determination. 29 CFR § 102.67(f) (2000); see *Magnesium Casting Co.* v.

NLRB, 401 U. S. 137, 139–141 (1971) (approving that practice); *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 161–162 (1941) (same).

Respondent petitioned for review of the Board's decision in the United States Court of Appeals for the Sixth Circuit, and the Board cross-petitioned. The Sixth Circuit granted respondent's petition as it applied to the nurses and refused to enforce the bargaining order. It held that the Board had erred in placing the burden of proving supervisory status on respondent rather than on its General Counsel, and it rejected the Board's interpretation of "independent judgment," explaining that the Board had erred by classifying "the practice of a nurse supervising a nurse's aide in administering patient care" as "'routine' [simply] because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with 'management.'" 193 F. 3d 444, 453 (1999). We granted the Board's petition for a writ of certiorari. 530 U. S. 1304 (2000).

II

The Act expressly defines the term "supervisor" in § 2(11), which provides:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152(11).

The Act does not, however, expressly allocate the burden of proving or disproving a challenged employee's supervisory status. The Board therefore has filled the statutory gap with the consistent rule that the burden is borne by

the party claiming that the employee is a supervisor. For example, when the General Counsel seeks to attribute the conduct of certain employees to the employer by virtue of their supervisory status, this rule dictates that he bear the burden of proving supervisory status. See, *e. g.*, *Masterform Tool Co.*, 327 N. L. R. B. 1071, 1071–1072 (1999). Or, when a union challenges certain ballots cast in a representation election on the basis that they were cast by supervisors, the union bears the burden. See, *e. g.*, *Panaro and Grimes*, 321 N. L. R. B. 811, 812 (1996).

The Board argues that the Court of Appeals for the Sixth Circuit erred in not deferring to its resolution of the statutory ambiguity, and we agree. The Board's rule is supported by "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 (1948). The Act's definition of "employee," § 2(3), 29 U. S. C. § 152(3), "reiterate[s] the breadth of the ordinary dictionary definition" of that term, so that it includes "any 'person who works for another in return for financial or other compensation.'" *NLRB* v. *Town & Country Elec., Inc.*, 516 U. S. 85, 90 (1995) (quoting American Heritage Dictionary 604 (3d ed. 1992)). Supervisors would fall within the class of employees, were they not expressly excepted from it. See *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 891 (1984); cf. *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947). The burden of proving the applicability of the supervisory exception, under *Morton Salt*, should thus fall on the party asserting it. In addition, it is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status. We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and

we therefore defer to it. *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 402–403 (1983).

Applying its rule to this case, the Board placed on respondent the duty to prove the supervisory status of its nurses both in the § 9(c) representation proceeding, where respondent sought to exclude the nurses from the bargaining unit prior to the election, and in the unfair labor practice hearing, where respondent defended against the § 8(a)(5) refusal-to-bargain charge. Respondent challenges the application of the rule to the latter proceeding where, it correctly observes and the Board does not dispute, "the General Counsel carries the burden of proving the elements of an unfair labor practice," *id.*, at 401, which means that it bears the burden of persuasion as well as of production, see Administrative Procedure Act, 5 U. S. C. § 556(d); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 276–278 (1994) (rejecting statement to contrary in *NLRB* v. *Transportation Management Corp.*, *supra*, at 404, n. 7). Supervisory status, however, is not an element of the Board's claim in this setting. The Board must prove that the employer refused to bargain with the representative of a unit of "employees," § 8(a)(5), 29 U. S. C. § 158(a)(5), that was properly certified; the unit was not properly certified (as the respondent contends) only if the respondent successfully demonstrated, at the certification stage, that some employees in the unit were also supervisors. In the unfair labor practice proceeding, therefore, the burden remains on the employer to establish the excepted status of these nurses. Insofar as the Court of Appeals held otherwise, it erred. It remains to consider whether the court's other holding that is challenged here suffices to sustain its judgment.

III

The text of § 2(11) of the Act that we quoted above, 29 U. S. C. § 152(11), sets forth a three-part test for deter-

mining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB* v. *Health Care & Retirement Corp. of America,* 511 U. S. 571, 573–574 (1994). The only basis asserted by the Board, before the Court of Appeals and here, for rejecting respondent's proof of supervisory status with respect to directing patient care was the Board's interpretation of the second part of the test—to wit, that employees do not use "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." Brief for Petitioner 11. The Court of Appeals rejected that interpretation, and so do we.

Two aspects of the Board's interpretation are reasonable, and hence controlling on this Court, see *NLRB* v. *Town & Country Elec., Inc., supra,* at 89–90; *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–844 (1984). First, it is certainly true that the statutory term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status. See *NLRB* v. *Health Care & Retirement Corp. of America, supra,* at 579. Many nominally supervisory functions may be performed without the "exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding" of supervisory status under the Act. *Weyerhaeuser Timber Co.,* 85 N. L. R. B. 1170, 1173 (1949). It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies. Second, as reflected in the Board's phrase "in accordance with employer-specified standards," it is also undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold

by detailed orders and regulations issued by the employer. So, for example, in *Chevron Shipping Co.*, 317 N. L. R. B. 379, 381 (1995), the Board concluded that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur."

The Board, however, argues further that the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion is not "independent judgment" if it is a particular *kind* of judgment, namely, "ordinary professional or technical judgment in directing less-skilled employees to deliver services." Brief for Petitioner 11. The first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence. The text, by focusing on the "clerical" or "routine" (as opposed to "independent") nature of the judgment, introduces the question of degree of judgment that we have agreed falls within the reasonable discretion of the Board to resolve. But the Board's categorical exclusion turns on factors that have nothing to do with the degree of discretion an employee exercises. Cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 481 (2001) ("[T]he agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear"). Let the judgment be significant and only loosely constrained by the employer; if it is "professional or technical" it will nonetheless not be independent.[1] The breadth

[1] The Board in its reply brief in this Court steps back from this interpretation and argues that it has only drawn distinctions between degrees of authority. Reply Brief for Petitioner 3. But the opinions of the Board that developed its current interpretation of "independent judgment" clearly draw a categorical distinction. See, *e. g.*, *Providence Hospital*, 320 N. L. R. B. 717, 729 (1996) ("Section 2(11) supervisory authority does

of this exclusion is made all the more startling by virtue of the Board's extension of it to judgment based on greater "experience" as well as formal training. See Reply Brief for Petitioner 3 ("professional or technical skill or experience"). What supervisory judgment worth exercising, one must wonder, does not rest on "professional or technical skill or experience"? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate "supervisors" from the Act. Cf. *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 687 (1980) (Excluding "decisions . . . based on . . . professional expertise" would risk "the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities").

As it happens, though, only one class of supervisors would be eliminated in practice, because the Board limits its categorical exclusion with a qualifier: Only professional judgment that is applied "in directing less-skilled employees to deliver services" is excluded from the statutory category of "independent judgment." Brief for Petitioner 11. This second rule is no less striking than the first, and is directly contrary to the text of the statute. *Every* supervisory function listed by the Act is accompanied by the statutory requirement that its exercise "requir[e] the use of independent judgment" before supervisory status will obtain, § 152(11), but the Board would apply its restriction upon "independent judgment" to just 1 of the 12 listed functions: "responsibly

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not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position"). It is those opinions that were cited in the Regional Director's opinion resolving the representation dispute, see App. to Pet. for Cert. 52a–53a, which was accepted without further review by the Board and was unreviewable in the unfair labor practice proceeding. "We do not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself." *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 685, n. 22 (1980) (citing *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947)).

to direct." There is no apparent textual justification for this asymmetrical limitation, and the Board has offered none. Surely no conceptual justification can be found in the proposition that supervisors exercise professional, technical, or experienced judgment only when they direct other employees. Decisions "to hire, . . . suspend, lay off, recall, promote, discharge, . . . or discipline" other employees, *ibid.*, must often depend upon that same judgment, which enables assessment of the employee's proficiency in performing his job. See *NLRB* v. *Yeshiva Univ.*, *supra*, at 686 ("[M]ost professionals in managerial positions continue to draw on their special skills and training"). Yet in no opinion that we were able to discover has the Board held that a supervisor's judgment in hiring, disciplining, or promoting another employee ceased to be "independent judgment" because it depended upon the supervisor's professional or technical training or experience. When an employee exercises one of these functions with judgment that possesses a sufficient degree of independence, the Board invariably finds supervisory status. See, *e. g.*, *Trustees of Noble Hospital*, 218 N. L. R. B. 1441, 1442 (1975).

The Board's refusal to apply its limiting interpretation of "independent judgment" to any supervisory function other than responsibly directing other employees is particularly troubling because just seven years ago we rejected the Board's interpretation of part three of the supervisory test that similarly was applied only to the same supervisory function. See *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U. S. 571 (1994). In *Health Care*, the Board argued that nurses did not exercise their authority "in the interest of the employer," as § 152(11) requires, when their "independent judgment [was] exercised incidental to professional or technical judgment" instead of for "disciplinary or other matters, i. e., in addition to treatment of patients." *Northcrest Nursing Home*, 313 N. L. R. B. 491, 505 (1993). It did not escape our notice that the target of this analy-

sis was the supervisory function of responsible direction. "Under § 2(11)," we noted, "an employee who in the course of employment uses independent judgment to engage in 1 of the 12 listed activities, including responsible direction of other employees, is a supervisor. Under the Board's test, however, a nurse who in the course of employment uses independent judgment to engage in responsible direction of other employees is not a supervisor." 511 U. S., at 578–579. We therefore rejected the Board's analysis as "inconsistent with . . . the statutory language," because it "rea[d] the responsible direction portion of § 2(11) out of the statute in nurse cases." *Id.*, at 579–580. It is impossible to avoid the conclusion that the Board's interpretation of "independent judgment," applied to nurses for the first time after our decision in *Health Care*, has precisely the same object. This interpretation of "independent judgment" is no less strained than the interpretation of "in the interest of the employer" that it has succeeded.[2] Cf. *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998) (an agency that announces one principle but applies another is not acting rationally under the Act).

The Board contends, however, that Congress incorporated the Board's categorical restrictions on "independent judgment" when it first added the term "supervisor" to the Act in 1947. We think history shows the opposite. The Act as originally passed by Congress in 1935 did not mention supervisors directly. It extended to "employees" the "right to self-organization, to form, join, or assist labor organizations,

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[2] JUSTICE STEVENS argues in this case, see *post*, at 725–726 (opinion concurring in part and dissenting in part), as the Board argued in *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U. S. 571, 579 (1994), that the strain is eased by the ambiguity of a different term in the statute, "responsibly to direct." That argument is no more persuasive now than when we rejected it in *Health Care:* "[A]mbiguity in one portion of a statute does not give the Board license to distort other provisions of the statute," *ibid.*

[and] to bargain collectively through representatives of their own choosing . . . ." Act of July 5, 1935, § 7, 49 Stat. 452, and it defined "employee" expansively (if circularly) to "include any employee," § 2(3). We therefore held that supervisors were protected by the Act. *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947). Congress in response added to the Act the exemption we had found lacking. The Labor Management Relations Act, 1947 (Taft-Hartley Act) expressly excluded "supervisors" from the definition of "employees" and thereby from the protections of the Act. § 2(3), 61 Stat. 137, as amended, 29 U. S. C. § 152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor"); Taft-Hartley Act § 14(a), as amended, 29 U. S. C. § 164(a) ("[N]o employer [covered by the Act] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining").

Well before the Taft-Hartley Act added the term "supervisor" to the Act, however, the Board had already been defining it, because while the Board agreed that supervisors were protected by the 1935 Act, it also determined that they should not be placed in the same bargaining unit as the employees they oversaw. To distinguish the two groups, the Board defined "supervisors" as employees who "supervise or direct the work of [other] employees . . . , *and* who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees." *Douglas Aircraft Co.*, 50 N. L. R. B. 784, 787 (1943) (emphasis added). The "and" bears emphasis because it was a true conjunctive: The Board consistently held that employees whose only supervisory function was directing the work of other employees were not "supervisors" within its test. For example, in *Bunting Brass & Bronze Co.*, 58 N. L. R. B. 618, 620 (1944), the Board wrote: "We are of the opinion that, while linemen do direct the work of [other] employees, they do not exercise substantial supervisory authority within the

usual meaning of that term." See also, *e. g.*, *Duval Texas Sulphur Co.*, 53 N. L. R. B. 1387, 1390–1391 (1943) ("As to the chief electrician, motor mechanic, plant engineers, and drillers, . . . [t]he fact that they work with helpers, and perforce direct and guide the work of their helpers, does not, of itself, elevate them to such supervisory rank that they must be excluded from the broad production and maintenance unit").

When the Taft-Hartley Act added the term "supervisor" to the Act in 1947, it largely borrowed the Board's definition of the term, with one notable exception: Whereas the Board required a supervisor to direct the work of other employees *and* perform another listed function, the Act permitted direction alone to suffice. "The term 'supervisor' means any individual having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, *or* responsibly to direct them, or to adjust their grievances." Taft-Hartley Act § 2(11), as amended, 29 U. S. C. § 152(11) (emphasis added). Moreover, the Act assuredly did *not* incorporate the Board's current interpretation of the term "independent judgment" as applied to the function of responsible direction, since the Board had not yet developed that interpretation. It had had no reason to do so, because it had limited the category of supervisors more directly, by requiring functions *in addition* to responsible direction. It is the Act's alteration of precisely that aspect of the Board's jurisprudence that has pushed the Board into a running struggle to limit the impact of "responsibly to direct" on the number of employees qualifying for supervisory status—presumably driven by the policy concern that otherwise the proper balance of labor-management power will be disrupted.

It is upon that policy concern that the Board ultimately rests its defense of its interpretation of "independent judgment." In arguments that parallel those expressed by the dissent in *Health Care*, see 511 U. S., at 588–590 (GINS-

BURG, J., dissenting), and which are adopted by JUSTICE STEVENS in this case, see *post,* at 726–727, the Board contends that its interpretation is necessary to preserve the inclusion of "professional employees" within the coverage of the Act. See § 2(12), 29 U. S. C. § 152(12). Professional employees by definition engage in work "involving the consistent exercise of discretion and judgment." § 152(12)(a)(ii). Therefore, the Board argues (enlisting dictum from our decision in *NLRB* v. *Yeshiva Univ.*, 444 U. S., at 690, and n. 30, that was rejected in *Health Care,* see 511 U. S., at 581–582), if judgment of that sort makes one a supervisor under § 152(11), then Congress's intent to include professionals in the Act will be frustrated, because "many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work," Brief for Petitioner 33. The problem with the argument is not the soundness of its labor policy (the Board is entitled to judge that without our constant second-guessing, see, *e. g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 786 (1990)). It is that the policy cannot be given effect through this statutory text. See *Health Care, supra,* at 581 ("[T]here may be 'some tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of professionals,' but we find no authority for 'suggesting that that tension can be resolved' by distorting the statutory language in the manner proposed by the Board") (quoting *NLRB* v. *Yeshiva Univ., supra,* at 686). Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees,* as § 152(11) requires. Certain of the Board's decisions appear to have drawn that distinction in the past, see, *e. g., Providence Hospital,* 320 N. L. R. B. 717, 729 (1996). We have no occasion to consider it here, however, because the Board has carefully

insisted that the proper interpretation of "responsibly to direct" is not at issue in this case, see Brief for Petitioner 21–22, n. 9; Reply Brief for Petitioner 7–8, n. 6.

What is at issue is the Board's contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, "independent judgment," that naturally includes them. And further, that it justifies limiting this categorical exclusion to the supervisory function of responsibly directing other employees. These contentions contradict both the text and structure of the statute, and they contradict as well the rule of *Health Care* that the test for supervisory status applies no differently to professionals than to other employees. 511 U. S., at 581. We therefore find the Board's interpretation unlawful. See *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S., at 364 ("Courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' and if the Board's 'explication is not inadequate, irrational or arbitrary' " (citations omitted)).

* * *

We may not enforce the Board's order by applying a legal standard the Board did not adopt, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 289–290 (1974); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88 (1943), and, as we noted above, *supra*, at 713, the Board has not asked us to do so. Hence, the Board's error in interpreting "independent judgment" precludes us from enforcing its order. Our decision in *Health Care*, where the Board similarly had not asserted that its decision was correct on grounds apart from the one we rejected, see 511 U. S., at 584, simply affirmed the judgment of the Court of Appeals denying enforcement. Since that same condition applies here, see Brief for Petitioner 14, 42, and since neither party has suggested that *Health Care*'s method for determining the propriety of a remand should

not apply here, we take the same course.[3] "Our conclusion that the Court of Appeals was correct to find the Board's test inconsistent with the statute . . . suffices to resolve the case." *Health Care*, *supra*, at 584. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

In my opinion, the National Labor Relations Board correctly found that respondent, Kentucky River Community Care, Inc., failed to prove that the six registered nurses employed at its facility in Pippa Passes, Kentucky, are "supervisors" within the meaning of the National Labor Relations Act. While we are unanimous in holding that the Court of Appeals set aside that finding based upon an incorrect allocation of the burden of proof, we disagree as to whether the Court of Appeals correctly concluded that the Board misinterpreted the provision of the NLRA excluding supervisors from the Act's coverage. Moreover, even if I agreed with the majority's view that the Board's interpretation was error, that error would not justify affirming the erroneous decision of the Court of Appeals.

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[3] Our decision in *Health Care* cannot be distinguished, as JUSTICE STEVENS suggests, see *post*, at 729, n. 10, on the ground that there we found that the Court of Appeals had not erred in any respect. The basis for remand to an agency is the *agency's* error on a point of law, not the reviewing court's. (That the reviewing court erred is irrelevant in light of "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason,'" *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943) (quoting *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937)).) And in *Health Care*, as here, the Board erred in interpreting the test for supervisory status.

I

In the proceedings before the Board, respondent relied heavily on the fact that two registered nurses (RNs) served as "building supervisors" on weekends, and on the second and third shifts. However, as the Regional Director who considered the evidence noted, the RNs received no extra compensation for serving as building supervisors and did not have keys to the facility. Instead, the only additional responsibility shouldered by the RNs when serving as building supervisors was that of contacting other employees if a shift was not fully staffed according to preestablished ratios not set by the RNs. However, the RNs had no authority to compel an employee to stay on duty or to come to work to fill a vacancy under threat of discipline.

With respect to the RNs' regular duties, while they might "occasionally request other employees to perform routine tasks," they had no "authority to take any action if the employee refuse[d] their directives."[1] App. to Pet. for Cert. 51a. In their routine work, they had no "authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action. They did not evaluate employees or take any action which would affect their employment status." *Id.*, at 52a. Indeed, the RNs, even when serving as "building supervisors," for the most part "work[ed] independently and by themselves without any subordinates." *Ibid.*

Based on his evaluation of the evidence, the NLRB's Regional Director applied "the same test to registered nurses as is applicable to all other individuals in determining supervisory status." *Ibid.* Under that test, he concluded that "only supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors, and not 'straw bosses, leadmen, set-up men and other minor

[1] The RNs did have the authority to file "incident reports, but so [could] any other employee." App. to Pet. for Cert. 51a.

supervisory employees.'" *Id.*, at 53a (quoting *Chicago Metallic Corp.*, 273 N. L. R. B. 1677, 1688 (1985)). He did, however, exclude from the bargaining unit 10 specific supervisors including the nursing coordinator. App. to Pet. for Cert. 54a.

Over the dissent of Judge Jones, the Court of Appeals set aside the Board's order. The panel majority first criticized the Board for ignoring its "repeated admonition" that the NLRB "'has the burden of proving that employees are not supervisors.'" *Id.*, at 15a. After acknowledging that "whether an employee is a supervisor is a highly fact-intensive inquiry," that majority concluded that the RNs' duties as building supervisors involved "independent judgment which is not limited to, or inherent in, the professional training of nurses." *Id.*, at 16a–19a. The panel majority also criticized the NLRB for interpreting the admittedly ambiguous statutory term "independent judgment" inconsistently with Sixth Circuit precedent.[2]

II

Although it is not necessary to do so to overturn the Court of Appeals' decision, the NLRB has asked us to reject the Sixth Circuit's interpretation of the term "independent judgment." In contrast to the Sixth Circuit, the NLRB interprets the term "independent judgment" as not including the exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.[3] *Provi-*

[2] "According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve 'independent judgment.' The NLRB classifies these activities as 'routine' because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with 'management.'" *Id.*, at 17a.

[3] Oddly, the majority in this Court omits one element—namely, "'in accordance with employer-specified standards.'" *Ante*, at 715–716. In so

dence Hospital, 320 N. L. R. B. 717 (1996), enforced, 121 F. 3d 548 (CA9 1997); *Nymed, Inc.*, 320 N. L. R. B. 806 (1996); see also, *e. g., Graphics Typography, Inc.*, 217 N. L. R. B. 1047, 1053 (1975), enforced mem., 547 F. 2d 1162 (CA3 1976). The Board's interpretation is a familiar one, which has been routinely applied in other employment contexts. See *Providence*, 320 N. L. R. B., at 717; *Graphics Typography*, 217 N. L. R. B., at 1053. Applying that interpretation, the NLRB has concluded that in some cases the employees in question are supervisors, and that in others they are not.[4] See Brief for Petitioner 17–19, nn. 5–7 (collecting cases); see also Brief for Respondent Kentucky State District Council of Carpenters 36, n. 16 (collecting cases).

The question before us is whether the Board's interpretation is both "rational and consistent with the Act."[5] *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 796 (1990); see *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 42 (1987). To my mind, the Board's test is both fully rational and entirely consistent with the Act.

The term "independent judgment" is indisputably ambiguous, and it is settled law that the NLRB's interpretation

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doing, it ignores a key nuance in the NLRB's position. That, however, is characteristic of the majority's treatment of the NLRB's position, which is at once more fact specific and far less categorical than the majority makes it out to be.

[4] The majority, however, pays scant heed to the adjudicative record when it asserts that the Board's interpretation would in essence eliminate the supervisory exception with respect to the "responsibly to direct" function. See *ante*, at 714–715.

[5] "[I]n many . . . contexts of labor policy, '[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'" *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978) (quoting *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957)).

of ambiguous language in the National Labor Relations Act is entitled to deference.[6] See *NLRB* v. *Health Care and Retirement Corporation*, 511 U. S. 571, 579 (1994) *(HCR); Auciello Iron Works, Inc.* v. *NLRB*, 517 U. S. 781, 787–788 (1996); *Curtin Matheson Scientific, Inc.*, 494 U. S., at 786–787. Such deference is particularly appropriate when the statutory ambiguity is compounded by the use of one ambiguous term—"independent judgment"—to modify another, equally ambiguous term—namely, "responsibly to direct."

Moreover, since Congress has expressly provided that professional employees are entitled to the protection of the Act, there is good reason to resolve the ambiguities consistently with the Board's interpretation. At the same time that Congress acted to exclude supervisors from the NLRA's protection, it explicitly extended those same protections to professionals, who, by definition, engage in work that involves "the consistent exercise of discretion and judgment in its performance."[7] 29 U. S. C. § 152(12)(a)(ii). As this Court has acknowledged, the inclusion of professional employees and the exclusion of supervisors necessarily gives rise to some tension in the statutory text. Cf. *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 686 (1980). Accordingly, if the term "supervisor" is construed too broadly, without regard for the statutory context, then Congress' inclusion of profes-

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[6] The majority suggests that the Board's interpretation of the term "independent judgment" is particularly problematic in light of this Court's decision in *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U. S. 571 (1994) *(HCR)*. But in *HCR*, this Court concluded that the terms "independent judgment" and "responsibly to direct" were ambiguous, while the term at issue in that case, "in the interest of the employer," was not. *Id.*, at 579.

[7] As the American Nurses Association points out in its *amicus* brief, the scope of nursing practice routinely involves the exercise of judgment and the supervision of others. Brief for American Nurses Association as *Amicus Curiae* 2–6.

sionals within the Act's protections is effectively nullified.[8] See *HCR*, 511 U. S., at 585 (GINSBURG, J., dissenting). In my opinion, the Court's approach does precisely what it accuses the Board of doing—namely, reading one part of the statute to the exclusion of the other.

The Court acknowledges today that deference is appropriate when the Board determines both the degree of discretion required for supervisory status as well as the significance of limitations on the alleged supervisor's discretion imposed by the employer. Thus, in a case like this, a court should not second-guess the Board's evaluation of the authority of the nurses as building supervisors, or of the significance of the employer's definition of that authority.

However, in a *tour de force* supported by little more than *ipse dixit*, the Court concludes that *no* deference is due the Board's evaluation of the "kind of judgment" that professional employees exercise. *Ante*, at 714 (emphasis deleted). Thus, under the Court's view, it is impermissible for the Board to attach a different weight to a nurse's judgment that an employee should be reassigned or disciplined than to a nurse's judgment that the employee should take a patient's temperature, even if nurses routinely instruct others to take a patient's temperature but do not ordinarily reassign or discipline employees. The Court's approach finds no support in the text of the statute, and is inconsistent with our case law. See, *e. g.*, *Yeshiva*, 444 U. S., at 690 ("Only if an employee's activities fall outside the scope of the duties routinely

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[8] Moreover, so broad a reading seems contrary to congressional intent in enacting the supervisory exception. Rather, the definition of "supervisor" was intended to apply only to those employees with "genuine management prerogatives" so that those employees excluded from the Act's coverage would be "truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess., pp. 4, 19 (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 410, 425 (1948).

performed by similarly situated professionals will he be found aligned with management").[9]

The Court further argues that the Board errs by not applying its limiting interpretation of the term "independent judgment" to all 12 functions identified by the statute as supervisory in nature. *Ante,* at 715–716. But of those 12, it is only "responsibly to direct" that is ambiguous and thus capable of swallowing the whole if not narrowly construed. The authority to "promote" or to "discharge," to use only two examples, is specific and readily identifiable. In contrast, the authority "responsibly to direct" is far more vague. Thus, it is only logical for the term "independent judgment" to take on different contours depending on the nature of the supervisory function at issue and its comparative ambiguity.

Simply put, these are quintessential examples of terms that the expert agency should be allowed to interpret in the light of the policies animating the statute. See, *e. g.*, *Curtin Matheson*, 494 U. S., at 786; *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). Because the Board's interpretation is fully consistent both with the statutory text and with the policy favoring collective bargaining by professional employees, this Court is obligated to uphold it.

III

Even if I shared the majority's view that the term "independent judgment" should be given the same meaning when applied to each of the 12 supervisory functions and when applied to professional and nonprofessional employees, I would not simply affirm the judgment of the Court of Appeals. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 289–290 (1974); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88 (1943). The Court's rejection of the Board's interpretation of the

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[9] In fact, in *Yeshiva*, 444 U. S., at 690, this Court concluded that the NLRB's decisions adopting such an approach "accurately capture[d] the intent of Congress."

term "independent judgment" does not justify a categorical affirmance of the Sixth Circuit's decision, which rests in part on an erroneous allocation of the burden of proof.[10]

In any case, I do not agree with the majority's view. Given the Regional Director's findings that the RNs' duties as building supervisors do not qualify them as "supervisors" within the meaning of 29 U. S. C. § 152(11), and that they, "'for the most part, work independently and by themselves without any subordinates,'" it is absolutely clear that the nurses in question are covered by the NLRA.[11] 193 F. 3d 444, 457 (CA6 1999). The Court's willingness to treat them as supervisors even if they have no subordinates[12] is particularly ironic when compared to the Board's undisturbed decision to deny supervisory status to the other group of professionals employed by respondent—namely, the 20 rehabilitation counselors who supervise the work of 40 rehabilitation assistants.

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[10] Even under the Court's approach, since the NLRB might well prevail under the correct allocation of the burden of proof, the appropriate course of action in this case would be to return the case to the NLRB for further proceedings. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 295 (1974); see also *Electrical Workers* v. *NLRB*, 366 U. S. 667 (1961); *Ford Motor Co.* v. *NLRB*, 305 U. S. 364 (1939). *HCR*, on which the majority relies, see *ante*, at 721–722, is not to the contrary. In that case, unlike in this one, we found no error in the lower court's decision. Here, however, the lower court erred in its allocation of the burden of proof, a fact which would seem to make a remand to the NLRB in order to apply what the majority deems to be the correct legal principle particularly appropriate.

[11] Nor do the RNs exercise any of the other supervisorial functions listed in § 152(11). They play no role in assigning staff to shifts on a permanent basis or in setting the staff-to-resident ratio. App. 18–19, 23–24. As noted above, the RNs, whether functioning in their ordinary capacity or as "building supervisors," do not have authority to hire, fire, reward, promote, or independently discipline employees, or to effectively recommend such action. Nor, for that matter, do they evaluate employees or take action that would affect their employment status.

[12] Neither the licensed practical nurses nor the rehabilitation assistants report to the RNs. *Id.*, at 30, 34, 45, 61.

Accordingly, while I join Part II of the Court's opinion, I respectfully dissent from its holding. I would reverse the judgment of the Court of Appeals.

Syllabus

BOOTH *v.* CHURNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99–1964. Argued March 20, 2001—Decided May 29, 2001

The Prison Litigation Reform Act of 1995 amended 42 U. S. C. § 1997e(a), which now requires a prisoner to exhaust "such administrative remedies as are available" before suing over prison conditions. Petitioner Booth was a Pennsylvania state prison inmate when he began this 42 U. S. C. § 1983 action in Federal District Court, claiming that respondent corrections officers violated his Eighth Amendment right to be free from cruel and unusual punishment by assaulting him, using excessive force against him, and denying him medical attention to treat ensuing injuries. He sought various forms of injunctive relief and money damages. At the time, Pennsylvania provided an administrative grievance and appeals system, which addressed Booth's complaints but had no provision for recovery of money damages. Before resorting to federal court, Booth filed an administrative grievance, but did not seek administrative review after the prison authority denied relief. Booth's failure to appeal administratively led the District Court to dismiss the complaint without prejudice for failure to exhaust administrative remedies under § 1997e(a). The Third Circuit affirmed, rejecting Booth's argument that the exhaustion requirement is inapposite to his case because the administrative process could not award him the monetary relief he sought (money then being the only relief still requested).

Held: Under 42 U. S. C. § 1997e(a), an inmate seeking only money damages must complete any prison administrative process capable of addressing the inmate's complaint and providing some form of relief, even if the process does not make specific provision for monetary relief. The meaning of the phrase "administrative remedies . . . available" is the crux of the case. Neither the practical considerations urged by the parties nor their reliance on the dictionary meanings of the words "remedies" and "available" are conclusive in seeking congressional intent. Clearer clues are found in two considerations. First, the broader statutory context in which Congress referred to "available" "remedies" indicates that exhaustion is required regardless of the relief offered through administrative procedures. While the modifier "available" requires the possibility of some relief for the action complained of, the word "exhausted" has a decidedly procedural emphasis. It makes no sense, for instance, to demand that someone exhaust "such adminis-

Syllabus

trative [redress]" as is available; one "exhausts" processes, not forms of relief, and the statute provides that one must. Second, statutory history confirms the suggestion that Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible. Before § 1997e(a) was amended by the 1995 Act, a court had discretion (though no obligation) to require a state inmate to exhaust "such . . . remedies as are available," but only if they were "plain, speedy, and effective." That scheme is now a thing of the past, for the amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be "plain, speedy, and effective" before exhaustion could be required. The significance of deleting that condition is apparent in light of *McCarthy* v. *Madigan*, 503 U. S. 140. In holding that the preamended version of § 1997e(a) did not require exhaustion by those seeking only money damages when money was unavailable at the administrative level, *id.*, at 149–151, the *McCarthy* Court reasoned in part that only a procedure able to provide money damages would be "effective" within the statute's meaning, *id.*, at 150. It has to be significant that Congress removed the very term, "effective," the *McCarthy* Court had previously emphasized in reaching the result Booth now seeks, and the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result. Congress's imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms. Pp. 736–741.

206 F. 3d 289, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

Nancy Winkelman argued the cause for petitioner. With her on the briefs were *Joseph T. Lukens* and *Ralph N. Sianni.*

Gerald J. Pappert, First Deputy Attorney General of Pennsylvania, argued the cause for respondents. With him on the brief were *D. Michael Fisher*, Attorney General, *John G. Knorr III*, Chief Deputy Attorney General, and *Gwendolyn T. Mosley* and *Calvin R. Koons*, Senior Deputy Attorneys General.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on

the brief were *Acting Solicitor General Underwood*, former *Solicitor General Waxman*, former *Assistant Attorney General Ogden*, *Barbara L. Herwig*, and *Peter R. Maier.**

JUSTICE SOUTER delivered the opinion of the Court.

The Prison Litigation Reform Act of 1995 amended 42 U. S. C. § 1997e(a), which now requires a prisoner to exhaust

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *David C. Fathi*, *Elizabeth Alexander*, *Margaret Winter*, *Daniel L. Greenberg*, *John Boston*, and *Alphonse A. Gerhardstein;* for the Association of the Bar of the City of New York by *Michael B. Mushlin* and *William J. Rold;* and for the Brennan Center for Justice et al. by *Robert J. Lukens*, *Richard P. Weishaupt*, and *Jonathan M. Stein.*

A brief of *amici curiae* urging affirmance was filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Stephen P. Carney*, Associate Solicitor, and *Todd R. Marti*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert R. Rigsby* of the District of Columbia, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *John F. Tarantino* of Guam, *Earl I. Anzai* of Hawaii, *Alan Lance* of Idaho, *James E. Ryan* of Illinois, *Karen Freeman-Wilson* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.*, of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Mark L. Earley* of Virginia, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming.

"such administrative remedies as are available" before suing over prison conditions. The question is whether an inmate seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money. We hold that he must.

I

Petitioner, Timothy Booth, was an inmate at the State Correctional Institution at Smithfield, Pennsylvania, when he began this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, in the United States District Court for the Middle District of Pennsylvania. He claimed that respondent corrections officers at Smithfield violated his Eighth Amendment right to be free from cruel and unusual punishment by assaulting him, bruising his wrists in tightening and twisting handcuffs placed upon him, throwing cleaning material in his face, and denying him medical attention to treat ensuing injuries. Booth sought various forms of injunctive relief, including transfer to another prison, as well as several hundred thousand dollars in money damages.

The Pennsylvania Department of Corrections provided an administrative grievance system at the time. It called for a written charge within 15 days of an event prompting an inmate's complaint, which was referred to a grievance officer for investigation and resolution. If any action taken or recommended was unsatisfactory to the inmate, he could appeal to an intermediate reviewing authority, with the possibility of a further and final appeal to a central review committee. App. 46–50. While the grievance system addressed complaints of the abuse and excessive force Booth alleged, it had no provision for recovery of money damages.[1]

Before resorting to federal court, Booth filed an administrative grievance charging at least some of the acts of

[1] The Commonwealth has since modified its grievance scheme to permit awards of money. App. 60.

abuse he later alleged in his action. *Id.*, at 10–14. He did not, however, go beyond the first step, and never sought intermediate or final administrative review after the prison authority denied relief.

Booth's failure to avail himself of the later stages of the administrative process led the District Court to dismiss the complaint without prejudice for failure to exhaust "administrative remedies . . . available" within the meaning of 42 U. S. C. § 1997e(a) (1994 ed., Supp. V). See App. to Pet. for Cert. 38a. The Court of Appeals for the Third Circuit affirmed, 206 F. 3d 289 (2000), rejecting Booth's argument that the statutory exhaustion requirement is inapposite to his case simply because the Commonwealth's administrative process could not award him the monetary relief he sought (money then being the only relief still requested, since Booth's transfer to another institution had mooted his claims for injunctive orders).[2] Although the Third Circuit acknowledged that several other Courts of Appeals had held the exhaustion requirement subject to exception when the internal grievance procedure could not provide an inmate-plaintiff with the purely monetary relief requested in his federal action, see, *e. g.*, *Whitley* v. *Hunt*, 158 F. 3d 882 (CA5 1998); *Lunsford* v. *Jumao-As*, 155 F. 3d 1178 (CA9 1998); *Garrett* v. *Hawk*, 127 F. 3d 1263 (CA10 1997), the court found no such exception in the statute, 206 F. 3d, at 299–300; accord, *Freeman* v. *Francis*, 196 F. 3d 641 (CA6 1999); *Alexander* v. *Hawk*, 159 F. 3d 1321 (CA11 1998). We granted certiorari to address this conflict among the Circuits, 531 U. S. 956 (2000), and we now affirm.

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[2] There is some uncertainty, probably stemming in part from the ambiguity of Booth's *pro se* filings in District Court, as to whether all of Booth's claims for relief other than money damages became moot when he was transferred. See Brief for Petitioner 12, n. 7; Brief for United States as *Amicus Curiae* 10, n. 2. We assume for present purposes that only Booth's claims for money damages remain.

II

In the aftermath of the Prison Litigation Reform Act of 1995,[3] 42 U. S. C. § 1997e(a) (1994 ed., Supp. V) provides that

> "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

The meaning of the phrase "administrative remedies . . . available" is the crux of the case, and up to a point the parties approach it with agreement. Neither of them denies that some redress for a wrong is presupposed by the statute's requirement of an "available" "remed[y]"; neither argues that exhaustion is required where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint.[4] The dispute here, then, comes down to whether or not a remedial scheme is "available" where, as in Pennsylvania, the administrative process has authority to take some action in response to a complaint, but not the remedial action an inmate demands to the exclusion of all other forms of redress.

In seeking the congressional intent, the parties urge us to give weight to practical considerations, among others, and at first glance Booth's position holds some intuitive appeal. Although requiring an inmate to exhaust prison grievance procedures will probably obviate some litigation when the administrative tribunal can award at least some of the relief sought, Booth argues that when the prison's process simply cannot satisfy the inmate's sole demand, the odds of keeping

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[3] 110 Stat. 1321, as renumbered and amended.

[4] Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust. The parties do not dispute that the state grievance system at issue in this case has authority to take some responsive action with respect to the type of allegations Booth raises.

the matter out of court are slim. See Reply Brief for Petitioner 16. The prisoner would be clearly burdened, while the government would obtain little or no value in return. The respondents, however, also have something to say. They argue that requiring exhaustion in these circumstances would produce administrative results that would satisfy at least some inmates who start out asking for nothing but money, since the very fact of being heard and prompting administrative change can mollify passions even when nothing ends up in the pocket. And one may suppose that the administrative process itself would filter out some frivolous claims and foster better-prepared litigation once a dispute did move to the courtroom, even absent formal factfinding. Although we have not accorded much weight to these possibilities in the past, see *McCarthy* v. *Madigan*, 503 U. S. 140, 155–156 (1992), Congress, as we explain below, may well have thought we were shortsighted. See *infra*, at 739–741. In any event, the practical arguments for exhaustion at least suffice to refute Booth's claim that no policy considerations justify respondents' position. The upshot is that pragmatism is inconclusive.

Each of the parties also says that the plain meaning of the words "remedies" and "available" in the phrase "such administrative remedies . . . available" is controlling. But as it turns out both of them quote some of the same dictionary definitions of "available" "remedies," and neither comes up with anything conclusive. Booth says the term "remedy" means a procedure that provides redress for wrong or enforcement of a right, and "available" means having sufficient power to achieve an end sought. See Brief for Petitioner 15–16 (citing Webster's Third New International Dictionary 150, 1920 (1993) (defining "remedy" as "the legal means to recover a right or to prevent or obtain redress for a wrong" and "available" as "having sufficient power or force to achieve an end," "capable of use for the accomplishment of a purpose," and that which "is accessible or may be ob-

tained")). So far so good, but Booth then claims to be able to infer with particularity that when a prisoner demands money damages as the sole means to compensate his injuries, a grievance system without that relief offers no "available" "remed[y]." The general definitions, however, just do not entail such a specific conclusion.

It strikes us that the same definitions get the respondent corrections officers and their *amicus* the United States closer to firm ground for their assertion that the phrase "such administrative remedies as are available" naturally requires a prisoner to exhaust the grievance procedures offered, whether or not the possible responses cover the specific relief the prisoner demands. See Brief for Respondents 21. The United States tracks Booth in citing Webster's Third New International Dictionary to define "remedy" as "the legal means to recover a right or to prevent or obtain redress for a wrong" and "available" as "capable of use for the accomplishment of a purpose." Webster's Third New International Dictionary, *supra*, at 150, 1920. But this exercise in isolated definition is ultimately inconclusive, for, depending on where one looks, "remedy" can mean either specific relief obtainable at the end of a process of seeking redress, or the process itself, the procedural avenue leading to some relief. See Black's Law Dictionary 1296 (7th ed. 1999) (defining "remedy" alternatively as "[t]he means of enforcing a right or preventing or redressing a wrong," or as "REMEDIAL ACTION. . . . Cf. RELIEF").

We find clearer pointers toward the congressional objective in two considerations, the first being the broader statutory context in which "available" "remedies" are mentioned. The entire modifying clause in which the words occur is this: "until such administrative remedies as are available are exhausted." The "available" "remed[y]" must be "exhausted" before a complaint under § 1983 may be entertained. While the modifier "available" requires the possibility of some relief for the action complained of (as the

parties agree), the word "exhausted" has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered. It would, for example, be very strange usage to say that a prisoner must "exhaust" an administrative order reassigning an abusive guard before a prisoner could go to court and ask for something else; or to say (in States that award money damages administratively) that a prisoner must "exhaust" his damages award before going to court for more. How would he "exhaust" a transfer of personnel? Would he have to spend the money to "exhaust" the monetary relief given him? It makes no sense to demand that someone exhaust "such administrative [redress]" as is available; one "exhausts" processes, not forms of relief, and the statute provides that one must.

A second consideration, statutory history, confirms the suggestion that Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible. Before § 1997e(a) was amended by the Act of 1995, a court had discretion (though no obligation) to require a state inmate to exhaust "such . . . remedies as are available," but only if those remedies were "plain, speedy, and effective." 42 U. S. C. § 1997e(a) (1994 ed.). That scheme, however, is now a thing of the past, for the amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be "plain, speedy, and effective" before exhaustion could be required.

The significance of deleting that condition is apparent in light of our decision two years earlier in *McCarthy* v. *Madigan*, *supra*. In *McCarthy*, a federal inmate, much like Booth, sought only money damages against federal prison officials, and the Bureau of Prison's administrative procedure offered no such relief. Although § 1997e(a) did not at that time apply to suits brought against federal officials, the government argued that the Court should create an analogous

exhaustion requirement for *Bivens* actions. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). It proposed § 1997e(a) as a model, on the assumption that the provision required exhaustion by those seeking nothing but money damages even when money was unavailable at the administrative level. We understood the effect of § 1997e(a) to be quite different, however. See 503 U. S., at 149–151. In holding that exhaustion was not required, we reasoned in part from the language of § 1997e(a) that required an "effective" administrative remedy as a precondition to exhaustion. *Id.*, at 150. When a prisoner sought only money damages, we indicated, only a procedure able to provide money damages would be "effective" within the meaning of the statute. *Ibid.* ("[I]n contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, the statute conditions exhaustion on the existence of 'effective administrative remedies' "); see also *id.*, at 156 (REHNQUIST, C. J., joined by SCALIA and THOMAS, JJ., concurring in judgment) ("[I]n cases . . . where prisoners seek monetary relief, the Bureau's administrative remedy furnishes no effective remedy").

When Congress replaced the text of the statute as construed in *McCarthy* with the exhaustion requirement at issue today, it presumably understood that under *McCarthy* the term "effective" in the former § 1997e(a) eliminated the possibility of requiring exhaustion of administrative remedies when an inmate sought only monetary relief and the administrative process offered none. It has to be significant that Congress removed the very term we had previously emphasized in reaching the result Booth now seeks, and the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result.[5] Congress's imposition

[5] This inference is, to say the least, also consistent with Congress's elimination of the requirement that administrative procedures must satisfy certain "minimum acceptable standards" of fairness and effectiveness before inmates can be required to exhaust them, and the elimination of

of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms.

Thus, we think that Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures.[6] Cf. *McCarthy*, 503 U. S., at 144 ("Where Congress specifically mandates, exhaustion is required"). We accordingly affirm the judgment of the Third Circuit.

It is so ordered.

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courts' discretion to excuse exhaustion when it would not be "appropriate and in the interests of justice." Compare 42 U. S. C. § 1997e(a) (1994 ed., Supp. V) with 42 U. S. C. § 1997e(a) (1994 ed.).

[6] That Congress has mandated exhaustion in either case defeats the argument of Booth and supporting *amici* that this reading of § 1997e (1994 ed., Supp. V) is at odds with traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has "no power to decree . . . relief," *Reiter* v. *Cooper*, 507 U. S. 258, 269 (1993), or need not exhaust where doing so would otherwise be futile. See Brief for Petitioner 24–27; Brief for Brennan Center for Justice et al. as *Amici Curiae*. Without getting into the force of this claim generally, we stress the point (which Booth acknowledges, see Reply Brief for Petitioner 4) that we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise. See *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992); cf. *Weinberger* v. *Salfi*, 422 U. S. 749, 766–767 (1975). Here, we hold only that Congress has provided in § 1997e(a) that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues.

Syllabus

NEW HAMPSHIRE *v.* MAINE

ON MOTION TO DISMISS COMPLAINT

No. 130, Orig. Argued April 16, 2001—Decided May 29, 2001

New Hampshire and Maine share a border that runs from northwest to southeast. At the border's southeastern end, New Hampshire's easternmost point meets Maine's southernmost point. The boundary in this region follows the Piscataqua River eastward into Portsmouth Harbor and, from there, extends in a southeasterly direction into the sea. In 1977, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment setting the precise location of the States' "lateral marine boundary," *i. e.*, the boundary in the marine waters off the coast, from the closing line of Portsmouth Harbor five miles seaward. *New Hampshire* v. *Maine*, 426 U. S. 363; *New Hampshire* v. *Maine*, 434 U. S. 1, 2. The Piscataqua River boundary was fixed by a 1740 decree of King George II at the "Middle of the River." See 426 U. S., at 366–367. In the course of litigation, the two States proposed a consent decree in which they agreed, *inter alia*, that the descriptive words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main navigable channel. Rejecting the Special Master's view that the quoted words mean the geographic middle of the river, this Court accepted the States' interpretation and directed entry of the consent decree. *Id.*, at 369–370. The final decree, entered in 1977, defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." 434 U. S., at 2. The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. In 2000, New Hampshire brought this original action against Maine, claiming on the basis of historical records that the inland river boundary runs along the Maine shore and that the entire Piscataqua River and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss, urging that the earlier proceedings bar New Hampshire's complaint.

Held: Judicial estoppel bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Pp. 749–756.

(a) Judicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion. Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, espe-

cially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *Davis* v. *Wakelee*, 156 U. S. 680, 689. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Courts have recognized that the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. In enumerating these factors, this Court does not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. Pp. 749–751.

(b) Considerations of equity persuade the Court that application of judicial estoppel is appropriate in this case. New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation to mean either the middle of the main navigable channel or the geographic middle of the river. Either construction located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River. Moreover, the record of the 1970's dispute makes clear that this Court accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Were the Court to accept New Hampshire's latest view, the risk of inconsistent court determinations would become a reality. The Court cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process. Pp. 751–752.

(c) The Court rejects various arguments made by New Hampshire. The State urged at oral argument that the 1977 consent decree simply fixed the "Middle of the River" at an arbitrary location based on the parties' administrative convenience. But that view is foreclosed by

Syllabus

the Court's determination that the consent decree proposed a wholly permissible final resolution of the controversy both as to facts and law, 426 U. S., at 368–369. The Court rejected the dissenters' view that the decree interpreted the middle-of-the-river language "by agreements of convenience" and not "in accordance with legal principles," *id.*, at 369. New Hampshire's contention that the 1977 consent decree was entered without a searching historical inquiry into what "Middle of the River" meant is refuted by the pleadings in the lateral marine boundary case and by this Court's independent determination that nothing suggests the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence, *ibid.* Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire relies on historical materials that were no less available in the 1970's than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have resulted in a substantial amount of additional territory for New Hampshire. Pp. 752–755.

(d) Also unavailing is New Hampshire's reliance on this Court's recognition that the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is ordinarily not applied to States, *Illinois ex rel. Gordon* v. *Campbell*, 329 U. S. 362, 369. This is not a case where estoppel would compromise a governmental interest in enforcing the law. Cf. *Heckler* v. *Community Health Services of Crawford Cty., Inc.*, 467 U. S. 51, 60. Nor is this a case where the shift in the government's position results from a change in public policy, cf. *Commissioner* v. *Sunnen*, 333 U. S. 591, 601, or a change in facts essential to the prior judgment, cf. *Montana* v. *United States*, 440 U. S. 147, 159. Instead, it is a case between two States, in which each owes the other a full measure of respect. The Court is unable to discern any substantial public policy interest allowing New Hampshire to construe "Middle of the River" differently today than it did 25 years ago. Pp. 755–756.

Motion to dismiss complaint granted.

GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except SOUTER, J., who took no part in the consideration or decision of the case.

Paul D. Stern, Deputy Attorney General of Maine, argued the cause for defendant. With him on the briefs were *An-*

drew Ketterer, Attorney General, and *Christopher C. Taub* and *William R. Stokes*, Assistant Attorneys General.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae*. With him on the brief were former *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, and *Patricia Weiss*.

Leslie J. Ludtke, Associate Attorney General of New Hampshire, argued the cause for plaintiff. With her on the briefs were *Phillip T. McLaughlin*, Attorney General, and *John R. Harrington*.

JUSTICE GINSBURG delivered the opinion of the Court.

The Piscataqua River lies at the southeastern end of New Hampshire's boundary with Maine. The river begins at the headwaters of Salmon Falls and runs seaward into Portsmouth Harbor (also known as Piscataqua Harbor). On March 6, 2000, New Hampshire brought this original action against Maine, claiming that the Piscataqua River boundary runs along the Maine shore and that the entire river and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss on the ground that two prior proceedings—a 1740 boundary determination by King George II and a 1977 consent judgment entered by this Court—definitively fixed the Piscataqua River boundary at the middle of the river's main channel of navigation.

The 1740 decree located the Piscataqua River boundary at the "Middle of the River." Because New Hampshire, in the 1977 proceeding, agreed without reservation that the words "Middle of the River" mean the middle of the Piscataqua River's main channel of navigation, we conclude that New Hampshire is estopped from asserting now that the boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

I

New Hampshire and Maine share a border that runs from northwest to southeast. At the southeastern end of the

border, the easternmost point of New Hampshire meets the southernmost point of Maine. The boundary in this region follows the Piscataqua River eastward into Portsmouth Harbor and, from there, extends in a southeasterly direction into the sea. Twenty-five years ago, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment fixing the precise location of the "lateral marine boundary," *i. e.*, the boundary in the marine waters off the coast of New Hampshire and Maine, from the closing line of Portsmouth Harbor five miles seaward to Gosport Harbor in the Isles of Shoals. *New Hampshire* v. *Maine*, 426 U. S. 363 (1976); *New Hampshire* v. *Maine*, 434 U. S. 1, 2 (1977). This case concerns the location of the Maine-New Hampshire boundary along the inland stretch of the Piscataqua River, from the mouth of Portsmouth Harbor westward to the river's headwaters at Salmon Falls. (A map of the region appears as an appendix to this opinion.)

In the 1970's contest over the lateral marine boundary, we summarized the history of the interstate boundary in the Piscataqua River region. See *New Hampshire* v. *Maine*, 426 U. S., at 366–367. The boundary, we said, "was in fact fixed in 1740 by decree of King George II of England" as follows:

> "'That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River . . . . And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour between the Islands to the Sea on the Southerly Side. . . .'" *Id.*, at 366 (quoting the 1740 decree).

In 1976, New Hampshire and Maine "expressly agree[d] . . . that the decree of 1740 fixed the boundary in the Piscataqua Harbor area." *Id.*, at 367 (internal quotation marks omitted). "Their quarrel was over the location . . . of the 'Mouth of Piscataqua River,' 'Middle of the River,' and 'Middle of the Harbour' within the contemplation of the decree."

Ibid. The meaning of those terms was essential to delineating the lateral marine boundary. See Report of Special Master, O. T. 1975, No. 64 Orig., pp. 32–49 (hereinafter Report). In particular, the northern end of the lateral marine boundary required a determination of the point where the line marking the "Middle of the [Piscataqua] River" crosses the closing line of Piscataqua Harbor. *Id.*, at 43.

In the course of litigation, New Hampshire and Maine proposed a consent decree in which they agreed, *inter alia*, that the words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main channel of navigation. Motion for Entry of Judgment By Consent of Plaintiff and Defendant in *New Hampshire* v. *Maine*, O. T. 1973, No. 64 Orig., p. 2 (hereinafter Motion for Consent Judgment). The Special Master, upon reviewing pertinent history, rejected the States' interpretation and concluded that "the geographic middle of the river and not its main or navigable channel was intended by the 1740 decree." Report 41. This Court determined, however, that the States' interpretation "reasonably invest[ed] imprecise terms" with a definition not "wholly contrary to relevant evidence." *New Hampshire* v. *Maine*, 426 U. S., at 369. On that basis, the Court declined to adopt the Special Master's construction of "Middle of the River" and directed entry of the consent decree. *Id.*, at 369–370. The final decree, entered in 1977, defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." *New Hampshire* v. *Maine*, 434 U. S., at 2.

The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. See Report 42–43 ("For the purposes of the present dispute, . . . it is unnecessary to lay out fully the course of the boundary as it proceeds upriver . . . ."). In the instant action, New Hampshire contends that the inland river boundary "run[s] along the low water mark on the Maine shore," Complaint 49, and asserts sovereignty over the entire river

and all of Portsmouth Harbor, including the Portsmouth Naval Shipyard on Seavey Island located within the harbor just south of Kittery, Maine, *id.*, at 34.* Relying on various historical records, New Hampshire urges that "Middle of the River," as those words were used in 1740, denotes the main branch of the river, not a midchannel boundary, Brief in Opposition to Motion to Dismiss 12–16, and that New Hampshire, not Maine, exercised sole jurisdiction over shipping and military activities in Portsmouth Harbor during the decades before and after the 1740 decree, *id.*, at 17–19, and nn. 35–38.

While disagreeing with New Hampshire's understanding of history, see Motion to Dismiss 9–14, 18–19 (compiling evidence that Maine continually exercised jurisdiction over the harbor and shipyard from the 1700's to the present day), Maine primarily contends that the 1740 decree and the 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation—a division that places Seavey Island within Maine's jurisdiction. Those earlier proceedings, according to Maine, bar New Hampshire's complaint under principles of claim and issue preclusion as well as judicial estoppel.

We pretermit the States' competing historical claims along with their arguments on the application *vel non* of the res judicata doctrines commonly called claim and issue preclusion. Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually

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*According to New Hampshire, the Federal Government in recent years has taken steps to close portions of the shipyard and to lease its land and facilities to private developers. Complaint 34. New Hampshire and Maine assert competing claims of sovereignty over private development on shipyard lands. *Ibid.*

litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. See Restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); D. Shapiro, Civil Procedure: Preclusion in Civil Actions 32, 46 (2001). In the unusual circumstances this case presents, we conclude that a discrete doctrine, judicial estoppel, best fits the controversy. Under that doctrine, we hold, New Hampshire is equitably barred from asserting—contrary to its position in the 1970's litigation—that the inland Piscataqua River boundary runs along the Maine shore.

II

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram* v. *Herdrich*, 530 U. S. 211, 227, n. 8 (2000); see 18 Moore's Federal Practice § 134.30, p. 134–62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards* v. *Aetna Life Ins. Co.*, 690 F. 2d 595, 598 (CA6

1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States* v. *McCaskey*, 9 F. 3d 368, 378 (CA5 1993). See *In re Cassidy*, 892 F. 2d 637, 641 (CA7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen* v. *Zurich Ins. Co.*, 667 F. 2d 1162, 1166 (CA4 1982) (judicial estoppel "protect[s] the essential integrity of the judicial process"); *Scarano* v. *Central R. Co.*, 203 F. 2d 510, 513 (CA3 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'" (quoting *Stretch* v. *Watson*, 6 N. J. Super. 456, 469, 69 A. 2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis* v. *Chen*, 626 F. 2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell* v. *Rolfs*, 893 F. 2d 1033, 1037 (CA9 1990) (internal quotation marks and citation omitted).

Courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen*, 667 F. 2d, at 1166; accord, *Lowery* v. *Stovall*, 92 F. 3d 219, 223 (CA4 1996); *Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F. 2d 208, 212 (CA1 1987). Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States* v. *Hook*, 195 F. 3d 299, 306 (CA7 1999); *In re Coastal Plains, Inc.*, 179 F. 3d 197, 206 (CA5 1999); *Hossaini* v. *Western Mo. Medical Center*, 140 F. 3d 1140, 1143 (CA8 1998); *Maharaj* v. *Bankamerica Corp.*, 128 F. 3d 94, 98 (CA2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F. 2d, at 599. Absent suc-

cess in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States* v. *C. I. T. Constr. Inc.*, 944 F. 2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See *Hook*, 195 F. 3d, at 306; *Maharaj*, 128 F. 3d, at 98; *Konstantinidis*, 626 F. 2d, at 939. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See *Davis*, 156 U. S., at 689; *Philadelphia, W., & B. R. Co.* v. *Howard*, 13 How. 307, 335–337 (1852); *Scarano*, 203 F. 2d, at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782.

In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation. As mentioned above, *supra*, at 747, interpretation of those words was "necessary" to fixing the northern endpoint of the lateral marine boundary, Report 43. New Hampshire offered two interpretations in the earlier proceeding—first agreeing with Maine in the proposed consent decree that "Middle of the River" means the middle of the main channel of navigation, and later agreeing with the Special Master that the words mean the geographic middle of the river. Both constructions located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River.

Moreover, the record of the 1970's dispute makes clear that this Court accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. New Hampshire, it is true, preferred the interpretation of "Middle of the River" in the Special Master's report. See Exceptions and Brief for Plaintiff in *New Hampshire* v. *Maine*, O. T. 1975, No. 64 Orig., p. 3 (hereinafter Plaintiff's Exceptions) ("the boundary now proposed by the Special Master is more favorable to [New Hampshire] than that recommended in the proposed consent decree"). But the consent decree was sufficiently favorable to New Hampshire to garner its approval. Although New Hampshire now suggests that it "compromised in Maine's favor" on the definition of "Middle of the River" in the 1970's litigation, Brief in Opposition to Motion to Dismiss 24, that "compromise" enabled New Hampshire to settle the case, see *id.*, at 24–25, on terms beneficial to both States. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Motion for Consent Judgment 1. Relying on that representation, the Court accepted the boundary proposed by the two States. *New Hampshire* v. *Maine*, 434 U. S. 1 (1977).

At oral argument, New Hampshire urged that the consent decree simply fixed the "Middle of the River" at "an arbitrary location based on the administrative convenience of the parties." Tr. of Oral Arg. 37. To the extent New Hampshire implies that the parties settled the lateral marine boundary dispute without judicial endorsement of their interpretation of "Middle of the River," that view is foreclosed by the Court's determination that "[t]he consent decree . . . proposes a wholly permissible final resolution of the controversy both as to facts and law," *New Hampshire* v. *Maine*, 426 U. S., at 368–369. Three dissenting Justices agreed with New Hampshire that the consent decree in-

terpreted the middle-of-the-river language "by agreements of convenience" and not "in accordance with legal principles." *Id.*, at 371 (White, J., joined by Blackmun and STEVENS, JJ., dissenting). But the Court concluded otherwise, noting that its acceptance of the consent decree involved "[n]othing remotely resembling 'arbitral' rather than 'judicial' functions," *id.*, at 369. The consent decree "reasonably invest[ed] imprecise terms with definitions that give effect to [the 1740] decree," *ibid.*, and "[did] not fall into the category of agreements that we reject because acceptance would not be consistent with our Art. III function and duty," *ibid.*

New Hampshire also contends that the 1977 consent decree was entered without "a searching historical inquiry into what that language ['Middle of the River'] meant." Tr. of Oral Arg. 39. According to New Hampshire, had it known then what it knows now about the relevant history, it would not have entered into the decree. *Ibid.* We do not question that it may be appropriate to resist application of judicial estoppel "when a party's prior position was based on inadvertence or mistake." *John S. Clark Co.* v. *Faggert & Frieden, P. C.*, 65 F. 3d 26, 29 (CA4 1995); see *In re Corey*, 892 F. 2d 829, 836 (CA9 1989); *Konstantinidis*, 626 F. 2d, at 939. We are unpersuaded, however, that New Hampshire's position in 1977 fairly may be regarded as a product of inadvertence or mistake.

The pleadings in the lateral marine boundary case show that New Hampshire did engage in "a searching historical inquiry" into the meaning of "Middle of the River." See Reply Brief for Plaintiff in *New Hampshire* v. *Maine*, O. T. 1975, No. 64 Orig., pp. 3–9 (examining history of river boundaries under international law, proceedings leading up to the 1740 order of the King in Council, and relevant precedents of this Court). None of the historical evidence cited by New Hampshire remotely suggested that the Piscataqua River boundary runs along the Maine shore. In fact, in attempting to place the boundary at the geographic middle of the

river, New Hampshire acknowledged that its agents in 1740 understood the King's order to "adjudg[e] *half of the river* to" the portion of Massachusetts that is now Maine. *Id.*, at 6 (emphasis in original) (quoting N. H. State Papers, XIX, pp. 591, 596–597); see Reply Brief in No. 64 Orig., *supra*, at 4 ("*The intention of those participating in the proceedings leading to the [1740 decree] was to use 'geographic middle' as the Piscataqua boundary.*" (emphasis in original)). In addition, this Court independently determined that "there is nothing to suggest that the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence." *New Hampshire* v. *Maine*, 426 U. S., at 369.

Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire relies on historical materials—primarily official documents and events from the colonial and postcolonial periods, see Brief in Opposition to Motion to Dismiss 12–19—that were no less available 25 years ago than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have placed the northern terminus of the lateral marine boundary much closer to Maine, "result[ing] in hundreds if not thousands of additional acres of territory being in New Hampshire rather than Maine," Tr. of Oral Arg. 48 (rebuttal argument of Maine). Tellingly, New Hampshire at the time understood the importance of placing the northern terminus as close to Maine as possible. While agreeing with the Special Master that "Middle of the River" means geographic middle, New Hampshire insisted that the geographic middle should be determined by using the banks of the river, not low tide elevations (as the Special Master had proposed), as the key reference points—a methodology that would have placed the northern terminus 350 yards closer to the Maine shore. Plaintiff's Exceptions 3.

In short, considerations of equity persuade us that application of judicial estoppel is appropriate in this case. Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the "risk of inconsistent court determinations," *C. I. T. Constr. Inc.*, 944 F. 2d, at 259, would become a reality. We cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

Finally, notwithstanding the balance of equities, New Hampshire points to this Court's recognition that "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states," *Illinois ex rel. Gordon* v. *Campbell*, 329 U. S. 362, 369 (1946). Of course, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." 18 Wright § 4477, p. 784. But this is not a case where estoppel would compromise a governmental interest in enforcing the law. Cf. *Heckler* v. *Community Health Services of Crawford Cty., Inc.*, 467 U. S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."). Nor is this a case where the shift in the government's position is "the result of a change in public policy," *United States* v. *Owens*, 54 F. 3d 271, 275 (CA6 1995); cf. *Commissioner* v. *Sunnen*, 333 U. S. 591, 601 (1948) (collateral estoppel does not apply to Commissioner where pertinent statutory provisions or Treasury

regulations have changed between the first and second proceeding), or the result of a change in facts essential to the prior judgment, cf. *Montana* v. *United States*, 440 U. S. 147, 159 (1979) ("changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues"). Instead, it is a case between two States, in which each owes the other a full measure of respect.

What has changed between 1976 and today is New Hampshire's interpretation of the historical evidence concerning the King's 1740 decree. New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself. Given Maine's countervailing interest in the location of the boundary, we are unable to discern any "broad interes[t] of public policy," 18 Wright § 4477, p. 784, that gives New Hampshire the prerogative to construe "Middle of the River" differently today than it did 25 years ago.

* * *

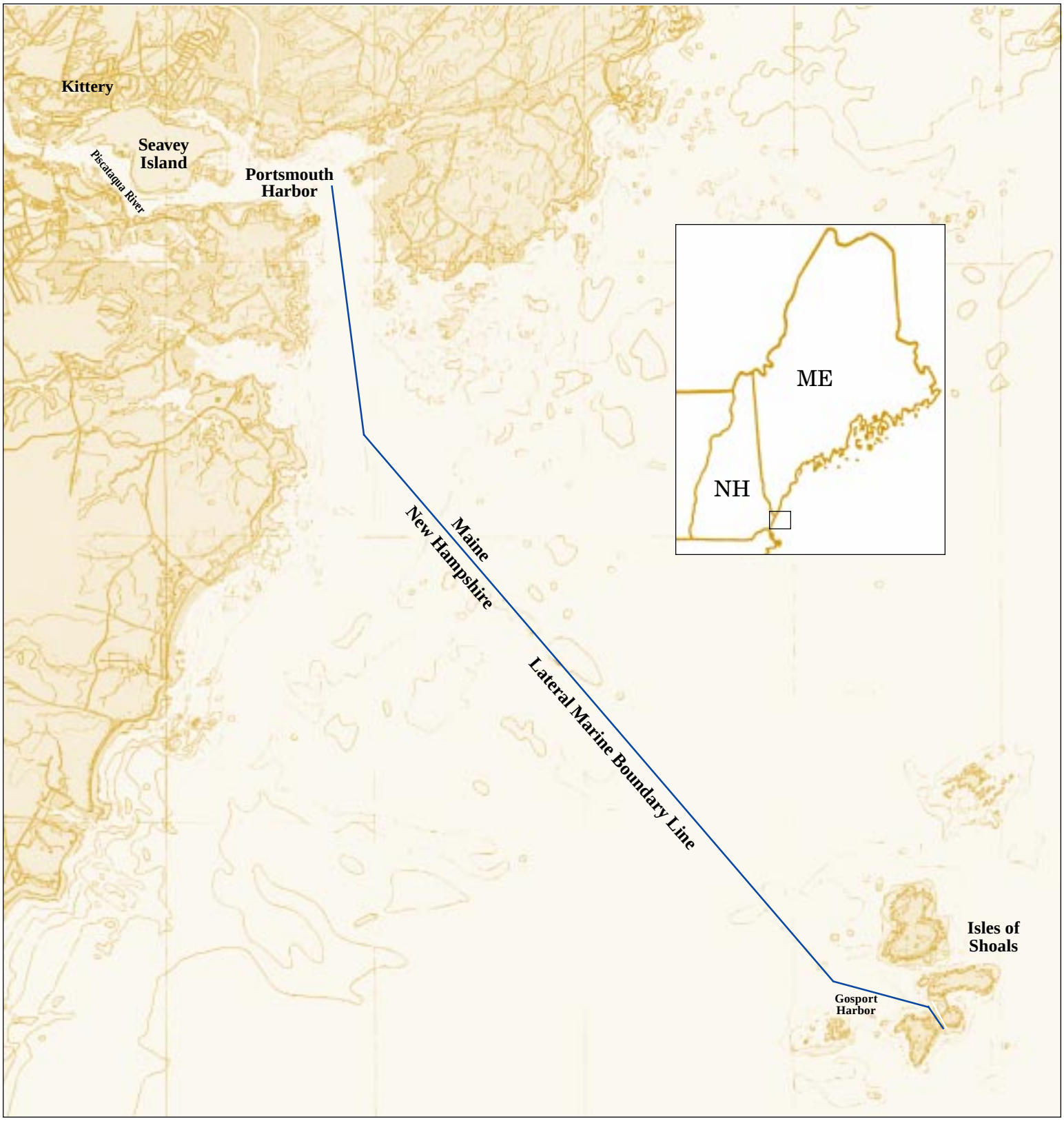
For the reasons stated, we conclude that judicial estoppel bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

It is so ordered.

JUSTICE SOUTER took no part in the consideration or decision of this case.

[Appendix containing Portsmouth Harbor to Isles of Shoals map follows this page.]

APPENDIX TO OPINION OF THE COURT



Adapted from Map 13283, Portsmouth Harbor to Isles of Shoals, National Oceanic and Atmospheric Administration, U. S. Department of Commerce (18th ed. Nov. 2000).

Syllabus

BECKER *v.* MONTGOMERY, ATTORNEY GENERAL OF OHIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00–6374. Argued April 16, 2001—Decided May 29, 2001

Petitioner Becker, an Ohio prisoner, instituted a *pro se* civil rights action contesting conditions of his confinement under 42 U. S. C. § 1983. The Federal District Court dismissed his complaint for failure to exhaust prison administrative remedies and failure to state a claim for relief. Within the 30 days allowed for appeal from a district court's judgment, see 28 U. S. C. § 2107(a); Fed. Rule App. Proc. 4(a)(1), Becker, still *pro se*, filed a notice of appeal using a Government-printed form on which he filled in all of the requested information. On the line tagged "(Counsel for Appellant)," Becker typed, but did not hand sign, his own name. The form contained no indication of a signature requirement. The District Court docketed the notice, sent a copy to the Court of Appeals for the Sixth Circuit, and subsequently granted Becker leave to proceed *in forma pauperis* on appeal. The Sixth Circuit Clerk's Office sent Becker a letter telling him that his appeal had been docketed, setting a briefing schedule, and stating that the court would not hold him to the same standards it required of attorneys in stating his case. Becker filed his brief in advance of the scheduled deadline, signing it on both the cover and the last page. Long after the 30-day time to appeal had expired, the Sixth Circuit dismissed the appeal on its own motion, holding, in reliance on its prior *Mattingly* decision, that the notice of appeal was fatally defective because it was not signed. The Court of Appeals deemed the defect "jurisdictional," and therefore not curable outside the time allowed to file the notice. No court officer had earlier called Becker's attention to the need for a signature.

Held: When a party files a timely notice of appeal in district court, the failure to sign the notice does not require the court of appeals to dismiss the appeal. Pp. 762–768.

(a) The Sixth Circuit based its *Mattingly* determination on the complementary operation of two Federal Rules: Federal Rule of Appellate Procedure (Appellate Rule) 4(a)(1), which provides that "the notice of appeal required by Rule 3 [to commence an appeal] must be filed with the district clerk within 30 days after the judgment . . . appealed from is entered"; and Federal Rule of Civil Procedure (Civil Rule) 11(a), which provides that "[e]very pleading, written motion, and other paper [filed

in a district court] shall be signed" by counsel or, if the party is unrepresented, by the party himself. Pp. 762–763.

(b) The Sixth Circuit is correct that the governing Federal Rules call for a signature on notices of appeal. Civil Rule 11(a), the signature requirement's source, comes into play on appeal this way. An appeal can be initiated, Appellate Rule 3(a)(1) instructs, "only by filing a notice of appeal with the district clerk within the time allowed by [Appellate] Rule 4." Whenever the Appellate Rules provide for a filing in the district court, Appellate Rule 1(a)(2) directs, "the procedure must comply with the practice of the district court." The district court practice relevant here is Civil Rule 11(a)'s signature requirement. Notices of appeal unquestionably qualify as "other paper[s]" under that requirement, so they "shall be signed." Without a rule change so ordering, the Court is not disposed to extend the meaning of the word "signed" to permit typed names, as Becker urges. Rather, the Court reads Civil Rule 11(a) to call for a name handwritten (or a mark handplaced). Pp. 763–764.

(c) However, the Sixth Circuit erred in its dispositive ruling that the signature requirement cannot be met after the appeal period expires. As plainly as Civil Rule 11(a) requires a signature on filed papers, so the rule goes on to provide that "omission of the signature" may be "corrected promptly after being called to the attention of the attorney or party." Corrections can be made, the Rules Advisory Committee noted, by signing the paper on file or by submitting a duplicate that contains the signature. Civil Rule 11(a)'s provision for correction applies to appeal notices. The rule was formulated and should be applied as a cohesive whole. So understood, the signature requirement and the cure for an initial failure to meet the requirement go hand in hand. Becker proffered a correction of the defect in his notice in the manner Rule 11(a) permits—he attempted to submit a duplicate containing his signature—and therefore should not have suffered dismissal of his appeal for nonobservance of that rule. The Court does not disturb its earlier statements describing Appellate Rules 3 and 4 as "jurisdictional in nature." *E. g., Torres* v. *Oakland Scavenger Co.,* 487 U. S. 312, 315. The Court rules simply and only that Becker's lapse was curable as Civil Rule 11(a) prescribes; his initial omission was not a "jurisdictional" impediment to pursuit of his appeal. While Appellate Rules 3 and 4 are indeed linked jurisdictional provisions, Rule 3(c)(1), which details what the notice of appeal must contain, does not include a signature requirement. Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional. Pp. 764–766.

(d) The Court rejects the argument that, even if there is no jurisdictional notice of appeal signature requirement for parties represented

by attorneys, *pro se* parties, like Becker, must sign within Rule 4's time line to avoid automatic dismissal. The foundation for this argument is Appellate Rule 3(c)(2), which reads: "A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise." That provision does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make of it an Appellate Rule 3 jurisdictional specification. Rather, Rule 3(c)(2) is entirely ameliorative; it assumes and assures that the *pro se* litigant's spouse and minor children, if they were parties below, will remain parties on appeal, unless the notice clearly indicates a contrary intent. This reading of Rule 3(c)(2) is in harmony with a related ameliorative rule, Appellate Rule 3(c)(4), which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. See, *e. g.*, *Smith* v. *Barry*, 502 U. S. 244, 245, 248–249. Pp. 766–768.

Reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

Jeffrey S. Sutton, by appointment of the Court, 531 U. S. 1123, argued the cause for petitioner. With him on the briefs were *Ronald E. Laymon* and *Chad A. Readler*.

Stewart A. Baker, by invitation of the Court, 531 U. S. 1110, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. *Betty D. Montgomery*, Attorney General of Ohio, *pro se*, and *David M. Gormley*, State Solicitor, filed a brief for respondents.

JUSTICE GINSBURG delivered the opinion of the Court.

Petitioner Dale G. Becker, an Ohio prisoner, instituted a *pro se* civil rights action in a Federal District Court, contesting conditions of his confinement. Upon dismissal of his complaint for failure to state a claim for relief, Becker sought to appeal. Using a Government-printed form, Becker timely filed a notice of appeal that contained all of the requested information. On the line tagged "(Counsel for Appellant),"

Becker typed, but did not hand sign, his own name. For want of a handwritten signature on the notice as originally filed, the Court of Appeals dismissed Becker's appeal. The appellate court deemed the defect "jurisdictional," and therefore not curable outside the time allowed to file the notice.

We granted review to address this question: "When a party files a timely notice of appeal in district court, does the failure to sign the notice of appeal require the court of appeals to dismiss the appeal?" 531 U. S. 1110 (2001). Our answer is no. For want of a signature on a timely notice, the appeal is not automatically lost. The governing Federal Rules direct that the notice of appeal, like other papers filed in district court, shall be signed by counsel or, if the party is unrepresented, by the party himself. But if the notice is timely filed and adequate in other respects, jurisdiction will vest in the court of appeals, where the case may proceed so long as the appellant promptly supplies the signature once the omission is called to his attention.

I

This case originated from a civil rights complaint under 42 U. S. C. § 1983 filed *pro se* by Ohio prison inmate Dale G. Becker in the United States District Court for the Southern District of Ohio. Becker challenged the conditions of his incarceration at the Chillicothe Correctional Institution, specifically, his exposure to second-hand cigarette smoke. The District Court dismissed Becker's complaint for failure to exhaust prison administrative remedies and failure to state a claim upon which relief could be granted. App. 5–8.

Within the 30 days allowed for appeal from a district court's judgment, see 28 U. S. C. § 2107(a); Fed. Rule App. Proc. 4(a)(1), Becker, still *pro se*, filed a notice of appeal. Using a notice of appeal form printed by the Government Printing Office, Becker filled in the blanks, specifying himself as sole appellant, designating the judgment from which

he appealed, and naming the court to which he appealed. See Fed. Rule App. Proc. 3(c)(1). He typed his own name in the space above "(Counsel for Appellant)," and also typed, in the spaces provided on the form, his address and the date of the notice. The form Becker completed contained no statement or other indication of a signature requirement and Becker did not hand sign the notice.

The District Court docketed the notice, sent a copy to the Court of Appeals, and subsequently granted Becker leave to proceed *in forma pauperis* on appeal. Becker received a letter from the Sixth Circuit Clerk's Office telling him that his appeal had been docketed and setting a briefing schedule. The letter stated: "The court is aware that you are not an attorney and it will *not* hold you to the same standards it requires of them in stating your case." App. 14.

Becker filed his brief more than two weeks in advance of the scheduled deadline. He signed it both on the cover and on the last page. Some six months later, on its own motion, the Sixth Circuit dismissed the appeal in a spare order relying on that court's prior, published decision in *Mattingly* v. *Farmers State Bank*, 153 F. 3d 336 (1998) *(per curiam)*. In Becker's case, the Court of Appeals said, summarily:

> "This court lacks jurisdiction over this appeal. The notice of appeal is defective because it was not signed by the pro se appellant or by a qualified attorney." App. 16–17.

No court officer had earlier called Becker's attention to the need for a signature, and the dismissal order, issued long after the 30-day time to appeal expired, accorded Becker no opportunity to cure the defect.

Becker filed a timely but unsuccessful motion for reconsideration, to which he appended a new, signed notice of appeal. Thereafter, he petitioned for this Court's review. The Attorney General of Ohio, in response, urged us "to summarily

reverse the judgment below," Brief in Response to Pet. for Cert. 1, stating:

> "We cannot honestly claim any uncertain[t]y about petitioner Becker's intention to pursue an appeal once he filed his timely, though unsigned, notice of appeal in the district court. We never objected to the lack of a signature on his notice of appeal, and fully expected the court of appeals to address his appellate arguments on the merits." *Id.*, at 5.

We granted certiorari, 531 U. S. 1069; 531 U. S. 1110 (2001), to assure the uniform interpretation of the governing Federal Rules, and now address the question whether Becker's failure to sign his timely filed notice of appeal requires the Court of Appeals to dismiss his appeal.[1]

II

In *Mattingly* v. *Farmers State Bank*, 153 F. 3d 336 (1998) *(per curiam)*, the Sixth Circuit determined that a notice of appeal must be signed, and that a signature's omission cannot be cured by giving the appellant an opportunity to sign after the time to appeal has expired. For this determination, that court relied on the complementary operation of two Federal Rules: Federal Rule of Appellate Procedure (Appellate Rule) 4(a)(1), which provides that "the notice of appeal required by Rule 3 [to commence an appeal] must be filed with the district clerk within 30 days after the judgment or order appealed from is entered";[2] and Federal Rule of Civil

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[1] Without any party to defend the Sixth Circuit's position, we invited Stewart A. Baker to brief and argue this case, as *amicus curiae*, in support of the judgment below. 531 U. S. 1110 (2001). His able representation, and that of Jeffrey S. Sutton, whom we appointed to represent Becker, 531 U. S. 1123 (2001), permit us to decide this case satisfied that the relevant issues have been fully aired.

[2] On motion filed no later than 30 days after expiration of the original appeal time, the appeal period may be extended upon a showing of "excusable neglect or good cause," but the extension "may [not] exceed 30

Procedure (Civil Rule) 11(a), which provides that "[e]very . . . paper [filed in a district court] shall be signed." We agree with the Sixth Circuit that the governing Federal Rules call for a signature on notices of appeal. We disagree, however, with that court's dispositive ruling that the signature requirement cannot be met after the appeal period expires.

Civil Rule 11(a), the source of the signature requirement, comes into play on appeal this way. An appeal can be initiated, Appellate Rule 3(a)(1) instructs, "only by filing a notice of appeal with the district clerk within the time allowed by [Appellate] Rule 4." Whenever the Appellate Rules provide for a filing in the district court, Appellate Rule 1(a)(2) directs, "the procedure must comply with the practice of the district court." The district court practice relevant here is Civil Rule 11(a).

Rule 11(a)'s first sentence states the signature requirement:

> "Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party."

Notices of appeal unquestionably qualify as "other paper[s]," so they "shall be signed."

Becker maintains that typing one's name satisfies the signature requirement and that his original notice of appeal, containing his name typed above "(Counsel of Record)," met Civil Rule 11(a)'s instruction. We do not doubt that the signature requirement can be adjusted to keep pace with technological advances. A 1996 amendment to Civil Rule 5 provides in this regard:

> "A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consist-

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days after the [originally] prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later." Fed. Rule App. Proc. 4(a)(5).

> ent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Fed. Rule Civ. Proc. 5(e).

See, *e. g.,* Rule 5.1 (ND Ohio 2000) (permitting "papers filed, signed, or verified by electronic means"). The local rules on electronic filing provide some assurance, as does a handwritten signature, that the submission is authentic. See, *e. g.*, United States District Court for the Northern District of Ohio, Electronic Filing Policies and Procedures Manual 4 (Apr. 2, 2001) (available at http://www.ohnd.uscourts.gov/Electronic_Filing/user.pdf) (allowing only registered attorneys assigned identification names and passwords to file papers electronically). Without any rule change so ordering, however, we are not disposed to extend the meaning of the word "signed," as that word appears in Civil Rule 11(a), to permit typed names. As Rule 11(a) is now framed, we read the requirement of a signature to indicate, as a signature requirement commonly does, and as it did in John Hancock's day, a name handwritten (or a mark handplaced).

As plainly as Civil Rule 11(a) requires a signature on filed papers, however, so the rule goes on to provide in its final sentence that "omission of the signature" may be "corrected promptly after being called to the attention of the attorney or party." "Correction can be made," the Rules Advisory Committee noted, "by signing the paper on file or by submitting a duplicate that contains the signature." Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 666.

Amicus urges that only the first sentence of Civil Rule 11(a), containing the signature requirement—not Rule 11(a)'s final sentence, providing for correction of a signature omission—applies to appeal notices. Appellate Rule 1(a)(2)'s di-

rection to "comply with the practice of the district court" ceases to hold sway, *amicus* maintains, once the notice of appeal is transmitted from the district court, in which it is filed, to the court of appeals, in which the case will proceed. Brief for *Amicus Curiae* in Support of the Judgment Below 15–18, and nn. 18–20.

Civil Rule 11(a), in our view, cannot be sliced as *amicus* proposes. The rule was formulated and should be applied as a cohesive whole. So understood, the signature requirement and the cure for an initial failure to meet the requirement go hand in hand. The remedy for a signature omission, in other words, is part and parcel of the requirement itself. Becker proffered a correction of the defect in his notice in the manner Rule 11(a) permits—he attempted to submit a duplicate containing his signature, see *supra*, at 761—and therefore should not have suffered dismissal of his appeal for nonobservance of that rule.

The Sixth Circuit in *Mattingly* correctly observed that we have described Appellate Rules 3 and 4 as "jurisdictional in nature." 153 F. 3d, at 337 (citing *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 315 (1988), and *Smith* v. *Barry*, 502 U. S. 244, 248 (1992)). We do not today hold otherwise. We rule simply and only that Becker's lapse was curable as Civil Rule 11(a) prescribes; his initial omission was not a "jurisdictional" impediment to pursuit of his appeal.

Appellate Rules 3 and 4, we clarify, are indeed linked jurisdictional provisions. Rule 3(a)(1) directs that a notice of appeal be filed "within the time allowed by Rule 4," *i. e.*, ordinarily, within 30 days after the judgment appealed from is entered, see *supra*, at 762–763, and n. 2. Rule 3(c)(1) details what the notice of appeal must contain: The notice, within Rule 4's timeframe, must (1) specify the party or parties taking the appeal; (2) designate the judgment from which the appeal is taken; and (3) name the court to which

the appeal is taken.[3] Notably, a signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional.

Amicus ultimately urges that even if there is no jurisdictional notice of appeal signature requirement for parties represented by attorneys, *pro se* parties, like Becker, must sign within Rule 4's time line to avoid automatic dismissal. See Tr. of Oral Arg. 34–36. Appellate Rule 3(c)(2) is the foundation for this argument. That provision reads: "A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise."

We do not agree that Rule 3(c)(2)'s prescription, added in 1993 to a then unsubdivided Rule 3(c), see Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U. S. C. App., p. 590, places *pro se* litigants in a singularly exacting time bind. The provision, as we read it, does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make of it an Appellate Rule 3 jurisdictional specification. The current Rule 3(c)(2), like other changes made in 1993, the Advisory Committee Notes explain, was designed "to prevent the loss of a right to appeal through inadvertent omission of a party's name" when "it is objectively clear that [the] party intended to appeal." Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U. S. C. App., p. 590. Seen in this light, the Rule is entirely ameliorative; it assumes and assures that the *pro se* litigant's spouse and minor children,

[3] Appellate Rule 3(c)(1), as currently framed, provides in full:

"(1) The notice of appeal must:

"(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X';

"(B) designate the judgment, order, or part thereof being appealed; and

"(C) name the court to which the appeal is taken."

if they were parties below, will remain parties on appeal, "unless the notice clearly indicates a contrary intent." *Ibid.*

If we had any doubt that Appellate Rule 3(c)(2) was meant only to facilitate, not to impede, access to an appeal, we would find corroboration in a related ameliorative rule, Appellate Rule 3(c)(4), which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Cf. this Court's Rule 14.5 ("If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule [governing the content of petitions for certiorari] or with Rule 33 or Rule 34 [governing document preparation], the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely.").

In *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312 (1988), it is true, we held, that a notice of appeal that omitted the name of a particular appellant, through a clerical error, was ineffective to take an appeal for that party. *Id.*, at 318 (construing Rule 3(c) prior to the ameliorative changes made in 1993).[4] Becker's notice, however, did not suffer from any failure to "specify the party or parties taking the appeal." Fed. Rule App. Proc. 3(c)(1)(A). Other opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. See *Smith* v. *Barry*, 502 U. S., at 245, 248–249 (holding that "a document intended to serve as an appellate brief [filed within the time specified by Appellate Rule 4 and containing the information required by Appellate Rule 3] may qualify as the notice of

[4] The Advisory Committee intended the elaborate 1993 amendment of Appellate Rule 3(c) "to reduce the amount of satellite litigation spawned by *[Torres]*." Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U. S. C. App., p. 590.

appeal"); *Foman* v. *Davis*, 371 U. S. 178, 181 (1962) (holding that an appeal was improperly dismissed when the record as a whole—including a timely but incomplete notice of appeal and a premature but complete notice—revealed the orders petitioner sought to appeal).

* * *

In sum, the Federal Rules require a notice of appeal to be signed. That requirement derives from Civil Rule 11(a), and so does the remedy for a signature's omission on the notice originally filed. On the facts here presented, the Sixth Circuit should have accepted Becker's corrected notice as perfecting his appeal. We therefore reverse the judgment dismissing Becker's appeal and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

ARKANSAS *v.* SULLIVAN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 00–262. Decided May 29, 2001

When the Arkansas police officer who stopped respondent Sullivan for speeding and improper window tinting remembered intelligence on Sullivan regarding narcotics, he arrested Sullivan for traffic violations and carrying a weapon and, during an inventory search of the vehicle, discovered a bag of drugs and drug-related materials. Sullivan was charged with, *inter alia*, various state-law drug offenses. The trial court granted Sullivan's motion to suppress the evidence seized from his vehicle on the basis that his arrest was a pretext to search him and therefore violated the Fourth and Fourteenth Amendments. After affirming, the Arkansas Supreme Court denied the State's rehearing petition, rejecting the State's argument that the court took into account the officer's subjective motivation in disregard of *Whren* v. *United States*, 517 U. S. 806, and holding that, even if *Whren* precludes inquiry into an arresting officer's subjective motivation, that court could interpret the United States Constitution more broadly than this Court.

Held: The State Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent. Its decision that the drug-related evidence should be suppressed because the police officer had an improper subjective motivation for making the stop cannot be squared with this Court's holding in *Whren*, *supra*, at 813, that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The State Supreme Court's alternative holding, that it may interpret the Federal Constitution to provide greater protection than this Court's own precedents provide, is foreclosed by *Oregon* v. *Hass*, 420 U. S. 714.

Certiorari granted; 340 Ark. 315, 11 S. W. 3d 526, and 340 Ark. 318–A, 16 S. W. 3d 551, reversed and remanded.

PER CURIAM.

In November 1998, Officer Joe Taylor of the Conway, Arkansas, Police Department stopped respondent Sullivan for speeding and for having an improperly tinted windshield. Taylor approached Sullivan's vehicle, explained the reason for the stop, and requested Sullivan's license, regis-

tration, and insurance documentation. Upon seeing Sullivan's license, Taylor realized that he was aware of " 'intelligence on [Sullivan] regarding narcotics.' " 340 Ark. 318–A, 318–B, 16 S. W. 3d 551, 552 (2000). When Sullivan opened his car door in an (unsuccessful) attempt to locate his registration and insurance papers, Taylor noticed a rusted roofing hatchet on the car's floorboard. Taylor then arrested Sullivan for speeding, driving without his registration and insurance documentation, carrying a weapon (the roofing hatchet), and improper window tinting.

After another officer arrived and placed Sullivan in his squad car, Officer Taylor conducted an inventory search of Sullivan's vehicle pursuant to the Conway Police Department's Vehicle Inventory Policy. Under the vehicle's armrest, Taylor discovered a bag containing a substance that appeared to him to be methamphetamine as well as numerous items of suspected drug paraphernalia. As a result of the detention and search, Sullivan was charged with various state-law drug offenses, unlawful possession of a weapon, and speeding.

Sullivan moved to suppress the evidence seized from his vehicle on the basis that his arrest was merely a "pretext and sham to search" him and, therefore, violated the Fourth and Fourteenth Amendments to the United States Constitution. Pet. for Cert. 3. The trial court granted the suppression motion and, on the State's interlocutory appeal, the Arkansas Supreme Court affirmed. 340 Ark. 315, 11 S. W. 3d 526 (2000). The State petitioned for rehearing, contending that the court had erred by taking into account Officer Taylor's subjective motivation, in disregard of this Court's opinion in *Whren* v. *United States*, 517 U. S. 806 (1996). Over the dissent of three justices, the court rejected the State's argument that *Whren* makes "the ulterior motives of police officers . . . irrelevant so long as there is probable cause for the traffic stop" and denied the State's rehearing petition. 340 Ark., at 318–B, 16 S. W. 3d, at 552.

The Arkansas Supreme Court declined to follow *Whren* on the ground that "much of it is *dicta*." 340 Ark., at 318–B, 16 S. W. 3d, at 552. The court reiterated the trial judge's conclusion that "the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime," and observed that "we do not believe that *Whren* disallows" suppression on such a basis. *Id.*, at 318–C, 16 S. W. 3d, at 552. Finally, the court asserted that, even if it were to conclude that *Whren* precludes inquiry into an arresting officer's subjective motivation, "there is nothing that prevents this court from interpreting the U. S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." 340 Ark., at 318–C, 16 S. W. 3d, at 552.

Because the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent, we grant the State's petition for a writ of certiorari and reverse.* As an initial matter, we note that the Arkansas Supreme Court never questioned Officer Taylor's authority to arrest Sullivan for a fine-only traffic violation (speeding), and rightly so. See *Atwater* v. *Lago Vista*, *ante*, p. 318. Rather, the court affirmed the trial judge's suppression of the drug-related evidence on the theory that Officer Taylor's arrest of Sullivan, although supported by probable cause, nonetheless violated the Fourth Amendment because Taylor had an improper subjective motivation for making the stop. The Arkansas Supreme Court's holding to that effect cannot be squared with our decision in *Whren*, in which we noted our "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers,"

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*Sullivan's motion for leave to proceed *in forma pauperis* is granted. We have jurisdiction under 28 U. S. C. § 1257 notwithstanding the absence of final judgment in the underlying prosecution. See *New York* v. *Quarles*, 467 U. S. 649, 651, n. 1 (1984) ("[S]hould the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal").

and held unanimously that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U. S., at 813. That *Whren* involved a traffic stop, rather than a custodial arrest, is of no particular moment; indeed, *Whren* itself relied on *United States* v. *Robinson*, 414 U. S. 218 (1973), for the proposition that "a traffic-violation arrest . . . [will] not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search.'" 517 U. S., at 812–813.

The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon* v. *Hass*, 420 U. S. 714 (1975). There, we observed that the Oregon Supreme Court's statement that it could "'interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court'" was "not the law and surely must be an inadvertent error." *Id.*, at 719, n. 4. We reiterated in *Hass* that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.*, at 719.

The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE BREYER join, concurring.

The Arkansas Supreme Court was moved by a concern rooted in the Fourth Amendment. Validating Kenneth Sullivan's arrest, the Arkansas court feared, would accord police officers disturbing discretion to intrude on individuals' lib-

erty and privacy. See 340 Ark. 318–A, 318–B, 16 S. W. 3d 551, 552 (2000) (expressing unwillingness "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity"). But this Court has held that such exercises of official discretion are unlimited by the Fourth Amendment. See *Atwater* v. *Lago Vista*, *ante*, p. 318; *Whren* v. *United States*, 517 U. S. 806 (1996). Given the Court's current case law, I join the Court's opinion.

In *Atwater*, which recognized no constitutional limitation on arrest for a fine-only misdemeanor offense, this Court relied in part on a perceived "dearth of horribles demanding redress." *Ante*, at 353. Although I joined a dissenting opinion questioning the relevance of the Court's conclusion on that score, see *ante*, at 372 (opinion of O'CONNOR, J.), I hope the Court's perception proves correct. But if it does not, if experience demonstrates "anything like an epidemic of unnecessary minor-offense arrests," *ante*, at 353 (opinion of the Court), I hope the Court will reconsider its recent precedent. See *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986) (observing that Court has departed from *stare decisis* when necessary "to bring its opinions into agreement with experience and with facts newly ascertained") (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)).

Syllabus

FLORIDA *v.* THOMAS

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 00–391. Argued April 25, 2001—Decided June 4, 2001

While officers were investigating marijuana sales and making arrests at a Florida home, respondent Thomas drove up, parked in the home's driveway, and walked toward the back of his car. An officer met him there and asked his name and whether he had a driver's license. After a check of Thomas' license revealed an outstanding warrant, the officer arrested him, handcuffed him, and took him inside the home. The officer then went back outside, alone, and searched Thomas' car, finding several bags containing methamphetamine. Thomas was charged with possession of that drug and related offenses. The trial court granted his motion to suppress the evidence of narcotics and narcotic paraphernalia. The Second District Court of Appeal reversed, finding the search valid under *New York* v. *Belton*, 453 U. S. 454, in which this Court established a "bright-line" rule permitting an officer who has made a lawful custodial arrest of a car's occupant to search the car's passenger compartment as a contemporaneous incident of the arrest. Holding that *Belton* did not apply, the Florida Supreme Court reversed, but remanded for the trial court to determine whether the vehicle search was justified under *Chimel* v. *California*, 395 U. S. 752. This Court granted certiorari to consider whether, as the State Supreme Court had held, *Belton*'s bright-line rule is limited to situations where the officer initiates contact with a vehicle's occupant while that person remains in the vehicle.

Held: The Court lacks jurisdiction to decide the question on which certiorari was granted. Although the parties did not raise the issue in their briefs on the merits, this Court must first consider whether it has jurisdiction to decide this case. See *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299, 306. Title 28 U. S. C. § 1257(a) authorizes this Court to review "[f]inal judgments . . . by the highest court of a State . . . where any . . . right . . . is specially set up or claimed under the Constitution." In a criminal prosecution, finality generally is defined by a judgment of conviction and the imposition of a sentence. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 54. However, in certain circumstances, the Court has treated state-court judgments as final for jurisdictional purposes even though further proceedings were to take place in the state court. *Flynt* v. *Ohio*, 451 U. S. 619, 620–621. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 479–483, the Court divided cases of this

Syllabus

kind into four categories: (1) cases in which there are further proceedings, even entire trials, yet to occur in the state courts, but where the federal issue is conclusive or the outcome of further proceedings preordained; (2) cases in which the federal issue, finally decided by a State's highest court, will survive and require decision regardless of the outcome of future state-court proceedings; (3) cases in which the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case; and (4) cases in which the state courts have finally decided the federal issue with further proceedings pending in which the party seeking review in this Court might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. Because none of those categories fits the Florida Supreme Court's judgment in this case, the judgment is not final. Pp. 777–781.

Certiorari dismissed for want of jurisdiction. Reported below: 761 So. 2d 1010.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Robert J. Krauss, Senior Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs were *Robert A. Butterworth*, Attorney General, *Carolyn M. Snurkowski*, Assistant Deputy Attorney General, and *John M. Klawikofsky*, Assistant Attorney General.

Gregory G. Garre argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.

Cynthia J. Dodge argued the cause for respondent. With her on the brief was *James Marion Moorman*.*

**Tracey Maclin* and *Lisa B. Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *New York* v. *Belton*, 453 U. S. 454 (1981), we established a "bright-line" rule permitting a law enforcement officer who has made a lawful custodial arrest of the occupant of a car to search the passenger compartment of that car as a contemporaneous incident of the arrest. We granted certiorari to consider whether that rule is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle. 531 U. S. 1069 (2001). We find, however, that we lack jurisdiction to decide the question.

On the evening at issue, officers were present at a home in Polk County, Florida, investigating the sale of marijuana and making arrests. Respondent Robert Thomas drove up to the residence, parked in the driveway, and walked toward the back of his vehicle. Officer J. D. Maney met Thomas at the rear of Thomas' vehicle, and asked him his name and whether he had a driver's license. After a check of Thomas' license revealed an outstanding warrant for his arrest, Officer Maney arrested him, handcuffed him, and took him inside the residence. The officer then went back outside, alone, and searched Thomas' car. The search revealed several small bags containing a white substance that tested positive for methamphetamine.

Respondent was charged with possession of methamphetamine and related narcotics offenses. The trial court granted his motion to suppress the evidence of narcotics and narcotic paraphernalia. The Second District Court of Appeal reversed, 711 So. 2d 1241 (1998), finding the search valid under *New York* v. *Belton*, *supra*. The Supreme Court of Florida in turn reversed, holding that *Belton* did not apply.

The court held that "*Belton*'s bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant" while the defendant remains in the car. 761 So. 2d 1010, 1014 (2000). The court concluded

that *Belton* was inapplicable, and directed that the trial court determine "whether the factors in *Chimel* [v. *California*, 395 U. S. 752 (1969),] justify the search of Thomas' vehicle." 761 So. 2d, at 1014. The court explained that "[b]ased on the record . . . we are unable to ascertain whether [the officer's] safety was endangered or whether the preservation of the evidence was in jeopardy," as necessary to justify the search under *Chimel* v. *California*, 395 U. S. 752 (1969), and remanded for further proceedings.

Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case. See *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299, 306 (1989). Title 28 U. S. C. § 1257(a) authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." In a criminal prosecution, finality generally "is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 54 (1989). But we have not, in practice, interpreted the finality rule so strictly. In certain circumstances, we have "treated state-court judgments as final for jurisdictional purposes although there were further proceedings to take place in the state court." *Flynt* v. *Ohio*, 451 U. S. 619, 620–621 (1981) *(per curiam)*. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), we divided cases of this kind into four categories. None fits the judgment of the Florida Supreme Court, however, and we therefore conclude that its judgment is not final.

The first *Cox* category includes those cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.*, at 479. The prototypical example of this category is *Mills* v. *Alabama*, 384 U. S. 214 (1966). There the Supreme Court of Alabama held that a statute

which prohibited the publication of an editorial endorsement on election day did not violate the First Amendment, and remanded the case for trial. *Id.*, at 216–217. Mills conceded that his only defense to the state charge was his constitutional claim; he admitted that he did publish the editorial. We held that this was a "final judgment" and took jurisdiction, saying that a trial "would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.*, at 217–218.

The decision of the Supreme Court of Florida here differs considerably from that of the state court in *Mills*. The Florida Supreme Court remanded the case not only for application of *Chimel*, but for further factfinding, and the State has not conceded that the search is invalid under *Chimel*.

In *Cox*'s second category are those cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U. S., at 480. In *Cox* we used our decision in *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120 (1945), to illustrate the second category. We said:

> "In *Radio Station WOW*, the Nebraska Supreme Court directed the transfer of the properties of a federally licensed radio station and ordered an accounting, rejecting the claim that the transfer order would interfere with the federal license. . . . Nothing that could happen

> in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox, supra,* at 480.

In this case, however, were the Florida courts to find that *Chimel* allows the search, a decision on the *Belton* issue would no longer be necessary. We have also noted that we treat state-court judgments in this category as final on the assumption that "'the federal questions that could come here have been adjudicated by the State court,'" and the state proceedings to take place on remand "'could not remotely give rise to a federal question . . . that may later come here.'" *Cox*, 420 U. S., at 480. We cannot make that assumption in this case.

Cases where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," fall into *Cox*'s third category. *Id.*, at 481. *New York* v. *Quarles*, 467 U. S. 649 (1984), is such a case. Respondent was charged in state court with criminal possession of a weapon, and certain evidence was suppressed on federal constitutional grounds. We granted the petition for certiorari and reversed, explaining that the suppression ruling was a "final judgment" although respondent had yet to be tried. *Id.*, at 651. We said that this case fell within *Cox*'s third category because "should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal." 467 U. S., at 651, and n. 1.

To deny review here would not necessarily cause Florida to go to trial without the suppressed evidence, with further appeal barred in the event of an acquittal or the federal claim mooted in the event of a conviction. The state court has

yet to decide whether the evidence should be suppressed; that will be resolved on remand. If the State prevails on remand and the evidence is admitted under *Chimel*, then the *Belton* issue will be moot, and the State cannot seek review of it. But if the State loses, and the evidence is suppressed, Florida law allows the State to appeal, as long as it does so prior to trial. Fla. Stat. § 924.071(1) (1996) ("The state may appeal from a pretrial order . . . suppressing evidence"); Fla. Rule App. Proc. 9.140(c)(1)(B) (2001) ("The state may appeal an order . . . suppressing before trial . . . evidence obtained by search and seizure"). Should the Supreme Court of Florida rule against the State on the *Chimel* issue, the question of suppression would be finally decided by the Florida courts, and the State could then seek certiorari in this Court. At that time it could obtain review of both the *Belton* issue and the *Chimel* issue. See *Jefferson* v. *City of Tarrant*, 522 U. S. 75, 83 (1997).

The fourth *Cox* category includes those cases where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U. S., at 482–483.

Here the State can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials. The fourth *Cox* exception does not apply here.

For the foregoing reasons, we dismiss the writ of certiorari for want of jurisdiction.

It is so ordered.

Syllabus

PENRY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00–6677. Argued March 27, 2001—Decided June 4, 2001

In 1989, this Court held that petitioner Penry had been sentenced to death in violation of the Eighth Amendment. At the close of the penalty hearing during Penry's first Texas capital murder trial, the jury was instructed to answer three statutorily mandated "special issues": (1) whether Penry's conduct was committed deliberately and with the reasonable expectation that death would result; (2) whether it was probable that he would be a continuing threat to society; and (3) whether the killing was unreasonable in response to any provocation by the deceased. Although Penry had offered extensive evidence that he was mentally retarded and had been severely abused as a child, the jury was never told it could consider and give mitigating effect to that evidence in imposing sentence. In holding that the jury had not been adequately instructed with respect to the mitigating evidence, the Court found, among other things, that none of the special issues was broad enough to allow the jury to consider and give effect to that evidence. *Penry* v. *Lynaugh*, 492 U. S. 302 *(Penry I)*. When Texas retried Penry in 1990, he was again found guilty of capital murder. During the penalty phase, the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse. On direct examination by the defense, a clinical neuropsychologist, Dr. Price, testified that he believed Penry suffered from organic brain impairment and mental retardation. During cross-examination, Price cited as one of the records he had reviewed in preparing his testimony a psychiatric evaluation prepared by Dr. Peebles in 1977 at the request of Penry's then-counsel to determine Penry's competency to stand trial on an earlier charge unrelated to the murder at issue. Over a defense objection, Price recited a portion of that evaluation which stated that it was Peebles' professional opinion that if Penry were released, he would be dangerous to others. When it came time to submit the case to the jury, the trial court instructed the jury to determine Penry's sentence by answering the same three special issues that were at issue in *Penry I*. The trial court then gave a "supplemental instruction": "[W]hen you deliberate on the . . . special issues, you are to consider mitigating circumstances, if any, supported by the evidence . . . . If you find [such]

circumstances . . . , you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to [Penry's] personal culpability . . . , a negative finding should be given to one of the special issues." The verdict form itself, however, contained only the text of the three special issues, and gave the jury two choices with respect to each: "Yes" or "No." Because the jury unanimously answered "yes" to each special issue, the court sentenced Penry to death in accordance with state law. In affirming, the Texas Court of Criminal Appeals rejected Penry's claims that the admission of language from the Peebles report violated Penry's Fifth Amendment privilege against self-incrimination, and that the jury instructions were constitutionally inadequate because they did not permit the jury to consider and give effect to his particular mitigating evidence. With respect to the latter, the court held that the supplemental instruction met *Penry I*'s constitutional requirements. After his petition for state habeas corpus relief was denied, Penry petitioned for federal habeas relief under 28 U. S. C. § 2254. The District Court found that the state appellate court's conclusions on both of Penry's claims were neither contrary to, nor an unreasonable application of, clearly established federal law. The Fifth Circuit denied a certificate of appealability.

Held:

1. Penry's argument is unavailing that the admission into evidence of the portion of the Peebles report referring to his future dangerousness violated his Fifth Amendment privilege against self-incrimination. This case is distinguishable from *Estelle* v. *Smith*, 451 U. S. 454, in which the Court held that the admission of a psychiatrist's testimony on the topic of future dangerousness, based on a defendant's uncounseled statements, violated the Fifth Amendment. The Court need not and does not decide whether the several respects in which this case differs from *Estelle* affect the merits of Penry's claim. Rather, the question is whether the Texas court's decision was "contrary to" or an "unreasonable application" of this Court's precedent. 28 U. S. C. § 2254(d)(1); see *Williams* v. *Taylor*, 529 U. S. 362. It was not. The differences between this case and *Estelle* are substantial, and the Court's *Estelle* opinion suggested that its holding was limited to the "distinct circumstances" presented there. 451 U. S., at 466. It also indicated that the Fifth Amendment analysis might be different where a defendant introduces psychiatric evidence at the penalty phase. *Id.*, at 472. Indeed, the Court has never extended *Estelle*'s Fifth Amendment holding beyond its particular facts. Cf., *e. g.*, *Buchanan* v. *Kentucky*, 483 U. S.

402. It therefore cannot be said that it was objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim. See *Williams*, *supra*, at 409. Even if the Court's precedent were to establish squarely that use of the Peebles report violated the Fifth Amendment, that error would justify overturning Penry's sentence only if he could establish that the error had a substantial and injurious effect or influence in determining the jury's verdict. *E. g.*, *Brecht* v. *Abrahamson*, 507 U. S. 619, 637. There is considerable doubt that Penry could make such a showing. The excerpt from the Peebles report was neither the first nor the last expert opinion the jury heard to the effect that Penry posed a future danger and was by no means the key to the State's case on future dangerousness. Pp. 793–796.

2. The jury instructions at Penry's resentencing, however, did not comply with the Court's mandate in *Penry I*. To the extent the Texas appellate court believed that *Penry I* was satisfied merely because a supplemental instruction was given, the court clearly misapprehended that prior decision. The key under *Penry I* is that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence." 492 U. S., at 319. To the extent the state court concluded that the substance of the jury instructions given at Penry's resentencing satisfied *Penry I*, that determination was objectively unreasonable. The three special issues submitted to the jury were identical to the ones found inadequate in *Penry I*. Although the supplemental instruction mentioned mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical. The jury was clearly instructed that a "yes" answer to a special issue was appropriate only when supported by the evidence beyond a reasonable doubt, and that a "no" answer was appropriate only when there was a reasonable doubt as to whether the answer to a special issue should be "yes." The verdict form listed the three special issues and, with no mention of mitigating circumstances, confirmed and clarified the jury's two choices with respect to each special issue. In the State's view, however, the jury was also told that it could ignore these clear guidelines and—even if there was in fact no reasonable doubt as to the matter inquired about—answer any special issue in the negative if the mitigating circumstances warranted a life sentence. In other words, the jury could change one or more truthful "yes" answers to an untruthful "no" answer in order to avoid a death sentence for Penry. The supplemental instruction thereby made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation. The comments of the prosecutor and defense counsel, as well as the comments of the court during *voir dire*, did

Syllabus

little to clarify the confusion caused by the instructions themselves. Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion the Court reached in *Penry I:* "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." 492 U. S., at 326. Pp. 796–804.

215 F. 3d 504, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, Parts I, II, and III–A of which were unanimous, and Part III–B of which was joined by STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined, *post,* p. 804.

Robert S. Smith argued the cause for petitioner. With him on the briefs were *Julia Tarver* and *John E. Wright.*

Andy Taylor, First Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *John Cornyn*, Attorney General, *Gregory S. Coleman*, Solicitor General, *Michael T. McCaul*, Deputy Attorney General, *Edward L. Marshall*, Senior Assistant Attorney General, and *Gena Blount Bunn* and *Tommy L. Skaggs,* Assistant Attorneys General.

Gene C. Schaerr argued the cause for the State of Alabama as *amicus curiae* urging affirmance. With him on the brief were *Bill Pryor*, Attorney General, *J. Clayton Crenshaw*, Assistant Attorney General, *Carter G. Phillips*, and *Rebecca K. Smith.**

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*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Retardation et al. by *James W. Ellis*, *Michael B. Browde*, *Jeffrey J. Pokorak*, and *Stanley S. Herr;* and for the National Association of Criminal Defense Lawyers by *Edward M. Chikofsky*, *Lisa B. Kemler*, *John H. Pickering*, and *Christopher J. Herrling.*

Briefs of *amici curiae* urging affirmance were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for Justice for All by *Patrick F. Philbin.*

Richard Wilson and *William J. Edwards* filed a brief for the International Association for the Scientific Study of Intellectual Disabilities et al. as *amici curiae.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1989, we held that Johnny Paul Penry had been sentenced to death in violation of the Eighth Amendment because his jury had not been adequately instructed with respect to mitigating evidence. See *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*. The State of Texas retried Penry in 1990, and that jury also found him guilty of capital murder and sentenced him to death. We now consider whether the jury instructions at Penry's resentencing complied with our mandate in *Penry I*. We also consider whether the admission into evidence of statements from a psychiatric report based on an uncounseled interview with Penry ran afoul of the Fifth Amendment.

I

Johnny Paul Penry brutally raped and murdered Pamela Carpenter on October 25, 1979. In 1980, a Texas jury found him guilty of capital murder. At the close of the penalty hearing, the jury was instructed to answer three statutorily mandated "special issues":

> "'(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "'(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "'(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.'" *Id.*, at 310 (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989)).

The jury answered "yes" to each issue and, as required by statute, the trial court sentenced Penry to death. 492 U. S., at 310–311.

Although Penry had offered extensive evidence that he was mentally retarded and had been severely abused as a child, the jury was never instructed that it could consider and give mitigating effect to that evidence in imposing sentence. *Id.*, at 320. Nor was any of the three special issues broad enough in scope that the jury could consider and give effect to the mitigating evidence in answering the special issue. *Id.*, at 322–325. While Penry's mental retardation was potentially relevant to the first special issue—whether he had acted deliberately—we found no way to be sure that the jurors fully considered the mitigating evidence as it bore on the broader question of Penry's moral culpability. *Id.*, at 322–323. As to the second issue—whether Penry would be a future danger—the evidence of his mental retardation and history of abuse was "relevant only as an *aggravating* factor." *Id.*, at 323 (emphasis in original). And the evidence was simply not relevant in a mitigating way to the third issue—whether Penry had unreasonably responded to any provocation. *Id.*, at 324–325.

The comments of counsel also failed to clarify the jury's role. Defense counsel had urged the jurors to vote "no" on one of the special issues if they believed that Penry, because of the mitigating evidence, did not deserve to be put to death. The prosecutor, however, had reminded them of their "oath to follow the law and . . . answe[r] these questions based on the evidence and following the law." *Id.*, at 325 (internal quotation marks omitted).

"In light of the prosecutor's argument, and . . . in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty," we concluded that "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.*, at 326,

328. We thus vacated Penry's sentence, confirming that in a capital case, "[t]he sentencer must . . . be able to consider and give effect to [mitigating] evidence in imposing sentence," so that "'the sentence imposed . . . reflec[ts] a reasoned *moral* response to the defendant's background, character, and crime.'" *Id.*, at 319 (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)).

Penry was retried in 1990 and again found guilty of capital murder. During the penalty phase, the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse. One defense witness on the subject of Penry's mental impairments was Dr. Randall Price, a clinical neuropsychologist. On direct examination, Dr. Price testified that he believed Penry suffered from organic brain impairment and mental retardation. App. 276–279; 878. In the course of cross-examining Dr. Price, the prosecutor asked what records Price had reviewed in preparing his testimony. Price cited 14 reports, including a psychiatric evaluation of Penry prepared by Dr. Felix Peebles on May 19, 1977. *Id.*, at 327. The Peebles report had been prepared at the request of Penry's then-counsel to determine Penry's competency to stand trial on a 1977 rape charge—unrelated to the rape and murder of Pamela Carpenter. *Id.*, at 55–60, 125. The prosecutor asked Dr. Price to read a specific portion of the Peebles report for the jury. Over the objection of defense counsel, Dr. Price recited that it was Dr. Peebles' "professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons." *Id.*, at 413. The prosecutor again recited this portion of the Peebles report during his closing argument. *Id.*, at 668.

When it came time to submit the case to the jury, the court instructed the jury to determine Penry's sentence by answering three special issues—the same three issues that

had been put before the jury in *Penry I*. Specifically, the jury had to determine whether Penry acted deliberately when he killed Pamela Carpenter; whether there was a probability that Penry would be dangerous in the future; and whether Penry acted unreasonably in response to provocation. App. 676–678. Cf. *Penry I*, 492 U. S., at 320.

The court told the jury how to determine its answers to those issues:

> "[B]efore any issue may be answered 'Yes,' all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be 'Yes.' . . . [I]f any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered 'Yes,' then such juror should vote 'No' to that Special Issue." App. 672–673.

The court explained the consequences of the jury's decision:

> "[I]f you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case." *Id.*, at 674–675.

The court then gave the following "supplemental instruction":

> "You are instructed that when you deliberate on the questions posed in the special issues, you are to consider

> mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." *Id.*, at 675.

A complete copy of the instructions was attached to the verdict form, and the jury took the entire packet into the deliberation room. Tr. of Oral Arg. 31. The verdict form itself, however, contained only the text of the three special issues, and gave the jury two choices with respect to each special issue: "We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is 'Yes,'" or "We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is 'No.'" App. 676–678.

After deliberating for approximately 2½ hours, the jury returned its punishment verdict. See 51 Record 1948, 1950. The signed verdict form confirmed that the jury had unanimously agreed that the answer to each special issue was "yes." App. 676–678. In accordance with state law, the court sentenced Penry to death.

The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence. The court rejected Penry's claim that the admission of language from the 1977 Peebles report violated Penry's Fifth Amendment privilege against self-incrimination. The court reasoned that because Dr. Peebles had examined Penry two years prior to the murder of Pamela Carpenter, Penry had not at that time been "confronted with someone who was essentially an agent for the State whose function was to gather evidence that might be used against him in connection with the crime for which he was incarcerated." *Penry* v. *State*, 903 S. W. 2d 715, 759–760 (1995) (internal quotation marks and citation omitted).

The court also rejected Penry's claim that the jury instructions given at his second sentencing hearing were constitutionally inadequate because they did not permit the jury to consider and give effect to his mitigating evidence of mental retardation and childhood abuse. The court cited *Penry I* for the proposition that when a defendant proffers "mitigating evidence that is not relevant to the special issues or that has relevance to the defendant's moral culpability beyond the scope of the special issues . . . the jury must be given a special instruction in order to allow it to consider and give effect to such evidence." 903 S. W. 2d, at 765. Quoting the supplemental jury instruction given at Penry's second trial, see *supra*, at 789–790, the court overruled Penry's claim of error. The court stated that "a nullification instruction such as this one is sufficient to meet the constitutional requirements of *[Penry I]*." 903 S. W. 2d, at 765.

In 1998, after his petition for state habeas corpus relief was denied, see App. 841 (trial court order); *id.*, at 863 (Court of Criminal Appeals order), Penry filed a petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254 (1994 ed. and Supp. V) in the United States District Court for the Southern District of Texas. The District Court rejected both of Penry's claims, finding that the Texas Court of Criminal Appeals' conclusions on both points were neither contrary

to, nor an unreasonable application of, clearly established federal law. App. 893, 920. After full briefing and argument, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability. 215 F. 3d 504 (2000).

We stayed Penry's execution and granted certiorari to consider Penry's constitutional arguments regarding the admission of the Peebles report and the adequacy of the jury instructions. 531 U. S. 1010 (2000).

II

Because Penry filed his federal habeas petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the provisions of that law govern the scope of our review. Specifically, 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. V) prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Last Term in *Williams* v. *Taylor*, 529 U. S. 362 (2000), we explained that the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning. *Id.*, at 404. A state court decision will be "contrary to" our clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.*, at 405–406. A state court decision will be an "unreasonable application of" our clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.*, at 407–408.

"[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*, at 409. Distinguishing between an unreasonable and an incorrect application of federal law, we clarified that even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable. *Id.*, at 410–411.

Although the District Court evaluated the Texas Court of Criminal Appeals' disposition of Penry's claims under a standard we later rejected in *Williams*, see App. 882 (stating that an application of law to facts is "unreasonable 'only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect' " (citation omitted)), the Fifth Circuit articulated the proper standard of review, as set forth in § 2254(d)(1) and clarified in *Williams*, and denied Penry relief. Guided by this same standard, we now turn to the substance of Penry's claims.

III

A

Penry contends that the admission into evidence of the portion of the 1977 Peebles report that referred to Penry's future dangerousness violated his Fifth Amendment privilege against self-incrimination because he was never warned that the statements he made to Dr. Peebles might later be used against him. The Texas Court of Criminal Appeals disagreed, concluding that when Dr. Peebles interviewed Penry, Peebles was not acting as an agent for the State in order to gather evidence that might be used against Penry. 903 S. W. 2d, at 759.

Penry argues that this case is indistinguishable from *Estelle* v. *Smith*, 451 U. S. 454 (1981). In *Estelle*, we considered a situation in which a psychiatrist conducted an

ostensibly neutral competency examination of a capital defendant, but drew conclusions from the defendant's uncounseled statements regarding his future dangerousness, and later testified for the prosecution on that crucial issue. We likened the psychiatrist to "an agent of the State recounting unwarned statements made in a postarrest custodial setting," and held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.*, at 467–468. The admission of the psychiatrist's testimony under those "distinct circumstances" violated the Fifth Amendment. *Id.*, at 466.

This case differs from *Estelle* in several respects. First, the defendant in *Estelle* had not placed his mental condition at issue, *id.*, at 457, n. 1, whereas Penry himself made his mental status a central issue in both the 1977 rape case and his trials for Pamela Carpenter's rape and murder. Second, in *Estelle*, the trial court had called for the competency evaluation and the State had chosen the examining psychiatrist. *Id.*, at 456–457. Here, however, it was Penry's own counsel in the 1977 case who requested the psychiatric exam performed by Dr. Peebles. Third, in *Estelle*, the State had called the psychiatrist to testify as a part of its affirmative case. *Id.*, at 459. Here, it was during the cross-examination of Penry's own psychological witness that the prosecutor elicited the quotation from the Peebles report. And fourth, in *Estelle*, the defendant was charged with a capital crime at the time of his competency exam, and it was thus clear that his future dangerousness would be a specific issue at sentencing. Penry, however, had not yet murdered Pamela Carpenter at the time of his interview with Dr. Peebles.

We need not and do not decide whether these differences affect the merits of Penry's Fifth Amendment claim.

Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent. 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. V). We think it was not. The differences between this case and *Estelle* are substantial, and our opinion in *Estelle* suggested that our holding was limited to the "distinct circumstances" presented there. It also indicated that the Fifth Amendment analysis might be different where a defendant "intends to introduce psychiatric evidence at the penalty phase." 451 U. S., at 472. Indeed, we have never extended *Estelle*'s Fifth Amendment holding beyond its particular facts. Cf., *e. g.*, *Buchanan* v. *Kentucky*, 483 U. S. 402 (1987) (*Estelle* does not apply, and it does not violate the Fifth Amendment, where a prosecutor uses portions of a psychiatric evaluation requested by a defendant to rebut psychiatric evidence presented by the defendant at trial). We therefore cannot say that it was objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim.

Even if our precedent were to establish squarely that the prosecution's use of the Peebles report violated Penry's Fifth Amendment privilege against self-incrimination, that error would justify overturning Penry's sentence only if Penry could establish that the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). We think it unlikely that Penry could make such a showing.

The excerpt from the Peebles report bolstered the State's argument that Penry posed a future danger, but it was neither the first nor the last opinion the jury heard on that point. Four prison officials testified that they were of the opinion that Penry "would commit criminal acts of violence that would constitute a continuing threat to society." App. 94, 104, 138; 47 Record 970. Three psychiatrists tes-

tified that Penry was a dangerous individual and likely to remain so. Two were the State's own witnesses. See App. 487, 557. The third was Dr. Price—the same defense witness whom the prosecutor had asked to read from the Peebles report. Before that recitation, Dr. Price had stated his own opinion that "[i]f [Penry] was in the free world, I would consider him dangerous." *Id.*, at 392.

While the Peebles report was an effective rhetorical tool, it was by no means the key to the State's case on the question whether Penry was likely to commit future acts of violence. We therefore have considerable doubt that the admission of the Peebles report, even if erroneous, had a "substantial and injurious effect" on the verdict. *Brecht* v. *Abrahamson*, *supra*, at 637. Accordingly, we will not disturb the Texas Court of Criminal Appeals' rejection of Penry's Fifth Amendment claim.

B

Penry also contends that the jury instructions given at his second sentencing hearing did not comport with our holding in *Penry I* because they did not provide the jury with a vehicle for expressing its reasoned moral response to the mitigating evidence of Penry's mental retardation and childhood abuse. The Texas Court of Criminal Appeals disagreed. The court summarized *Penry I* as holding that when a defendant proffers "mitigating evidence that is not relevant to the special issues or that has relevance to the defendant's moral culpability beyond the scope of the special issues . . . the jury must be given a special instruction in order to allow it to consider and give effect to such evidence." 903 S. W. 2d, at 765. The court then stated that the supplemental jury instruction given at Penry's second sentencing hearing satisfied that mandate. *Ibid.*

The Texas court did not make the rationale of its holding entirely clear. On one hand, it might have believed that *Penry I* was satisfied merely by virtue of the fact that

a supplemental instruction had been given. On the other hand, it might have believed that it was the substance of that instruction which satisfied *Penry I*.

While the latter seems to be more likely, to the extent it was the former, the Texas court clearly misapprehended our prior decision. *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence." 492 U. S., at 319 (emphasis added). See also *Johnson* v. *Texas*, 509 U. S. 350, 381 (1993) (O'CONNOR, J., dissenting) ("[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances" (emphasis in original)). For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U. S., at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence," *id.*, at 319 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304, 305 (1976)).

The State contends that the substance of the supplemental instruction satisfied *Penry I* because it provided the jury with the requisite vehicle for expressing its reasoned moral response to Penry's particular mitigating evidence. Specifically, the State points to the admittedly "less than artful" portion of the supplemental instruction which says:

> "If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue.* If you de-

> termine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues*." App. 675 (emphasis added). See also Brief for Respondent 16.

We see two possible ways to interpret this confusing instruction. First, as the portions italicized above indicate, it can be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I*. As we made clear in *Penry I*, none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse. Cf. 492 U. S., at 322–325. In the words of Judge Dennis below, the jury's ability to consider and give effect to Penry's mitigating evidence was still "shackled and confined within the scope of the three special issues." 215 F. 3d, at 514 (dissenting opinion). Thus, because the supplemental instruction had no practical effect, the jury instructions at Penry's second sentencing were not meaningfully different from the ones we found constitutionally inadequate in *Penry I*.

Alternatively, the State urges, it is possible to understand the supplemental instruction as informing the jury that it could "simply answer one of the special issues 'no' if it believed that mitigating circumstances made a life sentence . . . appropriate . . . regardless of its initial answers to the questions." Brief for Respondent 16. The Texas Court of Criminal Appeals appeared to understand the instruction in this sense, when it termed the supplemental instruction a "nullification instruction." 903 S. W. 2d, at 765. Even assuming the jurors could have understood the instruc-

tion to operate in this way, the instruction was not as simple to implement as the State contends. Rather, it made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation.

The jury was clearly instructed that a "yes" answer to a special issue was appropriate only when supported "by the evidence beyond a reasonable doubt." App. 672. A "no" answer was appropriate only when there was "a reasonable doubt as to whether the answer to a Special Issue should be . . . 'Yes.'" *Id.*, at 673. The verdict form listed the three special issues and, with no mention of mitigating circumstances, confirmed and clarified the jury's two choices with respect to each special issue. The jury could swear that it had unanimously determined "beyond a reasonable doubt that the answer to this Special Issue is 'Yes.'" *Id.*, at 676–678. Or it could swear that at least 10 jurors had "a reasonable doubt *as to the matter inquired about in this Special Issue*" and that the jury thus had "determin[ed] that the answer to this Special Issue is 'No.'" *Ibid.* (emphasis added).

In the State's view, however, the jury was also told that it could ignore these clear guidelines and—even if there was in fact no reasonable doubt as to the matter inquired about—answer any special issue in the negative if the mitigating circumstances warranted a life sentence. In other words, the jury could change one or more truthful "yes" answers to an untruthful "no" answer in order to avoid a death sentence for Penry.

We generally presume that jurors follow their instructions. See, *e. g.*, *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987). Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental in-

struction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'" Tex. Code Crim. Proc. Ann., Art. 35.22 (Vernon 1989).

The mechanism created by the supplemental instruction thus inserted "an element of capriciousness" into the sentencing decision, "making the jurors' power to avoid the death penalty dependent on their willingness" to elevate the supplemental instruction over the verdict form instructions. *Roberts* v. *Louisiana*, 428 U. S. 325, 335 (1976) (plurality opinion). There is, at the very least, "a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration" of Penry's mental retardation and childhood abuse. *Boyde* v. *California*, 494 U. S. 370, 380 (1990). The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Even though the Texas Court of Criminal Appeals focused solely on the supplemental instruction in affirming Penry's sentence, the State urges us to evaluate the instruction contextually, with reference to the comments of the prosecutor and defense counsel, as well as the comments of the court during *voir dire*. Indeed, we have said that we will approach jury instructions in the same way a jury would—with a "commonsense understanding of the instructions in the light of all that has taken place at the trial." *Id.*, at 381. *Penry I* itself illustrates this methodology, as there we evaluated the likely effect on the jury of the comments of the defense counsel and prosecutor. 492 U. S., at 325–326. As we did there, however, we conclude that these comments were insufficient to clarify the confusion caused by the instructions themselves.

Voir dire was a month-long process, during which approximately 90 prospective jurors were interviewed. See 3 Record (index of transcripts). Many of the venire members—including each of the 12 jurors who was eventually empaneled—received a copy of an instruction largely similar to the supplemental instruction ultimately given to the jury. After each juror read the instruction, the judge attempted to explain how it worked. See, *e. g.*, 18 Record 966–967 ("[I]f you thought the mitigating evidence was sufficient . . . you might, even though you really felt those answers [to the three special issues] should be yes, you might answer one or more of them no . . . so [Penry] could get the life sentence rather than the death penalty"). The prosecutor then attempted to explain the instruction. See, *e. g.*, *id.*, at 980 ("[E]ven though [you] believe all three of these answers are yes, [you] don't think the death penalty is appropriate for this particular person because of what has happened to him in the past . . . . [The] instruction is to give effect to that belief and answer one or all of these issues no"). And with most of the jurors, defense counsel also gave a similar explanation. See, *e. g.*, *id.*, at 1018 ("[I]f you believe[d] [there] was a mitigating circumstance . . . you [could] apply that mitigation to answer—going back and changing an answer from yes to a no").

While these comments reinforce the State's construction of the supplemental instruction, they do not bolster our confidence in the jurors' ability to give effect to Penry's mitigating evidence in deciding his sentence. Rather, they highlight the arbitrary way in which the supplemental instruction operated, and the fact that the jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.

Moreover, we are skeptical that, by the time their penalty phase deliberations began, the jurors would have remembered the explanations given during *voir dire*, much less taken them as a binding statement of the law. *Voir dire*

began almost two full months before the penalty phase deliberations. In the interim, the jurors had observed the rest of *voir dire*, listened to a 5-day guilt-phase trial and extensive instructions, participated in 2½ hours of deliberations with respect to Penry's guilt, and listened to another 5-day trial on punishment. The comments of the court and counsel during *voir dire* were surely a distant and convoluted memory by the time the jurors began their deliberations on Penry's sentence.

The State also contends that the closing arguments in the penalty phase clarified matters. Penry's counsel attempted to describe the jury's task:

> "If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, . . . then, you get to answer one of . . . those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow and the law does funny things sometimes." App. 640.

Again, however, this explanation only reminded the jurors that they had to answer the special issues *dis*honestly in order to give effect to Penry's mitigating evidence. For the reasons discussed above, such a "clarification" provided no real help. Moreover, even if we thought that the arguments of defense counsel could be an adequate substitute for statements of the law by the court, but see *Boyde* v. *California*, *supra*, at 384, the prosecutor effectively neutralized defense counsel's argument, as did the prosecutor in *Penry I*, by stressing the jury's duty "[t]o follow your oath, the evidence and the law." App. 616. At best, the jury received mixed signals.

Our opinion in *Penry I* provided sufficient guidance as to how the trial court might have drafted the jury charge for Penry's second sentencing hearing to comply with our

mandate. We specifically indicated that our concerns would have been alleviated by a jury instruction defining the term "deliberately" in the first special issue "in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability." 492 U. S., at 323. The trial court surely could have drafted an instruction to this effect. Indeed, Penry offered two definitions of "deliberately" that the trial court refused to give. See Tr. of Oral Arg. 12, 14–15.

A clearly drafted catchall instruction on mitigating evidence also might have complied with *Penry I*. Texas' current capital sentencing scheme (revised after Penry's second trial and sentencing) provides a helpful frame of reference. Texas now requires the jury to decide "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e)(1) (Vernon Supp. 2001).* Penry's counsel, while not conceding the issue, admitted that he "would have a tough time saying that *[Penry I]* was not complied with under the new Texas procedure." Tr. of Oral Arg. 16. At the very least, the brevity and clarity of this instruction highlight the confusing nature of the supplemental instruction actually given, and indicate that the trial court had adequate alternatives available to it as it drafted the instructions for Penry's trial.

Thus, to the extent the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given

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*Another recent development in Texas is the passage of a bill banning the execution of mentally retarded persons. See Babineck, Perry: Death-penalty measure needs analyzing, Dallas Morning News, May 31, 2001, p. 27A. As this opinion goes to press, Texas Governor Rick Perry is still in the process of deciding whether to sign the bill. *Ibid.*

at Penry's second sentencing hearing satisfied our mandate in *Penry I*, that determination was objectively unreasonable. Cf. *Shafer* v. *South Carolina*, *ante*, at 40, 50 (holding on direct review that the South Carolina Supreme Court "incorrectly limited" our holding in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), because the court had mischaracterized "how the State's new [capital sentencing] scheme works"). The three special issues submitted to the jury were identical to the ones we found constitutionally inadequate as applied in *Penry I*. Although the supplemental instruction made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical. The comments of the court and counsel accomplished little by way of clarification. Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion we reached in *Penry I:* "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." 492 U. S., at 326.

The judgment of the United States Court of Appeals for the Fifth Circuit is therefore affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in Parts I, II, and III–A, and dissenting in Part III–B.

Two Texas juries have now deliberated and reasoned that Penry's brutal rape and murder of Pamela Carpenter warrants the death penalty under Texas law. And two opinions of this Court have now overruled those decisions on the ground that the sentencing courts should have said more about Penry's alleged mitigating evidence. Because I believe the most recent sentencing court gave the jurors

an opportunity to consider the evidence Penry presented, I respectfully dissent.

As a habeas reviewing court, we are not called upon to propose what we believe to be the ideal instruction on how a jury should take into account evidence related to Penry's childhood and mental status. Our job is much simpler, and it is significantly removed from writing the instruction in the first instance. We must decide merely whether the conclusion of the Texas Court of Criminal Appeals—that the sentencing court's supplemental instruction explaining how the jury could give effect to any mitigating value it found in Penry's evidence satisfied the requirements of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*—was "objectively unreasonable." *Williams* v. *Taylor*, 529 U. S. 362, 409 (2000). See also 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. V).

At Penry's first sentencing, the court read to the jury Texas' three special issues for capital sentencing.[1] The court did not instruct the jury that "it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." 492 U. S., at 320. The prosecutor also did not offer any way for the jury to give mitigating effect to the evidence, but instead simply reiterated that the jury was to answer the three questions and follow the law. In *Penry I*, this Court concluded that, "[i]n light of the prosecutor's ar-

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[1] The special issues are:

"'(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"'(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"'(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.'" *Penry I*, 492 U. S. 302, 310 (1989) (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989)).

gument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.*, at 326.

At Penry's second sentencing, the court read to the jury the same three special issues. In contrast to the first sentencing, however, the court instructed the jury at length that it could consider Penry's proffered evidence as mitigating evidence and that it could give mitigating effect to that evidence. See *ante*, at 789–790. The Texas Court of Criminal Appeals concluded that this supplemental instruction "allow[ed] [the jury] to consider and give effect to" Penry's proffered mitigating evidence and therefore was "sufficient to meet the constitutional requirements of *[Penry I]*."[2] *Penry* v. *State*, 903 S. W. 2d 715, 765 (1995). In my view, this decision is not only objectively reasonable but also compelled by this Court's precedents and by common sense.

"In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson* v. *Texas*, 509 U. S. 350, 368 (1993) (quoting *Boyde* v. *California*, 494 U. S. 370, 381 (1990)). The Texas court's instruction, read for common sense, or, even after a technical parsing, tells jurors that they may consider the

[2] This Court's suggestion that the Texas court may have believed that any supplemental instruction, regardless of its substance, would satisfy *Penry I*'s requirement, see *ante*, at 796–797, is specious. The Texas court explained that a "jury must be given a special instruction *in order to allow it to consider and give effect to such evidence*"; it quoted the full text of the supplemental instruction; and it concluded that "a nullification instruction *such as this one* is sufficient to meet the constitutional requirements of *[Penry I]*." *Penry* v. *State*, 903 S. W. 2d 715, 765 (1995) (emphasis added). It is quite obvious that the court based its legal conclusion on the content of the supplemental instruction.

evidence Penry presented as mitigating evidence and that, if they believe the mitigating evidence makes a death sentence inappropriate, they should answer "no" to one of the special issues. Given this straightforward reading of the instructions, it is objectively reasonable, if not eminently logical, to conclude that a reasonable juror would have believed he had a "vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." 492 U. S., at 326.

It is true that Penry's proffered evidence did not fit neatly into any of the three special issues for imposing the death penalty under Texas law.[3] But the sentencing court told the jury in no uncertain terms precisely how to follow this Court's directive in *Penry I*. First, the sentencing court instructed the jury that it could consider such evidence to be mitigating evidence. See App. 675 ("[W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case"). Next, the court explained to the jury how it must give effect to the evidence. *Ibid.* ("If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue"). And finally, the court unambiguously instructed: "If you determine, when giving

[3] I am still bewildered as to why this Court finds it unconstitutional for Texas to limit consideration of mitigating evidence to those factors relevant to the three special issues. See *Graham* v. *Collins*, 506 U. S. 461, 478 (1993) (THOMAS, J., concurring). But we need not address this broader issue to uphold Penry's sentence.

effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues.*" *Ibid.* (emphasis added). Without performing legal acrobatics, I cannot make the instruction confusing. And I certainly cannot do the contortions necessary to find the Texas appellate court's decision "objectively unreasonable."[4] I simply do not share the Court's confusion as to how a juror could consider mitigating evidence, decide whether it makes a death sentence inappropriate, and respond with a "yes" or "no" depending on the answer.

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[4] I think we need not look beyond the court's instructions in evaluating the Texas appellate court's decision. But even if there were any doubt as to whether the instruction led the jurors to believe there was a vehicle for giving mitigating effect to Penry's evidence, the instruction was made clear "'in the light of all that ha[d] taken place at the trial.'" *Johnson* v. *Texas*, 509 U. S. 350, 368 (1993). The judge and prosecutor fully explained how to give effect to mitigating evidence during the *voir dire* process, and defense counsel made the instruction clear in closing: "[i]f, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, . . . then, you get to answer one of . . . those questions no," App. 640. Even if the jurors had forgotten what they had been told at *voir dire*, see *ante*, at 801–802, an assumption that I find questionable given our presumptions about jurors' ability to remember and follow instructions, see, *e. g.*, *Weeks* v. *Angelone*, 528 U. S. 225, 234 (2000), the defense counsel's explanation from closing arguments would have been fresh on their minds.

Despite the Court's assertion that defense counsel told the jurors to answer the questions dishonestly, *ante*, at 802, it seems to me that the jurors reasonably could have believed that they could honestly answer any question "no" if they found that the death sentence would be inappropriate given the mitigating evidence. They could follow their "'oath, the evidence and the law,'" *ibid.* (quoting the prosecutor's statement, App. 616), by truthfully concluding that the evidence of Penry's childhood and mental status did not warrant the death penalty and by writing "no" next to one of the special issues.

Curiously, this Court concludes that the supplemental instruction "inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions." *Ante,* at 800 (quoting *Roberts* v. *Louisiana*, 428 U. S. 325, 335 (1976) (plurality opinion)). Any reference to *Roberts*, however, is wholly misplaced. *Roberts* involved a situation in which the jury was told to find the defendant guilty of a lesser included offense, unsupported by any evidence, if the jury did not want him to be sentenced to death. *Id.*, at 334–335. In Penry's case there was no suggestion, express or implied, made to the jury that it could *disregard* the evidence. On the contrary, it was instructed on how to *give effect to* Penry's proffered evidence, as required by this Court in *Penry I.* Tellingly, the *Roberts* plurality stated in full that "[t]here is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to *disregard the trial judge's instructions.*" 428 U. S., at 335 (emphasis added). In Penry's case, the judge's instructions included an explanation of how to answer the three special issues and how to give effect to the mitigating evidence.

Finally, contrary to the Court's claim that the jury received "mixed signals," *ante,* at 802, it appears that it is the Texas courts that have received the mixed signals. In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court upheld the Texas sentencing statute at issue here against attack under the Eighth and Fourteenth Amendments. The joint opinion in *Jurek* concluded that the statute permits the jury "to consider whatever evidence of mitigating circumstances the defense can bring before it" and "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.*, at

273–274 (opinion of Stewart, Powell, and STEVENS, JJ.). Then, while purporting to distinguish, rather than to overrule, *Jurek*, this Court in *Penry I* determined that the same Texas statute was constitutionally insufficient by not permitting jurors to give effect to mitigating evidence. 492 U. S., at 328. See also *id.*, at 355–356 (SCALIA, J., dissenting) (explaining how *Penry I* contradicts *Jurek*'s conclusions). According to the Court, an instruction informing the jury that it could give effect to the mitigating evidence was necessary. 492 U. S., at 328. And in today's decision, this Court yet again has second-guessed itself and decided that even this supplemental instruction is not constitutionally sufficient.

Syllabus

NORFOLK SHIPBUILDING & DRYDOCK CORP. *v.* GARRIS, ADMINISTRATRIX OF THE ESTATE OF GARRIS, DECEASED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00–346. Argued April 18, 2001—Decided June 4, 2001

In her complaint filed in the District Court, respondent alleged that her son died as a result of injuries sustained while performing sandblasting aboard a vessel berthed in the navigable waters of the United States. She further asserted that the injuries were caused by the negligence of petitioner and another, and prayed for damages under general maritime law. The District Court dismissed the complaint for failure to state a federal claim, stating that no cause of action exists, under general maritime law, for death resulting from negligence. The Fourth Circuit reversed, explaining that although this Court had not yet recognized a maritime cause of action for wrongful death resulting from negligence, the principles contained in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, made such an action appropriate.

Held: The general maritime cause of action recognized in *Moragne*—for death caused by violation of maritime duties, *id.*, at 409—is available for the negligent breach of a maritime duty of care. Although *Moragne*'s opinion did not limit its rule to any particular maritime duty, *Moragne*'s facts were limited to the duty of seaworthiness, and so the issue of wrongful death for negligence has remained technically open. There is no rational basis, however, for distinguishing negligence from unseaworthiness. Negligence is no less a maritime duty than seaworthiness, and the choice-of-law and remedial anomalies provoked by withholding a wrongful-death remedy are no less severe. Nor is a negligence action precluded by any of the three relevant federal statutes that provide remedies for injuries and death suffered in admiralty: the Jones Act, the Death on the High Seas Act, and the Longshore and Harbor Workers' Compensation Act. Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress. See, *e. g.*, *American Dredging Co.* v. *Miller*, 510 U. S. 443, 455. The cause of action recognized today, however, is new only in the most technical sense. The general maritime law has recognized the tort of negligence for more than a cen-

tury, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury. Pp. 813–820.

210 F. 3d 209, affirmed.

SCALIA, J., delivered the opinion of the Court, Parts I, II–A, and II–B–1 of which were unanimous, and Part II–B–2 of which was joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, and THOMAS, JJ. GINSBURG, J., filed an opinion concurring in part, in which SOUTER and BREYER, JJ., joined, *post,* p. 820.

James T. Ferrini argued the cause for petitioner. With him on the briefs were *Kimbley A. Kearney, Melinda S. Kollross, Robert M. Tata,* and *Carl D. Gray.*

Patrick H. O'Donnell argued the cause for respondent. With him on the brief was *John R. Crumpler, Jr.*

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether the negligent breach of a general maritime duty of care is actionable when it causes death, as it is when it causes injury.

I

According to the complaint that respondent filed in the United States District Court for the Eastern District of Virginia, her son, Christopher Garris, sustained injuries on April 8, 1997, that caused his death one day later. App. to Pet. for Cert. 53. The injuries were suffered while Garris was performing sandblasting work aboard the USNS *Maj. Stephen W. Pless* in the employ of Tidewater Temps, Inc., a subcontractor for Mid-Atlantic Coatings, Inc., which was in turn a subcontractor for petitioner Norfolk Shipbuilding & Drydock Corporation. And the injuries were caused, the complaint continued, by the negligence of petitioner and one of its other subcontractors, since dismissed from this case. Because the vessel was berthed in the navigable waters of the United States when Garris was injured, respondent invoked federal admiralty jurisdiction, U. S. Const., Art. III,

§ 2, cl. 1; 28 U. S. C. § 1333, and prayed for damages under general maritime law. She also asserted claims under the Virginia wrongful-death statute, Va. Code Ann. §§ 8.01–50 to 8.01–56 (2000).

The District Court dismissed the complaint for failure to state a federal claim, for the categorical reason that "no cause of action exists, under general maritime law, for death of a nonseaman in state territorial waters resulting from negligence." 1999 A. M. C. 769 (1998). The United States Court of Appeals for the Fourth Circuit reversed and remanded for further proceedings, explaining that although this Court had not yet recognized a maritime cause of action for wrongful death resulting from negligence, the principles contained in our decision in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), made such an action appropriate. 210 F. 3d 209, 211 (2000). Judge Hall concurred in the judgment because, in her view, *Moragne* had itself recognized the action. 210 F. 3d, at 222–227. The Court of Appeals denied petitioner's suggestion for rehearing en banc, with two judges dissenting. 215 F. 3d 420 (2000). We granted certiorari. 531 U. S. 1050 (2000).

II

Three of four issues of general maritime law are settled, and the fourth is before us. It is settled that the general maritime law imposes duties to avoid unseaworthiness and negligence, see, *e. g.*, *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549–550 (1960) (unseaworthiness); *Leathers* v. *Blessing*, 105 U. S. 626, 630 (1882) (negligence), that nonfatal injuries caused by the breach of either duty are compensable, see, *e. g.*, *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 102–103 (1944) (unseaworthiness); *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449, 457 (1925) (negligence), and that death caused by breach of the duty of seaworthiness is also compensable, *Moragne* v. *States Marine Lines, Inc.*, *supra*, at 409. Before us is the question whether death

caused by negligence should, or must under direction of a federal statute, be treated differently.

A

For more than 80 years, from 1886 until 1970, all four issues were considered resolved, though the third not in the manner we have just described. The governing rule then was the rule of *The Harrisburg*, 119 U. S. 199, 213 (1886): Although the general maritime law provides relief for injuries caused by the breach of maritime duties, it does not provide relief for wrongful death. *The Harrisburg* said that rule was compelled by the existence of the same rule at common law, *id.*, at 213–214—although it acknowledged, *id.*, at 205–212, that admiralty courts had held that damages for wrongful death were recoverable under maritime law, see also *Moragne*, *supra*, at 387–388 (listing cases).

In 1969, however, we granted certiorari in *Moragne* v. *States Marine Lines, Inc.*, *supra*, for the express purpose of considering "whether *The Harrisburg* . . . should any longer be regarded as acceptable law." 398 U. S., at 375–376. We inquired whether the rule of *The Harrisburg* was defensible under either the general maritime law or the policy displayed in the maritime statutes Congress had since enacted, 398 U. S., at 379–393, whether those statutes preempted judicial action overruling *The Harrisburg*, 398 U. S., at 393–403, whether *stare decisis* required adherence to *The Harrisburg*, 398 U. S., at 403–405, and whether insuperable practical difficulties would accompany *The Harrisburg*'s overruling, 398 U. S., at 405–408. Answering every question no, we overruled the case and declared a new rule of maritime law: "We . . . hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.*, at 409.

As we have noted in an earlier opinion, the wrongful-death rule of *Moragne* was not limited to any particular maritime duty, *Yamaha Motor Corp., U. S. A.* v. *Calhoun*, 516

U. S. 199, 214, n. 11 (1996) (dictum), but *Moragne*'s facts were limited to the duty of seaworthiness, and so the issue of wrongful death for negligence has remained technically open. We are able to find no rational basis, however, for distinguishing negligence from seaworthiness. It is no less a distinctively maritime duty than seaworthiness: The common-law duties of care have not been adopted and retained unmodified by admiralty, but have been adjusted to fit their maritime context, see, *e. g.*, *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630–632 (1959), and a century ago the maritime law exchanged the common law's rule of contributory negligence for one of comparative negligence, see, *e. g.*, *The Max Morris*, 137 U. S. 1, 14–15 (1890); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 408–409 (1953). Consequently the "tensions and discrepancies" in our precedent arising "from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts"—which ultimately drove this Court in *Moragne* to abandon *The Harrisburg*, see 398 U. S., at 401—were no less pronounced with maritime negligence than with unseaworthiness. In fact, both cases cited by *Moragne* to exemplify those discrepancies involved maritime *negligence*, see *ibid.* (citing *Hess* v. *United States*, 361 U. S. 314 (1960); *Goett* v. *Union Carbide Corp.*, 361 U. S. 340 (1960) *(per curiam)*); see also *Nelson* v. *United States*, 639 F. 2d 469, 473 (CA9 1980) (opinion by then-Judge Kennedy) (concluding that uniformity concerns required *Moragne*'s application to negligence). It is true, as petitioner observes, that we have held admiralty accommodation of state remedial statutes to be constitutionally permissible, see, *e. g.*, *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242 (1921); *The Tungus* v. *Skovgaard*, 358 U. S. 588, 594 (1959),[1] but that does not re-

[1] The issue addressed in *Yamaha Motor Corp., U. S. A.* v. *Calhoun*, 516 U. S. 199 (1996), whether state remedies may in some instances supplement a federal maritime remedy, is not presented by this case, where respondent is no longer pursuing state remedies. After the District

solve the issue here: whether *requiring* such an accommodation by refusing to recognize a federal remedy is preferable as a matter of maritime policy. We think it is not.

The choice-of-law anomaly occasioned by providing a federal remedy for injury but not death is no less strange when the duty breached is negligence than when it is seaworthiness. Of two victims injured at the same instant in the same location by the same negligence, only one would be covered by federal law, provided only that the other died of his injuries. See, *e. g.*, *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573, 578 (ED La. 1954) (in case involving single car accident on ferry, applying state negligence law to claim for deceased husband's wrongful death but federal maritime negligence law to claim for surviving wife's injuries), aff'd, 227 F. 2d 958 (CA5 1955) *(per curiam)*. And cutting off the law's remedy at the death of the injured person is no less "a striking departure from the result dictated by elementary principles in the law of remedies," *Moragne* v. *States Marine Lines, Inc.*, 398 U. S., at 381, when the duty breached is negligence than when it is seaworthiness. "Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death." *Ibid.* Finally, the maritime policy favoring recovery for wrongful death that *Moragne* found implicit in federal statutory law cannot be limited to unseaworthiness, for both of the federal Acts on which *Moragne* relied permit recovery for negligence, see Jones Act, 46 U. S. C. App. § 688(a); Death on the High Seas Act (DOHSA), 46 U. S. C. App. § 761 *et seq.;* see also *Engel* v. *Davenport*, 271 U. S. 33, 36–37 (1926) (Jones Act). In sum, a negligent breach of a maritime duty of care being assumed

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Court dismissed her state-law claim on jurisdictional grounds, respondent re-filed it in state court, where it was resolved against her. See Brief for Respondent 2, n. 1.

by the posture of this case,[2] no rational basis within the maritime law exists for denying respondent the recovery recognized by *Moragne* for the death of her son.

B

Weightier arguments against recognizing a wrongful-death action for negligence may be found not within general maritime law but without, in the federal statutes that provide remedies for injuries and death suffered in admiralty. As we explained in *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 27 (1990), "[w]e no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress . . . [has] legislated extensively in these areas." And, even in admiralty, "we have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 626 (1978). Hence, when a statute resolves a particular issue, we have held that the general maritime law must comply with that resolution. See, *e. g.*, *Dooley* v. *Korean Air Lines Co.*, 524 U. S. 116, 123–124 (1998). We must therefore make careful study of the three statutes relevant here.

1

The Jones Act, 46 U. S. C. App. § 688(a), establishes a cause of action for negligence for injuries or death suffered in the course of employment, but only for seamen. See generally *Chandris, Inc.* v. *Latsis*, 515 U. S. 347 (1995) (describing test for seaman status). Respondent's son, who was not a seaman, was not covered by the Jones Act, and we have held that the Jones Act bears no implication for actions brought

[2] The District Court dismissed the case for the threshold reason that, regardless of a negligent breach, there could be no recovery. See *supra*, at 813. Petitioner therefore will be free to present its arguments regarding duty and breach on remand to the extent they have been preserved.

by nonseamen. See, *e. g.*, *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274, 282–283 (1980). Moreover, even as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes. See, *e. g.*, *Miles* v. *Apex Marine Corp.*, *supra*, at 28–30 (seaworthiness). The Jones Act does not preclude respondent's negligence action.

DOHSA creates wrongful-death actions for negligence and unseaworthiness, see *Moragne*, *supra*, at 395, but only by the personal representatives of people killed "beyond a marine league from the shore of any State," 46 U. S. C. App. § 761. Respondent's son was killed in state territorial waters, where DOHSA expressly provides that its provisions "shall . . . [not] apply," § 767. In *Moragne*, after discussing the anomalies that would result if DOHSA were interpreted to preclude federal maritime causes of action even where its terms do not apply, 398 U. S., at 395–396, we held that DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act," *id.*, at 402. Or, "[t]o put it another way, . . . no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Id.*, at 400. DOHSA therefore does not pre-empt respondent's negligence action.

Finally, the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, provides nonseaman maritime workers such as respondent's son, see § 902(3) (defining covered employees), with no-fault workers' compensation claims (against their employer, § 904(b)) and negligence claims (against the vessel, § 905(b)) for injury and death. As to those two defendants, the LHWCA expressly pre-empts all other claims, §§ 905(a), (b); but cf. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U. S. 715, 723–726 (1980) (holding some state workers' compensation claims against employer *not* pre-empted), but it expressly

preserves all claims against third parties, §§ 933(a), (i). And petitioner is a third party: It neither employed respondent's son nor owned the vessel on which he was killed.

Petitioner argues, however, that § 933's preservation-of-other-claims provisions express Congress's intent to reserve all other wrongful-death actions to the States. That argument cannot withstand our precedent, since we have consistently interpreted § 933 to preserve federal maritime claims as well as state claims, see, *e. g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 100–102 (1946); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106, 113 (1974), including maritime negligence claims, see, *e. g.*, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S., at 411–413 (upholding recovery for negligence under maritime law by longshoreman covered by the LHWCA). Petitioner's further contention—that the policy implicit in the 1972 amendments to the LHWCA bars a maritime action for wrongful death though the text of those amendments (which left § 933 unchanged) permits it—cannot succeed. We do not find, as petitioner does, an anti-maritime-wrongful-death policy implicit in the amendment to § 905(b), see 86 Stat. 1263, which eliminated covered workers' unseaworthiness claims against a vessel, see, *e. g.*, *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U. S. 74, 83 (1980) ("Congress abolished the unseaworthiness remedy for longshoremen, recognized in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946)"). That amendment was directed not at wrongful death in particular, but at unseaworthiness generally, see *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 262 (1979) ("Congress acted in 1972, among other things, to eliminate the shipowner's liability to the longshoreman for unseaworthiness . . .—in other words, to overrule *Sieracki*"). To the extent the amendment to § 905(b) reflects any policy relevant here, it is in expressly ratifying longshore and harbor workers' claims against the vessel for *negligence*, see *id.*, at 259–260. The LHWCA therefore does not preclude this negligence action for wrongful death.

2

Even beyond the express pre-emptive reach of federal maritime statutes, however, we have acknowledged that they contain a further prudential effect. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *American Dredging Co.* v. *Miller*, 510 U. S. 443, 455 (1994). Cf. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 332–333 (1999) (equitable lawmaking power of bankruptcy courts limited by statute). Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress. The cause of action we recognize today, however, is new only in the most technical sense. The general maritime law has recognized the tort of negligence for more than a century, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury. Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents.

* * *

The maritime cause of action that *Moragne* established for unseaworthiness is equally available for negligence.

We affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring in part.

I join all but Part II–B–2 of the Court's opinion.

Following the reasoning in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), the Court today holds that

the maritime cause of action *Moragne* established for unseaworthiness is equally available for negligence. I agree with the Court's clear opinion with one reservation. In Part II–B–2, the Court counsels: "Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes . . . allow, to leave further development to Congress." *Ante*, at 820. *Moragne* itself, however, tugs in the opposite direction. Inspecting the relevant legislation, the Court in *Moragne* found no measures counseling against the judicial elaboration of general maritime law there advanced. See 398 U. S., at 399–402, 409; see also *id.*, at 393 ("Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases."). In accord with *Moragne*, I see development of the law in admiralty as a shared venture in which "federal common lawmaking" does not stand still, but "harmonize[s] with the enactments of Congress in the field." *Ante*, at 820 (quoting *American Dredging Co.* v. *Miller*, 510 U. S. 443, 455 (1994)). I therefore do not join the Court's dictum.

Syllabus

UNITED DOMINION INDUSTRIES, INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00–157. Argued March 26, 2001—Decided June 4, 2001

Under the Internal Revenue Code of 1954, a "net operating loss" (NOL) results from deductions in excess of gross income for a given year. 26 U. S. C. § 172(c). A taxpayer may carry its NOL either backward or forward to other tax years in order to set off its lean years against its lush years. § 172(b)(1)(A). The carryback period for "product liability loss[es]" is 10 years. § 172(b)(1)(I). Because a product liability loss (PLL) is the total of a taxpayer's product liability expenses (PLEs) up to the amount of its NOL, § 172(j)(1), a taxpayer with a positive annual income, and thus no NOL, may have PLEs but can have no PLL. An affiliated group of corporations may file a single consolidated return. § 1501. Treasury Regulations provide that such a group's "consolidated taxable income" (CTI), or, alternatively, its "consolidated net operating loss" (CNOL), is determined by taking into account several items, the first of which is the "separate taxable income" (STI) of each group member. In calculating STI, the member must disregard items such as capital gains and losses, which are considered, and factored into CTI or CNOL, on a consolidated basis. Petitioner's predecessor in interest, AMCA International Corporation, was the parent of an affiliated group filing consolidated returns for the years 1983 through 1986. In each year, AMCA reported CNOL exceeding the aggregate of its 26 individual members' PLEs. Five group members with PLEs reported positive STIs. Nonetheless, AMCA included those PLEs in determining its PLL for 10-year carryback under a "single-entity" approach in which it compared the group's CNOL and total PLEs to determine the group's total PLL. In contrast, the Government's "separate-member" approach compares each affiliate's STI and PLEs in order to determine whether each affiliate suffers a PLL, and only then combines any PLLs of the individual affiliates to determine a consolidated PLL. Under this approach, PLEs incurred by an affiliate with positive STI cannot contribute to a PLL. In 1986 and 1987, AMCA petitioned the Internal Revenue Service for refunds based on its PLL calculations. The IRS ruled in AMCA's favor, but was reversed by a joint congressional committee that controls refunds exceeding a certain thresh-

old. AMCA then filed this refund action. The District Court applied AMCA's single-entity approach, concluding that so long as the affiliated group's consolidated return reflects CNOL in excess of the group's aggregate PLEs, the total of those expenses is a PLL that may be carried back. In reversing, the Fourth Circuit applied the separate-member approach.

Held: An affiliated group's PLL must be figured on a consolidated, single-entity basis, not by aggregating PLLs separately determined company by company. Pp. 829–838.

(a) The single-entity approach to calculating an affiliated group's PLL is straightforward. The first step in applying § 172(j)'s definition of PLL requires a taxpayer filing a consolidated return to calculate an NOL. The Code and regulations governing affiliated groups of corporations filing consolidated returns provide only one definition of NOL: "consolidated" NOL. The absence of a separate NOL for a group member in this context is underscored by the fact that the regulations provide a measure of separate NOL in a different context, for any year in which an affiliated corporation files a separate return. The exclusive definition of NOL as CNOL at the consolidated level is important. Neither the Code nor the regulations indicate that the essential relationship between NOL and PLL for a consolidated group differs from their relationship for a conventional corporate taxpayer. Comparable treatment of PLL for the group and the conventional taxpayer can be achieved only if PLEs are compared with the loss amount at the consolidated level after CNOL has been determined, for CNOL is the only NOL measure for the group. An approach based on comparable treatment is also (relatively) easy to understand and to apply. Pp. 829–831.

(b) The case for the separate-member approach is not so easily made. Because there is no NOL below the consolidated level, there is nothing for comparison with PLEs to produce a PLL at any stage before the CNOL calculation. Thus, a separate-member proponent must identify some figure in the consolidated return scheme with a plausible analogy to NOL at the affiliated corporations level. An individual member's STI is not analogous, for it excludes several items that an individual taxpayer would normally count in computing income or loss, but which an affiliated group may tally only at the consolidated level. The "separate net operating loss," Treas. Reg. § 1.1502–79(a)(3), used by the Fourth Circuit fares no better. Although that figure accounts for some gains or losses that STI does not, § 1.1502–79(a)(3)'s purpose is to allocate CNOL to an affiliate member seeking to carry

back a loss to a year in which the member was not part of the consolidated group. Such returns are not at issue here. Pp. 831–834.

(c) Several objections to the single-entity approach—that it allows affiliated groups a double deduction, that the omission of PLEs from the series of items that Treas. Reg. § 1.1502–12 requires to be tallied at the consolidation level indicates that PLEs were not meant to be tallied at that level, and that the single-entity approach would permit significant tax avoidance abuses—are rejected. Pp. 834–838.

208 F. 3d 452, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 838. STEVENS, J., filed a dissenting opinion, *post*, p. 839.

Eric R. Fox argued the cause for petitioner. With him on the briefs was *Alan J. J. Swirski.*

Kent L. Jones argued the cause for the United States. With him on the brief were *Acting Solicitor General Underwood*, *Deputy Assistant Attorney General Fallon*, *Deputy Solicitor General Wallace*, *Richard Farber*, and *Edward T. Perelmuter.**

JUSTICE SOUTER delivered the opinion of the Court.

Under § 172(b)(1)(I) of the Internal Revenue Code of 1954, a taxpayer may carry back its "product liability loss" up to 10 years in order to offset prior years' income. The issue here is the method for calculating the product liability loss of an affiliated group of corporations electing to file a consolidated federal income tax return. We hold that the group's product liability loss must be figured on a consolidated basis in the first instance, and not by aggregating product liability losses separately determined company by company.

**Richard E. Zuckerman* and *Raymond M. Kethledge* filed a brief for the National Association of Manufacturers et al. as *amici curiae* urging reversal.

I

A "net operating loss" results from deductions in excess of gross income for a given year. 26 U. S. C. § 172(c).[1] Under § 172(b)(1)(A), a taxpayer may carry its net operating loss either backward to past tax years or forward to future tax years in order to "set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year," *Libson Shops, Inc.* v. *Koehler*, 353 U. S. 382, 386 (1957).

Although the normal carryback period was at the time three years, in 1978, Congress authorized a special 10-year carryback for "product liability loss[es]," 26 U. S. C. § 172(b)(1)(I), since, it understood, losses of this sort tend to be particularly "large and sporadic." Joint Committee on Taxation, General Explanation of the Revenue Act of 1978, 95th Cong., 232 (Comm. Print 1979). The Code defines "product liability loss," for a given tax year, as the lesser of (1) the taxpayer's "net operating loss for such year" and (2) its allowable deductions attributable to product liability "expenses." 26 U. S. C. § 172(j)(1). In other words, a taxpayer's product liability loss (PLL) is the total of its product liability expenses (PLEs), limited to the amount of its net operating loss (NOL). By definition, then, a taxpayer with positive annual income, and thus no NOL, may have PLEs but can have no PLL.[2]

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954, 26 U. S. C. § 1 *et seq.* (1982 ed. and Supp. V), as in effect between 1983 and 1986, the tax years here in question.

[2] If, for example, a company had $100 in taxable income, $50 in deductible PLEs, and $75 in additional deductions, its NOL would be $25 (*i. e.*, $100 − $50 − $75 = −$25); it could count only $25 of its $50 in PLEs as PLL. If the company had $100 in income, $50 in PLEs, and $125 in additional deductions, its NOL would be $75, and it could count its entire $50 in PLEs as PLL. And, finally, if the company had $100 in income, $50 in PLEs, and $40 in additional deductions, it would have positive income and, thus, no NOL and no PLL.

Instead of requiring each member company of "[a]n affiliated group of corporations" to file a separate tax return, the Code permits the group to file a single consolidated return, 26 U. S. C. § 1501, and leaves it to the Secretary of the Treasury to work out the details by promulgating regulations governing such returns, § 1502. Under Treas. Regs. §§ 1.1502–11(a) and 1.1502–21(f),[3] an affiliated group's "consolidated taxable income" (CTI), or, alternatively, its "consolidated net operating loss" (CNOL), is determined by "taking into account" several items. The first is the "separate taxable income" (STI) of each group member. A member's STI (whether positive or negative) is computed as though the member were a separate corporation (*i. e.*, by netting income and expenses), but subject to several important "modifications." Treas. Reg. § 1.1502–12. These modifications require a group member calculating its STI to disregard, among other items, its capital gains and losses, charitable-contribution deductions, and dividends-received deductions. *Ibid.* These excluded items are accounted for on a consolidated basis, that is, they are combined at the level of the group filing the single return, where deductions otherwise attributable to one member (say, for a charitable contribution) can offset income received by another (from a capital gain, for example). Treas. Regs. §§ 1.1502–11(a)(3) to (8); 1.1502–21(f)(2) to (6). A consolidated group's CTI or CNOL, therefore, is the sum of each member's STI, plus or minus a handful of items considered on a consolidated basis.

II

Petitioner United Dominion's predecessor in interest, AMCA International Corporation, was the parent of an affiliated group of corporations that properly elected to file

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[3] Unless otherwise noted, Treasury Regulation references are to the regulations in effect between 1983 and 1986, 26 CFR § 1.1502–11 *et seq.* (1982–1986).

consolidated tax returns for the years 1983 through 1986. In each of these years, AMCA reported CNOL (the lowest being $85 million and the highest, $140 million) that exceeded the aggregate of its 26 individual members' PLEs ($3.5 million to $6.5 million). This case focuses on the PLEs of five of AMCA's member companies, which, together, generated roughly $205,000 in PLEs in 1983, $1.6 million in 1984, $1.3 million in 1985, and $250,000 in 1986. No one disputes these amounts or their characterization as PLEs. See 208 F. 3d 452, 453 (CA4 2000) ("The parties agree" with respect to the amount of "the product liability expenses incurred by the five group members in the relevant years"). Rather, the sole question here is whether the AMCA affiliated group may include these amounts on its consolidated return, in determining its PLL for 10-year carryback. The question arises because of the further undisputed fact that in each of the relevant tax years, each of the five companies in question (with minor exceptions not relevant here), reported a positive STI.

AMCA answered this question by following what commentators have called a "single-entity" approach[4] to calculating its "consolidated" PLL. For each tax year, AMCA (1) calculated its CNOL pursuant to Treas. Reg. § 1.1502–11(a), and (2) aggregated its individual members' PLEs. Because, as noted above, for each tax year AMCA's CNOL was greater than the sum of its members' PLEs, AMCA treated the full amount of the PLEs as consolidated PLL eligible for 10-year carryback. In AMCA's view, the fact that several member companies throwing off large PLEs also, when considered separately, generated positive taxable income was of no significance.

From the Government's perspective, however, the fact that the several affiliated members with PLEs also gen-

[4] Axelrod & Blank, The Supreme Court, Consolidated Returns, and 10-Year Carrybacks, 90 Tax Notes, No. 10, p. 1383 (Mar. 5, 2001) (hereinafter Axelrod & Blank).

erated positive separate taxable income is of critical significance. According to the Government's methodology, which we will call the "separate-member" approach,[5] PLEs incurred by an affiliate with positive separate taxable income cannot contribute to a PLL eligible for 10-year carryback. Whereas AMCA compares the group's total income (or loss) and total PLEs in an effort to determine the group's total PLL, the Government compares each affiliate's STI and PLEs in order to determine whether each affiliate suffers a PLL, and only then combines any PLLs of the individual affiliates to determine a consolidated PLL amount.

In 1986 and 1987, AMCA petitioned the Internal Revenue Service for refunds of taxes based on its PLL calculations. The IRS first ruled in AMCA's favor but was reversed by the Joint Committee on Internal Revenue Taxation of the United States Congress, which controls refunds exceeding a certain threshold, 26 U. S. C. § 6405(a). AMCA then filed this refund action in the United States District Court for the Western District of North Carolina. The District Court agreed with AMCA that an affiliated group's PLL is determined on a single-entity basis, and held that, so long as the group's consolidated return reflects CNOL in excess of the group's aggregate PLEs, the total of those expenses (including those incurred by members with positive separate taxable income) is a PLL that "may be carried back the full ten years." No. 3:95–CV–341–MU (June 19, 1998), App. to Pet. for Cert. 39a. The United States Court of Appeals for the Fourth Circuit reversed, and held that "determining 'product liability loss' separately for each group member is correct and consistent with [Treasury] regulations." 208 F. 3d, at 458.

Because the Fourth Circuit's separate-member approach to calculating PLL conflicted with the Sixth Circuit's adoption of the single-entity approach in *Intermet Corp.* v. *Com-*

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[5] *Ibid.*

missioner, 209 F. 3d 901 (2000), we granted certiorari, 531 U. S. 1009 (2000).[6] We now reverse.

III

The case for the single-entity approach to calculating an affiliated group's PLL is straightforward. Section 172(j)(1) defines a taxpayer's "product liability loss" for a given tax year as the lesser of its "net operating loss for such year" and its product liability "expenses." In order to apply this definition, the taxpayer first determines whether it has taxable income or NOL, and in making that calculation it subtracts PLEs. If the result is NOL, the taxpayer then makes a simple comparison between the NOL figure and the total PLEs. The PLE total becomes the PLL to the extent it does not exceed NOL. That is, until NOL has been determined, there is no PLL.

The first step in applying the definition and methodology of PLL to a taxpayer filing a consolidated return thus requires the calculation of NOL. As United Dominion correctly points out, the Code and regulations governing affiliated groups of corporations filing consolidated returns provide only one definition of NOL: "consolidated" NOL, see Treas. Reg. § 1.1502–21(f). There is no definition of separate NOL for a member of an affiliated group. Indeed, the fact that Treasury Regulations do provide a measure of separate NOL in a different context, for an affiliated corporation as to any year in which it filed a separate return, *infra*, at 832–834, underscores the absence of such a measure for an affili-

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[6] *Intermet* involved "specified liability losses" (SLLs), not PLLs. The difference, however, does not matter. The PLL was a statutory predecessor to the SLL, and PLLs were folded into the SLL provision in § 11811(b)(1) of the Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388–532. Thus, "[i]n all relevant respects, the provisions on [PLLs] and SLLs are the same." Leatherman, Current Developments for Consolidated Groups, 486 PLI/Tax 389, 393, n. 5 (2000) (hereinafter Leatherman, Current Developments).

ated corporation filing as a group member. Given this apparently exclusive definition of NOL as CNOL in the instance of affiliated entities with a consolidated return (and for reasons developed below, *infra*, at 834–838) we think it is fair to say, as United Dominion says, that the concept of separate NOL "simply does not exist." Brief for Petitioner 15.[7] The exclusiveness of NOL at the consolidated level as CNOL is important here for the following reasons. The Code's authorization of consolidated group treatment contains no indication that for a consolidated group the essential relationship between NOL and PLL will differ from their relationship for a conventional corporate taxpayer. Nor does any Treasury Regulation purport to change the relationship in the consolidated context. If, then, the relationship is to remain essentially the same, the key to understanding it lies in the regulations' definition of net operating loss exclusively at the consolidated level. Working back from that, PLEs should be considered first in calculating CNOL, and they are: because any PLE of an affiliate affects the calculation of its STI, that same PLE necessarily affects the CTI or CNOL in exactly the same way, dollar for dollar. And because, by definition, there is no NOL measure for a consolidated return group or any affiliate except CNOL, PLEs cannot be compared with any NOL to produce PLL until CNOL has been calculated. Then, and only then in the case of the consolidated filer, can total PLEs be compared

[7] In addition to Treas. Reg. § 1.1502–79(a)(3), discussed *infra*, at 832–834, two other provisions, 26 U. S. C. § 1503(f)(2) and the current version (though not the version applicable between 1983 and 1986) of Treas. Reg. § 1502–21(b) (2000), refer to separate group members' NOLs. The parties here have not emphasized those provisions, and with good reason. Not only are they inapplicable to the question before us (either substantively, temporally, or both), but, as one commentator has observed, their references to separate NOLs "ste[m] more from careless drafting than meaningful design." Leatherman, Are Separate Liability Losses Separate for Consolidated Groups?, 52 Tax. Law. 663, 705 (1999) (hereinafter Leatherman, Separate Liability Losses).

with a net operating loss. In sum, comparable treatment of PLL in the instances of the usual corporate taxpayer and group filing a consolidated return can be achieved only if the comparison of PLEs with a limiting loss amount occurs at the consolidated level after CNOL has been determined. This approach resting on comparable treatment has a further virtue entitled to some weight in case of doubt: it is (relatively) easy to understand and to apply.

The case for the separate-member approach, advanced (in one variant) by the Government and adopted (on a different rationale) by the Court of Appeals, is not so easily made. In the analysis of comparable treatment just set out, of course, there is no NOL below the consolidated level and hence nothing for comparison with PLEs to produce PLL at any stage before the CNOL calculation. At the least, then, a proponent of the separate-member approach must identify some figure in the consolidated return scheme that could have a plausible analogy to NOL at the level of the affiliated corporations. See A. Dubroff, J. Blanchard, J. Broadbent, & K. Duvall, Federal Income Taxation of Corporations Filing Consolidated Returns § 41.04[06], p. 41–75 (2d ed. 2000) (hereinafter Dubroff) ("Even if separate entity treatment was appropriate, it is unclear how a member with [PLEs] would compute its separate NOL"). The Government and the Court of Appeals have suggested different substitute measures. Neither one works.

The Government has argued that an individual group member's STI, as determined under Treas. Reg. § 1.1502–12, is analogous to a "separate" NOL, so that an affiliate's STI may be compared with its PLEs in order to determine any separate PLL. An individual member's PLL would be the amount of its separate PLEs up to the amount of its negative STI; a member having positive STI could have no PLL.

The Government claims that an STI-based comparison places the group member closest to the position it would have occupied if it had filed a separate return. But that

is simply not so. We have seen already that the calculation of a group member's STI by definition excludes several items that an individual taxpayer would normally account for in computing income or loss, but which an affiliated group may tally only at the consolidated level, such as capital gains and losses, charitable-contribution deductions, and dividends-received deductions. Treas. Regs. §§ 1.1502–12(j) to (n). Owing to these exclusions, an affiliate's STI will tend to be inflated by eliminating deductions it would have taken if it had filed separately, or deflated by eliminating an income item like capital gain.

When pushed, the Government concedes that STI is "not necessarily equivalent to the income or [NOL] figure that the corporation would have computed if it had filed a separate return." Brief for United States 21, n. 14. But, the Government claims, "[t]here has never been a taxpayer with [PLEs] who had a positive [STI] but a negative separate [NOL]." Tr. of Oral Arg. 27. In other words, the Government says that the deductions excluded from STI have never once made a difference and, therefore, that STI is, in fact, a decent enough proxy for a group member's "separate" NOL. But whether or not the excluded items have made a difference in the past, or make a difference here, they certainly could make a difference and, given the potential importance of some of the deductions involved (a large charitable contribution, for example), it is not hard to see how the difference could favor the Government.

The Court of Appeals was therefore right to reject the Government's reliance on STI as a functional surrogate for an affiliate's "separate" NOL. 208 F. 3d, at 459–460. But what the Court of Appeals used in place of STI fares no better. The court relied on Treas. Reg. § 1.1502–79, which contains a definition of "separate net operating loss" that the court believed to be "analogous to an individual's 'net operating loss' on a separate return." 208 F. 3d, at 460. Section 1.1502–79(a)(3) provides that, "[f]or purposes of this

subparagraph," the "separate net operating loss of a member of the group shall be determined under § 1.1502–12 . . . , adjusted for the . . . items taken into account in the computation of" the CNOL. As the Court of Appeals said, the directive of § 1.1502–79(a)(3) (unlike the definition of STI) "takes into account, for example, [a] member's charitable contributions" and other consolidated deductions. 208 F. 3d, at 460–461.

But this sounds too good. It is true that, insofar as § 1.1502–79(a)(3) accounts for gains and losses that STI does not, it gets closer to a commonsense notion of a group member's "separate" NOL than STI does. But the fact that § 1.1502–79(a)(3) improves on STI simply by undoing what § 1.1502–12 requires in defining STI is suspicious, and the suspicion turns out to be justified. Section 1.1502–79(a)(3) unbakes the cake for only one reason, and that reason has no application here. The definition on which the Court of Appeals relied applies, by its terms, only "for purposes of" § 1.1502–79(a)(3), and context makes clear that the purpose is to provide a way to allocate CNOL to an affiliate member that seeks to carry back a loss to a "separate return year," that is, to a year in which the member was not part of the consolidated group. See Treas. Reg. § 1.1502–79 (titled "Separate return years"); § 1.1502–79(a) (titled "Carryover and carryback of [CNOL] to separate return years"); § 1.1502–79(a)(1) ("[i]f a [CNOL] can be carried . . . to a separate return year . . ."). No separate return years are at issue before us; all NOL carrybacks relevant here apply to years in which the five corporations were affiliated in the group. The Court of Appeals thus applied concepts addressing separate return years to a determination for a consolidated return year, without any statutory or regulatory basis for doing so. Cf. 49 Fed. Reg. 30530 (1984) ("[A]lthough the consolidated net operating loss is apportioned to individual members for purposes of carry backs to separate return years [under § 1.1502–79(a)], the apportioned amounts are not

separate NOLs of each member"). Hence, while § 1.1502–79 might not distort an affiliate's separate NOL in the same way that STI does, the facial inapplicability of that regulation only underscores the exclusive concern of § 1.1502–11(a) with consolidated NOL.

In sum, neither method for computing PLL on a separate-member basis squares with the notion of comparability as applied to consolidated return regulations. On the contrary, by expressly and exclusively defining NOL as CNOL, the regulations support the position that group members' PLEs should be aggregated and the affiliated group's PLL determined on a consolidated, single-entity basis.

IV

Several objections have been raised to a single-entity approach to calculating PLL that we have not considered yet. First, the Government insists that a single-entity rule allows affiliated groups a "double deduction." The Government argues that because PLEs are not included among the specific items (charitable-contribution deductions, etc.) for which consolidated, single-entity treatment is required under Treas. Reg. § 1.1502–12, PLEs are "consumed" or "used up" in computing members' STIs, which, pursuant to Treas. Regs. §§ 1.1502–11(a) and 1.1502–21(f), are then used to calculate the group's CTI or CNOL. According to the Government, to permit the use of PLEs first to reduce an individual member's STI and then to contribute to an aggregate PLL for carryback purposes would be tantamount to a double deduction.

The double-deduction argument may have superficial appeal, but any appeal it has rests on a fundamental misconception of the function of STI in computing an affiliated group's tax liability. Calculation of a group member's STI is not in and of itself the basis for any tax event, and there is no separate tax saving when STI is calculated; that occurs only when deductions on the consolidated return equal in-

come and (if they exceed income and produce a CNOL) are carried back against prior income. STI is merely an accounting construct devised as an interim step in computing a group's CTI or CNOL; it "has no other purpose." *Intermet*, 209 F. 3d, at 906 ("A member's STI is simply a step along the way to calculating the group's taxable income or CNOL"). The fact that a group member's PLEs reduce its STI, which in turn either reduces the group's CTI or contributes to its CNOL "dollar for dollar," *ibid.*, is of no other moment.[8] If there were anything wrong in what United Dominion proposes to do, it would be wrong in relation to CNOL and its use for any carryback. Yet, as noted above, no one here disputes that the group members had PLEs in the total amount claimed or that the AMCA group is entitled to carry back the full amount of its CNOL to offset income in prior years. The only question is what portion, if any, of AMCA's CNOL is PLL and, as such, eligible for 10-year, as opposed to 3-year, carryback treatment. There is no more of a double deduction with a 10-year carryback than one for three years.

A second objection was the reason that the Court of Appeals rejected the single-entity approach. That court attached dispositive significance to the fact that, while the Treasury Regulation we have discussed, § 1.1502–12, specifically provides that several items (capital gains and losses, charitable-contribution deductions, etc.) shall be accounted for on a consolidated basis, it does not similarly provide for accounting for PLEs on a consolidated basis: "The regulations provide for blending the group members' [NOLs],

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[8] It makes no difference whatsoever whether the affiliate's PLEs are (1) first netted against each member's income and then aggregated or (2) first aggregated and then netted against the group's combined income: under either method, AMCA's CNOL is the same. See Axelrod & Blank 1394 (noting that this conclusion follows from "the associative principle of arithmetic (which holds that the groupings of items in the case of addition and subtraction have no effect on the result)").

and they explicitly define [CNOL] without an accompanying reference to consolidated [PLEs]. This omission . . . makes clear that blending those expenses is not permitted . . . ." 208 F. 3d, at 458.

We think the omission of PLEs from the series of items that § 1.1502–12 requires to be tallied at the consolidated level has no such clear lesson, however. The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned. *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993) *("Expressio unius est exclusio alterius")*. But here, as always, the soundness of that premise is a function of timing: if there was a good reason to consider the treatment of consolidated PLL at the time the regulation was drawn, then omitting PLL from the list of items for consolidated treatment may well have meant something. But if there was no reason to consider PLL then, its omission would mean nothing at all. And in fact there was no reason. When the consolidated return regulations were first promulgated in 1966, there was no carryback provision pegged to PLEs or PLLs; those notions did not become separate carryback items until 1978, when the 10-year rule was devised. See Revenue Act of 1978, § 371, 92 Stat. 2859; see also Leatherman, Current Developments 393, n. 5. Omission of PLEs or PLLs from the series set out for consolidated treatment in the 1966 regulation therefore meant absolutely nothing in 1966. The issue, then, is the significance, not of omission, but of failure to include later: has the significance of the earlier regulation changed solely because the Treasury has never amended it, even though PLL is now a separate carryback? We think that is unlikely. The Treasury's relaxed approach to amending its regulations to track Code changes is well documented. See *e. g.*, Dubroff 41–72, n. 193; Axelrod & Blank 1391; Leatherman, Separate Liability Losses 708–709. The absence of any amendment to § 1.1502–12 that might have added PLEs

or PLLs to the list of items for mandatory single-entity treatment therefore is more likely a reflection of the Treasury's inattention than any affirmative intention on its part to say anything at all.

Last, the Government warns that "[t]he rule that petitioner advocates would permit significant tax avoidance abuses." Brief for United States 40. Specifically:

> "Under petitioner's approach, a corporation that is currently unprofitable but that had substantial income in prior years could (i) acquire a profitable corporation with product liability expense deductions in the year of acquisition, (ii) file a consolidated return and (iii) thereby create an otherwise nonexistent 'product liability loss' for the new affiliated group that would allow the acquiring corporation to claim refunds of the tax it paid in prior years." *Ibid.*

The Government suggests, for example, that "a manufacturing company (with prior profits and current losses) that has no product liability exposure could purchase a tobacco company (with both prior and current profits) that has significant product liability expenses" and that "[t]he combined entity could . . . assert a ten-year carryback of 'product liability losses' even though the tobacco company has always made a profit and never incurred a 'loss' of any type." *Id.*, at 40–41, n. 27.

There are several answers. First, on the score of tax avoidance, the separate-member approach is no better (and is perhaps worse) than the single-entity treatment; both entail some risk of tax-motivated behavior. See Leatherman, Separate Liability Losses 681 (Under the separate-member approach, "[d]espite sound non-tax business reasons, a group may be disinclined to form a new member or transfer assets between members, because it may worry that it would lose the benefit of a ten-year carryback," and "may be encouraged to transfer assets between members to increase its consoli-

dated [PLL], even when those transfers would otherwise be ill-advised"). Second, the Government may, as always, address tax-motivated behavior under Internal Revenue Code § 269, which gives the Secretary ample authority to "disallow [any] deduction, credit, or other allowance" that results from a transaction "the principal purpose [of] which . . . is evasion or avoidance of Federal income tax." 26 U. S. C. § 269(a). And finally, if the Government were to conclude that § 269 provided too little protection and that it simply could not live with the single-entity approach, the Treasury could exercise the authority provided by the Code, 26 U. S. C. § 1502, and amend the consolidated return regulations.

* * *

Thus, it is true, as the Government has argued, that "[t]he Internal Revenue Code vests ample authority in the Treasury to adopt consolidated return regulations to effect a binding resolution of the question presented in this case." Brief for United States 19–20. To the extent that the Government has exercised that authority, its actions point to the single-entity approach as the better answer. To the extent the Government disagrees, it may amend its regulations to provide for a different one.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I agree with the Court that the Internal Revenue Code provision and the corresponding Treasury Regulations that control consolidated filings are best interpreted as requiring a single-entity approach in calculating product liability loss. I write separately, however, because I respectfully disagree with the dissent's suggestion that, when a provision of the

Code and the corresponding regulations are ambiguous, this Court should defer to the Government's interpretation. See *post* this page (opinion of STEVENS, J.). At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter. See *Leavell* v. *Blades*, 237 Mo. 695, 700–701, 141 S. W. 893, 894 (1911) ("When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it"); *United States* v. *Merriam*, 263 U. S. 179, 188 (1923) ("If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer"); *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 350 (1927) ("The provision is part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers"). Accord, *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474 (1891); *Benziger* v. *United States*, 192 U. S. 38, 55 (1904).

JUSTICE STEVENS, dissenting.

This is a close and difficult case, in which neither the statute nor the regulations offer a definitive answer to the crucial textual question. Absent a clear textual anchor, I would credit the Secretary of the Treasury's concerns about the potential for abuse created by the petitioner's reading of the statutory scheme and affirm the decision of the Court of Appeals on that basis.[1]

[1] JUSTICE THOMAS accurately points to a tradition of cases construing "revenue-raising laws" against their drafter. See *ante* this page (THOMAS, J., concurring). However, when the ambiguous provision in question is not one that imposes tax liability but rather one that crafts an exception from a general revenue duty for the benefit of some taxpayers, a countervailing tradition suggests that the ambiguity should be resolved in the government's favor. See, *e. g.*, *INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79, 84 (1992); *Interstate Transit Lines* v. *Commissioner*,

As the majority accurately reports, during the time relevant to this case, § 172(b)(1)(I) of the Internal Revenue Code of 1954 allowed any "taxpayer" who "ha[d] a product liability loss" to carry back its excess product liability losses for 10 years. The resolution of this case turns on whether, when a group of affiliated corporations files a consolidated tax return, the entire group should be considered the "taxpayer" for the purposes of implementing this provision or whether each individual corporation should be seen as a "taxpayer."

There is no obvious answer to this question. On the one hand, it is generally accepted that the rationale behind the consolidated return regulations is to allow affiliated corporations that are run as a single entity to elect to be treated for tax purposes as a single entity. See, *e. g.*, Brief for Petitioner 17–19 (collecting sources in which the Internal Revenue Service so stated). On the other hand, it is quite clear that each corporation in such a group remains in both a legal and a literal sense a "taxpayer," a status that has important consequences. See *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 328 (1932) ("The fact is not to be ignored that each of two or more corporations joining . . . in a consolidated return is none the less a taxpayer"); 26 U. S. C. § 7701(a)(14) (defining a "taxpayer" as "any person subject to any internal revenue tax," where a related provision defines "person" to include corporations). As both the group and the individual corporations are considered "taxpayers" in different contexts, the statute presents a genuine ambiguity.

When a provision of the Internal Revenue Code presents a patent ambiguity, Congress, the courts, and the IRS share a preference for resolving the ambiguity via executive action. See, *e. g.*, *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 477 (1979). This is best

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319 U. S. 590, 593 (1943); *Deputy, Administratrix* v. *Du Pont*, 308 U. S. 488, 493 (1940); *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440 (1934); *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326 (1932).

achieved by the issuing of a Treasury Regulation resolving the ambiguity. *Ibid.* In this instance, however, the Secretary of the Treasury issued no such regulation. In the absence of such a regulation, the majority has scoured tangentially related regulations, looking for clues to what the Secretary might intend. For want of a more precise basis for resolving this case, that approach is sound.

It is at this point, however, that I part company with the majority's analysis. The fact that the regulations forward a particular method for calculating a consolidated "net operating loss" (NOL) for a group of affiliated companies, see Treas. Reg. § 1.1502–21(f), tells us how the Secretary wants the NOL to be calculated whenever it is necessary to determine a consolidated NOL, but it does not tell us what provisions of the Code require the calculation of a consolidated NOL. That is a separate and prior question. Even if we were to draw some mild significance from the presence of such a regulation (and the absence, at the time these returns were filed, of a similar regulation for the calculation of corporation-specific NOL's), the power of that inference is counterbalanced by the fact that the regulations listing deductions that must be reported at the consolidated level makes no mention of product liability expenses. See Treas. Reg. § 1.1502–12; see also *H. Enterprises Int'l, Inc.* v. *Commisioner*, 105 T. C. 71, 85 (1995) (construing Treas. Reg. § 1.1502–80(a) to provide "[w]here the consolidated return regulations do not require that corporations filing such returns be treated differently from the way separate entities would be treated, those corporations shall be treated as separate entities when applying provisions of the Code"). In addition, the subsequent promulgation of a method for calculating a corporation-specific NOL (albeit for a different purpose), see § 1.1502–79(a)(3) (defining "separate net operating loss"), demonstrates that there are no inherent problems implicit in undertaking such a calculation.

In short, I find no answer to this case in the text of the statute or in any Treasury Regulation.[2] However, the Government does forward a valid policy concern that militates against petitioner's construction of the statute: the fear of tax abuse. See Brief for United States 40–42. Put simply, the Government fears that currently unprofitable but previously profitable corporations might receive a substantial windfall simply by acquiring a corporation with significant product liability expenses but no product liability losses. See *id.*, at 40. On a subjective level, I find these concerns troubling. Cf. *Woolford Realty Co.*, 286 U. S., at 330 (rejecting "the notion that Congress in permitting a consolidated return was willing to foster an opportunity for juggling so facile and so obvious"). More importantly, however, I credit the Secretary of the Treasury's concerns about the potential scope of abuse. Perhaps the Court is correct in suggesting that these concerns can be alleviated through applications of other anti-abuse provisions of the Tax Code, see *ante*, at 838, but I am not persuaded of my own ability to make that judgment. When we deal "with a subject that is highly specialized and so complex as to be the despair of judges," *Dobson* v. *Commissioner*, 320 U. S. 489, 498 (1943), an ounce of deference is appropriate.

I respectfully dissent.[3]

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[2] I am also in full agreement with the Court's rejection of the Government's double-deduction argument. See *ante*, at 834–835.

[3] Because I agree with the majority that the calculation contemplated by Treas. Reg. § 1.1502–79(a)(3) better approximates the NOL that each company would have had reported if filing individually than the alternative forwarded by the Government, see *ante*, at 833, I agree with the Court of Appeals' decision to adopt that measure and would affirm the decision below in its entirety.

Syllabus

POLLARD *v.* E. I. DU PONT DE NEMOURS & CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00–763. Argued April 23, 2001—Decided June 4, 2001

Petitioner Pollard sued respondent, her former employer, alleging that she had been subjected to a hostile work environment based on her sex, in violation of Title VII of the Civil Rights Act of 1964. Finding that Pollard was subjected to co-worker sexual harassment of which her supervisors were aware, and that the harassment resulted in a medical leave of absence for psychological assistance and her eventual dismissal for refusing to return to the same hostile work environment, the District Court awarded her, as relevant here, $300,000 in compensatory damages—the maximum permitted under 42 U. S. C. § 1981a(b)(3). The court observed that the award was insufficient to compensate Pollard, but was bound by an earlier Sixth Circuit holding that front pay—money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement—was subject to the damages cap of § 1981a(b)(3). The Sixth Circuit affirmed.

Held: Front pay is not an element of compensatory damages under § 1981a and thus is not subject to the damages cap imposed by § 1981a(b)(3). Pp. 847–854.

(a) Under § 706(g) of the Civil Rights Act of 1964, as originally enacted, when a court found that an employer had intentionally engaged in an unlawful employment practice, the court was authorized to award such remedies as injunctions, reinstatement, backpay, and lost benefits. 42 U. S. C. § 2000e–5(g)(1). Because this provision closely tracked the language of § 10(c) of the National Labor Relations Act (NLRA), § 10(c)'s meaning before the Civil Rights Act of 1964 was enacted provides guidance as to § 706(g)'s proper meaning. In applying § 10(c), the National Labor Relations Board consistently had made "backpay" awards up to the date the employee was reinstated or returned to the position he should have been in had the NLRA violation not occurred, even if such event occurred after judgment. Consistent with that interpretation, courts finding unlawful intentional discrimination in Title VII actions awarded this same type of backpay (known today as "front pay" when it occurs after the judgment) under § 706(g). After Congress expanded § 706(g)'s remedies in 1972 to include "any other equitable relief as the court deems appropriate," courts endorsed a broad view of front pay, which included front pay awards made in lieu of reinstatement.

Syllabus

By 1991, virtually all of the courts of appeals had recognized front pay as a remedy authorized by § 706(g). In 1991, Congress further expanded the available remedies to include compensatory and punitive damages, subject to § 1981a(b)(3)'s cap. Pp. 848–851.

(b) The 1991 Act's plain language makes clear that the newly authorized § 1981a remedies were *in addition to* the relief authorized by § 706(g). Thus, if front pay was a type of relief authorized under § 706(g), it is excluded from the meaning of compensatory damages under § 1981a and it would not be subject to § 1981a(b)(3)'s cap. As the original language of § 706(g) authorizing backpay awards was modeled after the same language in the NLRA, backpay awards (now called front pay awards under Title VII) made for the period between the judgment date and the reinstatement date were authorized under § 706(g). Because there is no logical difference between front pay awards made when there eventually is reinstatement and those made when there is not, front pay awards made in lieu of reinstatement are authorized under § 706(g) as well. To distinguish between the two cases would lead to the strange result that employees could receive front pay when reinstatement eventually is available but not when it is unavailable—whether because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries that the discrimination has caused the plaintiff. Thus, the most egregious offenders could be subject to the least sanctions. The text of § 706(g) does not lend itself to such a distinction. Front pay awards made in lieu of reinstatement fit within § 706(g)'s authorization for courts to "order such affirmative action as may be appropriate." Pp. 852–854.

213 F. 3d 933, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except O'CONNOR, J., who took no part in the consideration or decision of the case.

Kathleen L. Caldwell argued the cause for petitioner. With her on the briefs was *Eric Schnapper.*

Matthew D. Roberts argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Yeomans*, *Austin C. Schlick*, *Dennis J. Dimsey*, *Jennifer Levin*, *Gwendolyn Young Reams*, *Phillip B. Sklover*, *Carolyn L. Wheeler*, and *Caren I. Friedman.*

Raymond Michael Ripple argued the cause for respondent. With him on the brief was *Donna L. Goodman.**

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a front pay award is an element of compensatory damages under the Civil Rights Act of 1991. We conclude that it is not.

I

Petitioner Sharon Pollard sued her former employer, E. I. du Pont de Nemours and Company (DuPont), alleging that she had been subjected to a hostile work environment based on her sex, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.* After a trial, the District Court found that Pollard was subjected to coworker sexual harassment of which her supervisors were aware. The District Court further found that the harassment resulted in a medical leave of absence from her job for psychological assistance and her eventual dismissal for refusing to return to the same hostile work environment. The court awarded Pollard $107,364 in backpay and benefits, $252,997 in attorney's fees, and, as relevant here, $300,000 in compensatory damages—the maximum permitted under the statutory cap for such damages in 42 U. S. C. § 1981a(b)(3).

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*Briefs of *amici curiae* urging reversal were filed for the Lawyers' Committee for Civil Rights Under Law et al. by *Richard M. Wyner, Matthew M. Hoffman, Charles T. Lester, Jr., John Payton, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, Steven R. Shapiro, Lenora M. Lapidus, Sara L. Mandelbaum, Marcia D. Greenberger, Judith L. Lichtman, Donna R. Lenhoff, Martha F. Davis, Karen K. Narasaki, Vincent A. Eng, Mark D. Roth,* and *Laurie A. McCann;* and for the National Employment Lawyers Association et al. by *Woodley B. Osborne, H. Candace Gorman,* and *Paula A. Brantner.*

Briefs of *amici curiae* urging affirmance were filed for the Equal Employment Advisory Council et al. by *Robert E. Williams, Ann Elizabeth Reesman, Stephen A. Bokat,* and *Robin S. Conrad;* and for the Society for Human Resource Management by *Paul Salvatore.*

The Court of Appeals affirmed, concluding that the record demonstrated that DuPont employees engaged in flagrant discrimination based on sex and that DuPont managers and supervisors did not take adequate steps to stop it. 213 F. 3d 933 (CA6 2000).

The issue presented for review here is whether front pay constitutes an element of "compensatory damages" under 42 U. S. C. § 1981a and thus is subject to the statutory damages cap imposed by that section. Although courts have defined "front pay" in numerous ways, front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. For instance, when an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs. See, *e. g.*, *Walsdorf* v. *Board of Comm'rs*, 857 F. 2d 1047, 1053–1054 (CA5 1988); *King* v. *Staley*, 849 F. 2d 1143, 1145 (CA8 1988). In cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, courts have ordered front pay as a substitute for reinstatement. See, *e. g.*, *Gotthardt* v. *National R. R. Passenger Corp.*, 191 F. 3d 1148, 1156 (CA9 1999); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F. 2d 945, 957 (CA10 1980). For the purposes of this opinion, it is not necessary for us to explain when front pay is an appropriate remedy. The question before us is only whether front pay, if found to be appropriate, is an element of compensatory damages under the Civil Rights Act of 1991 and thus subject to the Act's statutory cap on such damages.

Here, the District Court observed that "the $300,000.00 award is, in fact, insufficient to compensate plaintiff," 16 F. Supp. 2d 913, 924, n. 19 (WD Tenn. 1998), but it stated that

it was bound by the Sixth Circuit's decision in *Hudson* v. *Reno*, 130 F. 3d 1193 (1997), which held that front pay was subject to the cap. On appeal, Pollard argued that *Hudson* was wrongly decided because front pay is not an element of compensatory damages, but rather a replacement for the remedy of reinstatement in situations in which reinstatement would be inappropriate. She also argued that § 1981a, by its very terms, explicitly excludes from the statutory cap remedies that traditionally were available under Title VII, which she argued included front pay. The Court of Appeals agreed with Pollard's arguments but considered itself bound by *Hudson*. The Sixth Circuit declined to rehear the case en banc.

The Sixth Circuit's decision in *Hudson* was one of the first appellate opinions to decide whether front pay is an element of compensatory damages subject to the statutory cap set forth in § 1981a(b)(3). Contrary to the Sixth Circuit's resolution of this question, the other Courts of Appeals to address it have concluded that front pay is a remedy that is not subject to the limitations of § 1981a(b)(3). See, *e. g.*, *Pals* v. *Schepel Buick & GMC Truck, Inc.*, 220 F. 3d 495, 499–500 (CA7 2000); *Kramer* v. *Logan County School Dist. No. R–1*, 157 F. 3d 620, 625–626 (CA8 1998); *Gotthardt*, *supra*, at 1153–1154; *Medlock* v. *Ortho Biotech, Inc.*, 164 F. 3d 545, 556 (CA10 1999); *EEOC* v. *W&O, Inc.*, 213 F. 3d 600, 619, n. 10 (CA11 2000); *Martini* v. *Federal Nat. Mortgage Assn.*, 178 F. 3d 1336, 1348–1349 (CADC 1999). We granted certiorari to resolve this conflict. 531 U. S. 1069 (2001).

II

Plaintiffs who allege employment discrimination on the basis of sex traditionally have been entitled to such remedies as injunctions, reinstatement, backpay, lost benefits, and attorney's fees under § 706(g) of the Civil Rights Act

of 1964. 42 U. S. C. § 2000e–5(g)(1). In the Civil Rights Act of 1991, Congress expanded the remedies available to these plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages. 42 U. S. C. § 1981a(a)(1) ("[T]he complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964"). The amount of compensatory damages awarded under § 1981a for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," and the amount of punitive damages awarded under § 1981a, however, may not exceed the statutory cap set forth in § 1981a(b)(3). The statutory cap is based on the number of people employed by the respondent. In this case, the cap is $300,000 because DuPont has more than 500 employees.

The Sixth Circuit has concluded that front pay constitutes compensatory damages awarded for future pecuniary losses and thus is subject to the statutory cap of § 1981a(b)(3). 213 F. 3d, at 945; *Hudson*, *supra*, at 1203. For the reasons discussed below, we conclude that front pay is not an element of compensatory damages within the meaning of § 1981a, and, therefore, we hold that the statutory cap of § 1981a(b)(3) is inapplicable to front pay.

A

Under § 706(g) of the Civil Rights Act of 1964 as originally enacted, when a court found that an employer had intentionally engaged in an unlawful employment practice, the court was authorized to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay." 42 U. S. C. § 2000e–5(g)(1). This provision closely tracked the language of

§ 10(c) of the National Labor Relations Act (NLRA), 49 Stat. 454, 29 U. S. C. § 160(c), which similarly authorized orders requiring employers to take appropriate, remedial "affirmative action." § 160(c) (authorizing the National Labor Relations Board to issue an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter"). See also *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419, n. 11 (1975). The meaning of this provision of the NLRA prior to enactment of the Civil Rights Act of 1964, therefore, gives us guidance as to the proper meaning of the same language in § 706(g) of Title VII. In applying § 10(c) of the NLRA, the Board consistently had made awards of what it called "backpay" up to the date the employee was reinstated or returned to the position he should have been in had the violation of the NLRA not occurred, even if such event occurred after judgment. See, *e. g.*, *Nathanson* v. *NLRB*, 344 U. S. 25, 29–30 (1952); *NLRB* v. *Reeves Broadcasting & Development Corp.*, 336 F. 2d 590, 593–594 (CA4 1964); *NLRB* v. *Hill & Hill Truck Line, Inc.*, 266 F. 2d 883, 887 (CA5 1959); *Berger Polishing, Inc.*, 147 N. L. R. B. 21, 40 (1964); *Lock Joint Pipe Co.*, 141 N. L. R. B. 943, 948 (1963). Consistent with the Board's interpretation of this provision of the NLRA, courts finding unlawful intentional discrimination in Title VII actions awarded this same type of backpay under § 706(g). See, *e. g.*, *Culpepper* v. *Reynolds Metals Co.*, 442 F. 2d 1078, 1080 (CA5 1971); *United States* v. *Georgia Power Co.*, 3 FEP Cases 767, 790 (ND Ga. 1971). In the Title VII context, this form of "backpay" occurring after the date of judgment is known today as "front pay."

In 1972, Congress expanded § 706(g) to specify that a court could, in addition to awarding those remedies previously listed in the provision, award "any other equitable relief

as the court deems appropriate." After this amendment to § 706(g), courts endorsed a broad view of front pay. See, *e. g.*, *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 269 (CA4 1976) (stating that where reinstatement is not immediately feasible, backpay "should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position"); *EEOC* v. *Enterprise Assn. Steamfitters*, 542 F. 2d 579, 590 (CA2 1976) (stating that backpay award would terminate on the date of actual remedying of discrimination); *Bush* v. *Lone Star Steel Co.*, 373 F. Supp. 526, 538 (ED Tex. 1974) (ordering backpay from the date the employee would have been entitled to fill a vacancy but for racial discrimination to the date the employee would in all reasonable probability reach his rightful place). Courts recognized that reinstatement was not always a viable option, and that an award of front pay as a substitute for reinstatement in such cases was a necessary part of the "make whole" relief mandated by Congress and by this Court in *Albemarle*. See, *e. g.*, *Shore* v. *Federal Express Corp.*, 777 F. 2d 1155, 1158–1159 (CA6 1985) ("Front pay is . . . simply compensation for the post-judgment effects of past discrimination." It is awarded "to effectuate fully the 'make whole' purposes of Title VII"); *Brooks* v. *Woodline Motor Freight, Inc.*, 852 F. 2d 1061, 1066 (CA8 1988) (stating that front pay was appropriate given substantial animosity between parties where "the parties' relationship was not likely to improve, and the nature of the business required a high degree of mutual trust and confidence"); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F. 2d, at 957 (upholding award of front pay where continuing hostility existed between the parties); *Cassino* v. *Reichhold Chems., Inc.*, 817 F. 2d 1338, 1347 (CA9 1987) (same). By 1991, virtually all of the courts of appeals had recognized that "front pay" was a remedy authorized

under § 706(g).[1] In fact, no court of appeals appears to have ever held to the contrary.[2]

In 1991, without amending § 706(g), Congress further expanded the remedies available in cases of intentional employment discrimination to include compensatory and punitive damages. See 42 U. S. C. § 1981a(a)(1). At that time, Rev. Stat. § 1977, 42 U. S. C. § 1981, permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination. Thus, § 1981a brought all forms of intentional employment discrimination into alignment, at least with respect to the forms of relief available to successful plaintiffs. However, compensatory and punitive damages awarded under § 1981a may not exceed the statutory limitations set forth in § 1981a(b)(3), while such damages awarded under § 1981 are not limited by statute.

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[1] See, *e. g.*, *Barbano* v. *Madison Cty.*, 922 F. 2d 139, 146–147 (CA2 1990); *Blum* v. *Witco Chem. Corp.*, 829 F. 2d 367, 383 (CA3 1987); *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 269 (CA4 1976); *Walsdorf* v. *Board of Comm'rs*, 857 F. 2d 1047, 1054 (CA5 1988); *Shore* v. *Federal Express Corp.*, 777 F. 2d 1155, 1159–1160 (CA6 1985); *Briseno* v. *Central Technical Community College Area*, 739 F. 2d 344, 348 (CA8 1984); *Thorne* v. *El Segundo*, 802 F. 2d 1131, 1137 (CA9 1986); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F. 2d 945, 957 (CA10 1980); *Nord* v. *United States Steel Corp.*, 758 F. 2d 1462, 1473–1474 (CA11 1985); *Thompson* v. *Sawyer*, 678 F. 2d 257, 292 (CADC 1982). See also *McKnight* v. *General Motors Corp.*, 908 F. 2d 104, 116–117 (CA7 1990) (reserving question of availability of front pay under Title VII); *Wildman* v. *Lerner Stores Corp.*, 771 F. 2d 605, 615–616 (CA1 1985) (holding that front pay is available under the Age Discrimination in Employment Act of 1967, but relying on Title VII case law).

[2] The only two Courts of Appeals not to have addressed this issue prior to the Civil Rights Act of 1991 have since joined the other Circuits in holding that front pay is a remedy available under § 706(g). See *Selgas* v. *American Airlines, Inc.*, 104 F. 3d 9, 12–13 (CA1 1997); *Williams* v. *Pharmacia, Inc.*, 137 F. 3d 944, 951–952 (CA7 1998).

B

In the abstract, front pay could be considered compensation for "future pecuniary losses," in which case it would be subject to the statutory cap. § 1981a(b)(3). The term "compensatory damages . . . for future pecuniary losses" is not defined in the statute, and, out of context, its ordinary meaning could include all payments for monetary losses after the date of judgment. However, we must not analyze one term of § 1981a in isolation. See *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 99 (1992) ("'[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law'"). When § 1981a is read as a whole, the better interpretation is that front pay is not within the meaning of compensatory damages in § 1981a(b)(3), and thus front pay is excluded from the statutory cap.

In the Civil Rights Act of 1991, Congress determined that victims of employment discrimination were entitled to *additional* remedies. Congress expressly found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," without giving any indication that it wished to curtail previously available remedies. See Civil Rights Act of 1991, 105 Stat. 1071, § 2. Congress therefore made clear through the plain language of the statute that the remedies newly authorized under § 1981a were *in addition to* the relief authorized by § 706(g). Section 1981a(a)(1) provides that, in intentional discrimination cases brought under Title VII, "the complaining party may recover compensatory and punitive damages as allowed in subjection (b) of [§ 1981a], *in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964*, from the respondent." (Emphasis added.) And § 1981a(b)(2) states that "[c]ompensatory damages awarded under [§ 1981a] shall not include backpay, interest on backpay, *or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964*."

(Emphasis added.) According to these statutory provisions, if front pay was a type of relief authorized under § 706(g), it is excluded from the meaning of compensatory damages under § 1981a.

As discussed above, the original language of § 706(g) authorizing backpay awards was modeled after the same language in the NLRA. This provision in the NLRA had been construed to allow awards of backpay up to the date of reinstatement, even if reinstatement occurred after judgment. Accordingly, backpay awards made for the period between the date of judgment and the date of reinstatement, which today are called front pay awards under Title VII, were authorized under § 706(g).

As to front pay awards that are made in lieu of reinstatement, we construe § 706(g) as authorizing these awards as well. We see no logical difference between front pay awards made when there eventually is reinstatement and those made when there is not.[3] Moreover, to distinguish between the two cases would lead to the strange result that employees could receive front pay when reinstatement eventually is available but not when reinstatement is not an option—whether because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries that the discrimination has caused the plaintiff. Thus, the most egregious offenders could be subject to the least sanctions. Had Congress drawn such a line in the statute and foreclosed front pay awards in lieu of reinstatement, we certainly would honor that line. But, as written, the text of the statute does not lend itself to such a distinction, and we will not create one. The statute

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[3] We note that the federal courts consistently have construed § 706(g) as authorizing front pay awards in lieu of reinstatement. See, *e. g.*, *Blum* v. *Witco Chem. Corp.*, *supra*, at 383 ("A front pay . . . award is the monetary equivalent of the equitable remedy of reinstatement"); *Williams* v. *Pharmacia, Inc.*, *supra*, at 952 (stating that "front pay is the functional equivalent of reinstatement").

authorizes courts to "order such affirmative action as may be appropriate." 42 U. S. C. § 2000e–5(g)(1). We conclude that front pay awards in lieu of reinstatement fit within this statutory term.

Because front pay is a remedy authorized under § 706(g), Congress did not limit the availability of such awards in § 1981a. Instead, Congress sought to expand the available remedies by permitting the recovery of compensatory and punitive damages in addition to previously available remedies, such as front pay.

* * *

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

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Reporter's Note

The next page is purposely numbered 901. The numbers between 854 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 5 THROUGH JUNE 10, 2001

MARCH 5, 2001

Certiorari Granted—Remanded

No. 99–1263. MASSACHUSETTS ET AL. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL.; and

No. 99–1265. AMERICAN LUNG ASSN. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL. C. A. D. C. Cir. The Court affirmed in part and reversed in part the judgment below in *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001). Therefore, certiorari granted, and cases remanded for further proceedings. Reported below: 175 F. 3d 1027 and 195 F. 3d 4.

Certiorari Granted—Vacated and Remanded

No. 00–6808. VALENSIA *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). Reported below: 222 F. 3d 1173.

Certiorari Dismissed

No. 00–7796. ATRAQCHI ET UX. *v.* DARUI. C. A. D. C. Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 254 F. 3d 315.

No. 00–7963. STONE *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 00M70. COOK *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 00M71. MELKA MARINE, INC. *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Acting Solicitor General for divided argument granted. [For earlier order herein, see, *e. g.,* 531 U. S. 1122.]

No. 128, Orig. ALASKA *v.* UNITED STATES. Amended complaint and answer referred to the Special Master. [For earlier order herein, see, *e. g.,* 531 U. S. 1066.]

No. 00–454. ATKINSON TRADING CO., INC. *v.* SHIRLEY ET AL. C. A. 10th Cir. [Certiorari granted, 531 U. S. 1009.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–720. CHUBB & SON, INC. *v.* ASIANA AIRLINES. C. A. 2d Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 00–1073. OWASSO INDEPENDENT SCHOOL DISTRICT NO. I–011, AKA OWASSO PUBLIC SCHOOLS, ET AL. *v.* FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, PLETAN ET AL. C. A. 10th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 00–7728. IN RE NEVIUS; and

No. 00–8475. IN RE JOHNSON. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 00–799. CITY OF LOS ANGELES *v.* ALAMEDA BOOKS, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 222 F. 3d 719.

No. 00–1045. TRW INC. *v.* ANDREWS. C. A. 9th Cir. Certiorari granted. Reported below: 225 F. 3d 1063.

No. 00–860. CORRECTIONAL SERVICES CORP. *v.* MALESKO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma*

pauperis granted. Certiorari granted. Reported below: 229 F. 3d 374.

No. 00–878. MATHIAS ET AL. *v.* WORLDCOM TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. Certiorari granted limited to the following questions:

"1. Whether a state commission's action relating to the enforcement of a previously approved § 252 interconnection agreement is a 'determination under [§ 252]' and thus is reviewable in federal court under 47 U. S. C. § 252(e)(6)?

"2. Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity?

"3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine?" JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 179 F. 3d 566.

Certiorari Denied

No. 99–604. VELAZQUEZ ET AL. *v.* LEGAL SERVICES CORPORATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 757.

No. 99–1431. APPALACHIAN POWER CO. ET AL. *v.* WHITMAN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.; and

No. 99–1442. CITIZENS FOR BALANCED TRANSPORTATION ET AL. *v.* WHITMAN, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 175 F. 3d 1027 and 195 F. 3d 4.

No. 00–289. YARNELL, CHIEF ENGINEER, MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL. *v.* CUFFLEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 208 F. 3d 702.

No. 00–445. APPALACHIAN POWER CO. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 00–632. MICHIGAN ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 00–633. OHIO ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 F. 3d 663.

No. 00–504. LOUISIANA ACORN FAIR HOUSING, INC., ET AL. *v.* LEBLANC. C. A. 5th Cir. Certiorari denied. Reported below: 211 F. 3d 298.

No. 00–675. JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL. *v.* SCHAEFER. C. A. 9th Cir. Certiorari denied. Reported below: 215 F. 3d 1031.

No. 00–704. CRIS REALMS, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 F. 3d 830.

No. 00–854. ADVANCED DISPLAY SYSTEMS, INC., ET AL. *v.* KENT DISPLAY SYSTEMS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 212 F. 3d 1272.

No. 00–895. WEDDERBURN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 215 F. 3d 795.

No. 00–907. FOSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 579.

No. 00–910. HUMANITARIAN LAW PROJECT ET AL. *v.* ASHCROFT, ATTORNEY GENERAL, ET AL.; and

No. 00–1077. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* HUMANITARIAN LAW PROJECT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1130.

No. 00–929. TRANSATLANTIC SCHIFFAHRTSKONTOR GMBH *v.* SHANGHAI FOREIGN TRADE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 204 F. 3d 384.

No. 00–946. S. S., BY AND THROUGH HER NEXT FRIEND AND GUARDIAN AD LITEM, JERVIS *v.* MCMULLEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 225 F. 3d 960.

No. 00–1003. BELHUMEUR ET AL. *v.* MASSACHUSETTS LABOR RELATIONS COMMISSION ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 432 Mass. 458, 735 N. E. 2d 860.

No. 00–1049. CASS ET AL. *v.* COUNTY OF SUFFOLK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 272 App. Div. 2d 471, 708 N. Y. S. 2d 326.

No. 00–1052. UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA *v.* TAMPA ELECTRIC CO. ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 767 So. 2d 428.

No. 00–1059. RODRIGUE ET AL. *v.* HIDALGO RODRIGUE. C. A. 5th Cir. Certiorari denied. Reported below: 218 F. 3d 432.

No. 00–1062. YEI-HWEI TONG *v.* GUTIERREZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 431.

No. 00–1068. BAYOU FLEET, INC. *v.* HOME PLACE BATTURE LEASING, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 852.

No. 00–1069. EFRON *v.* EMBASSY SUITES (PUERTO RICO), INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 223 F. 3d 12.

No. 00–1074. NIEMEYER ET AL. *v.* OROVILLE UNION HIGH SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 228 F. 3d 1092.

No. 00–1078. SPRINGER, DBA BONDAGE BREAKER MINISTRIES *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 212 F. 3d 180.

No. 00–1081. SUDDUTH *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–1082. BRADT *v.* LILLY ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 14 S. W. 3d 756.

No. 00–1091. ILLINOIS *v.* CARLSON. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 313 Ill. App. 3d 447, 729 N. E. 2d 858.

No. 00–1092. BARTLETT, EXECUTIVE DIRECTOR, BOARD OF ELECTIONS OF NORTH CAROLINA, ET AL. *v.* PERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 231 F. 3d 155.

No. 00–1099. LEXINGTON 76 AUTO TRUCK STOP ET AL. *v.* MCALPIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 491.

No. 00–1100. MILLER *v.* GENERAL BANK NEDERLAND, N. V., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 217 F. 3d 74.

No. 00–1106. MURPHY *v.* BINION ET AL. Sup. Ct. Nev. Certiorari denied.

No. 00–1111. MCKAY *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 226 F. 3d 752.

No. 00–1117. LIVINGSTONE ET VIR *v.* NORTH BELLE VERNON BOROUGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 211 F. 3d 1262.

No. 00–1124. BOYKIN *v.* ENTERGY OPERATIONS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 707.

No. 00–1132. MORICE *v.* EG&G FLORIDA, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 33.

No. 00–1148. SOUTH CAROLINA *v.* HOLMES. Sup. Ct. S. C. Certiorari denied. Reported below: 342 S. C. 113, 536 S. E. 2d 671.

No. 00–1152. GARNER *v.* DEPARTMENT OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 221 F. 3d 822.

No. 00–1156. LEVI STRAUSS & CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 222 F. 3d 1344.

No. 00–1161. MCKINNEY ET AL. *v.* CHAO, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 209.

No. 00–1162. BESTER *v.* LOUISIANA COMMITTEE ON BAR ADMISSIONS. Sup. Ct. La. Certiorari denied. Reported below: 762 So. 2d 624.

No. 00–1171. HAGGAR APPAREL CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 222 F. 3d 1337.

No. 00–1175. REESE *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1269.

No. 00–1209. SOLOMON *v.* GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud.

Dept. Certiorari denied. Reported below: 264 App. Div. 2d 24, 702 N. Y. S. 2d 562.

No. 00–1247. LEJEUNE *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 00–1267. ROGERS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 54 M. J. 244.

No. 00–1269. ALLEN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 53 M. J. 402.

No. 00–6368. DILLARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 214 F. 3d 88.

No. 00–6561. DAVENPORT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 217 F. 3d 1341.

No. 00–6732. MARTIN *v.* TAYLOR, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–6980. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 208 F. 3d 1306.

No. 00–7133. MELSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 775 So. 2d 904.

No. 00–7167. BAKER *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–7255. WHITEHEAD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 777 So. 2d 854.

No. 00–7270. MANNING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 765 So. 2d 516.

No. 00–7297. KEEN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 31 S. W. 3d 196.

No. 00–7311. HYDE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 778 So. 2d 237.

No. 00–7312. HAMMONDS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 777 So. 2d 777.

No. 00–7391. DAMPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 211 F. 3d 592.

No. 00–7423. KRAFT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 23 Cal. 4th 978, 5 P. 3d 68.

No. 00–7476. MOORE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 90 Ohio St. 3d 47, 734 N. E. 2d 804.

No. 00–7522. MINES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 26 S. W. 3d 910.

No. 00–7688. GUIDRY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–7706. NELOMS *v.* MCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–7710. BEASLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7711. POTEETE *v.* CAPITAL ENGINEERING, INC., ET AL. C. A. 7th Cir. Certiorari denied.

No. 00–7714. MEDRANO AYALA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 23 Cal. 4th 225, 1 P. 3d 3.

No. 00–7718. JONES *v.* CONROY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 888.

No. 00–7729. BEAUBRUM *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–7733. JACKSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–7734. JOHNSON *v.* LARKINS ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–7739. WILLIAMS LEWIS *v.* ENTERGY ELECTRIC CO. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 315.

No. 00–7743. NEWGENT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 770 So. 2d 159.

No. 00–7745. TORRES ARBOLEDA *v.* NEWLAND, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–7752. WESLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–7753. WICKS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7759. MCCLURE *v.* HARGETT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1164.

No. 00–7761. ROBERTS *v.* SABINE STATE BANK & TRUST CO. C. A. 5th Cir. Certiorari denied. Reported below: 226 F. 3d 374.

No. 00–7763. FRANK *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 769 So. 2d 1221.

No. 00–7768. HANSEN *v.* CROSBY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 229 F. 3d 1166.

No. 00–7769. HIGH *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 209 F. 3d 1257.

No. 00–7777. GREEN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–7779. SWENDRA *v.* SOARES, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 221 F. 3d 1353.

No. 00–7782. RAIOLO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–7783. REYNOLDS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–7785. SANABRIA *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 00–7787. WILLIAMS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7789. SHOUGH *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 00–7794. TOM *v.* NORTHWEST AIRLINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1144.

No. 00–7801. ORTIZ *v.* RODRIGUEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 225 F. 3d 663.

No. 00–7802. MORGAN *v.* MURO ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–7820. COOPER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 00–7826. UTLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7844. REESE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 768 So. 2d 1057.

No. 00–7850. COLEMAN *v.* CHILDS, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–7852. DORSEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7901. BUTLER *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 229 F. 3d 1170.

No. 00–7956. ALLISON *v.* CORDOVA, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–7958. BROWN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8002. STANGEL *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 219 F. 3d 498.

No. 00–8009. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 233 F. 3d 575.

No. 00–8014. BAILEY *v.* CARTER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 221 F. 3d 1338.

No. 00–8070. DRAIN *v.* SNYDER, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 00–8087. THOMPSON *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 316.

No. 00–8209. DUNMON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8226. GASTON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1142.

No. 00–8227. HUNNELL *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 209.

No. 00–8233. GRAY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 259 Neb. 897, 612 N. W. 2d 507.

No. 00–8235. GLASS *v.* BATTLES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–8236. FORD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1340.

No. 00–8249. ASHWAY *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8258. GREENE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 00–8262. MELENDEZ *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8266. FAIN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8275. PINNAVAIA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 243 F. 3d 566.

No. 00–8284. HOLLINGSWORTH *v.* FREEH, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8304. HANNAFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 515.

No. 00–8333. MORALES CERVANTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 219 F. 3d 882.

No. 00–8343. DAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–8352. GARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 237 F. 3d 631.

No. 00–8355. RINALDI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 3d 1131.

No. 00–8356. SALCEDO-VILLANUEVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 385.

No. 00–8362. ROJAS-MENDOZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–8364. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 635.

No. 00–8365. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8366. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–8370. FULTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 173 F. 3d 847.

No. 00–8372. HALL, AKA REED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 891.

No. 00–8376. NICHOLSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 231 F. 3d 445.

No. 00–8380. ARECHIGA-GIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 383.

No. 00–8384. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 636.

No. 00–8386. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1271.

No. 00–8387. ANDREWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1354.

No. 00–8394. CARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–8395. QUINN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8403. RICHARDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 1285.

No. 00–8405. BOGGS *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 226 F. 3d 728.

No. 00–8406. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 232 F. 3d 44.

No. 00–8433. NARVAEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 647.

No. 00–8437. MENDOZA-DE LA PARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8438. JOSEPH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 635.

No. 00–8441. DUNBAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 424.

No. 00–8445. RICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 892.

No. 00–8453. DICKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–8458. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1139.

No. 00–8467. SIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 634.

No. 00–8478. FERNANDEZ *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 254 Conn. 637, 758 A. 2d 842.

No. 00–906. ERIE COUNTY, PENNSYLVANIA *v.* ERIE COUNTY RETIREES ASSN. ET AL. C. A. 3d Cir. Motions of Central States, Southeast and Southwest Areas Health and Welfare Fund,

American Association of Health Plans, Inc., et al., and ERISA Industry Committee for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 220 F. 3d 193.

No. 00–948. UNITED AIRLINES, INC. *v.* FRANK ET AL. C. A. 9th Cir. Motions of Council for Employment Law Equity and Equal Employment Advisory Council for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 216 F. 3d 845.

No. 00–1102. BAWAZIR *v.* MAHFOUZ. Ct. App. Wash. Motion of petitioner for leave to lodge documents under seal granted. Certiorari denied. Reported below: 100 Wash. App. 1018.

No. 00–8525. FISHER *v.* NORTH CAROLINA. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 353 N. C. 386, 546 S. E. 2d 610.

Rehearing Denied

No. 00–900. FULTZ *v.* ABB POWER T & D, INC., ET AL., 531 U. S. 1080;

No. 00–913. KERSEY *v.* CRANE ET AL., 531 U. S. 1127;

No. 00–6411. DAWLEY *v.* MANGEL, 531 U. S. 1021;

No. 00–6716. MILLER *v.* GOBER, ACTING SECRETARY OF VETERANS AFFAIRS, 531 U. S. 1026;

No. 00–6754. IN RE GREGORY, 531 U. S. 1009;

No. 00–6809. TRAINER *v.* STILLS, 531 U. S. 1087;

No. 00–6810. VAUGHN *v.* JACKSON, WARDEN, 531 U. S. 1087;

No. 00–6881. JONES *v.* POWELL ET AL., 531 U. S. 1089;

No. 00–6942. SHIVAEE *v.* CUBE, 531 U. S. 1091;

No. 00–6984. IN RE COTHRUM, 531 U. S. 1111;

No. 00–7118. WATLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 531 U. S. 1116; and

No. 00–7361. PURDLE *v.* GROESCH, WARDEN, 531 U. S. 1130. Petitions for rehearing denied.

No. 99–2041. VALLONE *v.* UNITED STATES, 531 U. S. 825. Motion for leave to file petition for rehearing denied.

March 6, 2001

Miscellaneous Orders

No. 00A767 (00–8810). Richardson *v.* Luebbers, Superintendent, Potosi Correctional Center. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

No. 00A773. Luebbers, Superintendent, Potosi Correctional Center *v.* Richardson. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit on March 6, 2001, presented to Justice Thomas, and by him referred to the Court, granted. Justice Stevens, Justice Ginsburg, and Justice Breyer would deny the application to vacate the stay of execution.

Certiorari Denied

No. 00–8505 (00A702). Dowthitt *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Justice Stevens and Justice Ginsburg would grant the application for stay of execution. Reported below: 230 F. 3d 733.

March 7, 2001

Certiorari Denied

No. 00–8824 (00A775). Dowthitt *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this application and this petition.

March 9, 2001

Certiorari Denied

No. 00–8867 (00A782). Fisher *v.* North Carolina. Sup. Ct. N. C. Application for stay of execution of sentence of death,

presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

MARCH 16, 2001

Miscellaneous Order

No. 00–6677. PENRY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. [Certiorari granted, 531 U. S. 1010.] Motion of Alabama for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 19, 2001

Certiorari Granted—Reversed and Remanded. (See No. 00–1028, *ante,* p. 17.)

Certiorari Dismissed. (See No. 00–7895, *infra.*)

No. 00–7868. ALFORD *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein.

No. 00–7944. RICHARDSON *v.* DICK. Cir. Ct. Berkeley County, W. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein.

Miscellaneous Orders

No. 00A718. CREAMER *v.* UNITED STATES. Application for release, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. D–2226. IN RE DISBARMENT OF PARTEN. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. 00M72. CUELLAR *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 130, Orig. NEW HAMPSHIRE *v.* MAINE. Motion of the Acting Solicitor General for leave to participate in oral argument granted. JUSTICE SOUTER took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 531 U. S. 1066.]

No. 99–1786. GREAT-WEST LIFE & ANNUITY INSURANCE CO. ET AL. *v.* KNUDSON ET AL. C. A. 9th Cir. [Certiorari granted, 531 U. S. 1124.] Motion of respondents to dismiss the writ of certiorari as improvidently granted is denied. Richard G. Taranto, Esq., of Washington, D. C., is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 00–151. UNITED STATES *v.* OAKLAND CANNABIS BUYERS' COOPERATIVE ET AL. C. A. 9th Cir. [Certiorari granted, 531 U. S. 1010.] Motion of Sudi Pebbles Trippet for leave to file a brief as *amicus curiae* granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 00–507. CHICKASAW NATION *v.* UNITED STATES; and CHOCTAW NATION OF OKLAHOMA *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 531 U. S. 1124.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 00–795. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Holder* v. *Free Speech Coalition*, 531 U. S. 1124.] Motions of Morality in Media, Inc., and Sam Brownback et al. for leave to file briefs as *amici curiae* granted.

No. 00–6374. BECKER *v.* MONTGOMERY, ATTORNEY GENERAL OF OHIO, ET AL. C. A. 6th Cir. [Certiorari granted, 531 U. S. 1069, 1110.] Motion of respondents for divided argument denied.

No. 00–7813. SCHWARTZ *v.* PENNSYLVANIA. Super. Ct. Pa.;
No. 00–8023. RICE *v.* CITY OF OAKLAND ET AL. C. A. 9th Cir.; and
No. 00–8532. PALMIERI *v.* UNITED STATES ET AL. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 9, 2001, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 00–7895. IN RE RETTIG. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of common-law certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 00–904. IN RE MCKENZIE;
No. 00–7490. IN RE EVANS;
No. 00–8631. IN RE JACKSON ET AL.;
No. 00–8676. IN RE MERRITT; and
No. 00–8690. IN RE SAMUEL. Petitions for writs of habeas corpus denied.

No. 00–1143. IN RE LEJANO ET AL.;
No. 00–8401. IN RE TACKETT;
No. 00–8415. IN RE HARRISON; and
No. 00–8427. IN RE METTETAL. Petitions for writs of mandamus denied.

No. 00–8157. IN RE ALFORD. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1

(1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 00–1290. IN RE PERRY. Motion of petitioner to defer consideration of petition for writ of mandamus and/or prohibition denied. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 97–8812. LAMBERT *v.* BLACKWELL, ADMINISTRATOR, EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 134 F. 3d 506.

No. 00–584. WILLIAM *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 217 F. 3d 340.

No. 00–607. GRAY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 51 M. J. 1.

No. 00–650. SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS *v.* KAMUF. C. A. 8th Cir. Certiorari denied. Reported below: 221 F. 3d 1342.

No. 00–711. RICCIARDI ET AL. *v.* GRANT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 225 F. 3d 648.

No. 00–770. KAISER ALUMINUM & CHEMICAL CORP. *v.* DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 214 F. 3d 586.

No. 00–788. ZEIREI AGUDATH ISRAEL BOOKSTORE ET AL. *v.* AVIS RENT-A-CAR SYSTEM, INC. C. A. 11th Cir. Certiorari denied. Reported below: 211 F. 3d 1228.

No. 00–869. WILSON *v.* HALEY, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 211 F. 3d 598.

No. 00–919. STEVENSON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 53 M. J. 257.

No. 00–947. WILSON *v.* NEAL. Sup. Ct. Ark. Certiorari denied. Reported below: 341 Ark. 282, 16 S. W. 3d 228.

No. 00–972. CONTEMPORARY MEDIA, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 214 F. 3d 187.

No. 00–995. PIZZA HUT, INC. *v.* PAPA JOHN'S INTERNATIONAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 227 F. 3d 489.

No. 00–1020. BOROFF *v.* VAN WERT CITY BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 220 F. 3d 465.

No. 00–1027. TRACY *v.* BAPTIST HEALTHCARE SYSTEM, INC. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1360.

No. 00–1071. CARRERAS-ROSA *v.* ALVES-CRUZ ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 215 F. 3d 1311.

No. 00–1076. TUNSTALL, A MINOR, BY AND THROUGH HER MOTHER, TUNSTALL, ET AL. *v.* BERGESON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WASHINGTON, ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 141 Wash. 2d 201, 5 P. 3d 691.

No. 00–1108. ADAMS OUTDOOR ADVERTISING *v.* CITY OF EAST LANSING. Sup. Ct. Mich. Certiorari denied. Reported below: 463 Mich. 17, 614 N. W. 2d 634.

No. 00–1110. ELAMIR ET AL. *v.* MAGNET RESOURCES, INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–1116. DAVIS *v.* NICHOLS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 230 F. 3d 1362.

No. 00–1119. CRYSEN/MONTENAY ENERGY CO. *v.* SHELL OIL CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 226 F. 3d 160.

No. 00–1122. B. C. ROGERS PROCESSORS, INC., ET AL. *v.* BOC GROUP, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 229 F. 3d 1321.

No. 00–1123. FEIST ET AL. *v.* CONSOLIDATED FREIGHTWAYS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 216 F. 3d 1075.

No. 00–1126. SCOTT *v.* NORFOLK SOUTHERN CORP. ET AL. C. A. 4th Cir. Certiorari denied.

No. 00–1128. SIERRA MEDICAL CENTER *v.* CRONIN ET UX. Ct. App. N. M. Certiorari denied. Reported below: 129 N. M. 521, 10 P. 3d 845.

No. 00–1129. ODDI ET UX. *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 136.

No. 00–1130. NEWMAN *v.* ECKERD CORP. C. A. 11th Cir. Certiorari denied. Reported below: 235 F. 3d 1346.

No. 00–1135. JAMES ET AL. *v.* MAZDA MOTOR CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 222 F. 3d 1323.

No. 00–1140. CAIN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 00–1144. MCPHAUL *v.* BOARD OF COMMISSIONERS OF MADISON COUNTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 226 F. 3d 558.

No. 00–1151. GORE *v.* TRANS WORLD AIRLINES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 210 F. 3d 944.

No. 00–1153. MCDONNELL *v.* COMMITTEE ON CHARACTER AND FITNESS, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 00–1154. ROGERS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 221 F. 3d 1349.

No. 00–1157. C DE BACA *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 11 P. 3d 426.

No. 00–1163. BASS *v.* BOARD OF MEDICAL EXAMINERS OF NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 00–1164. FIREFIGHTERS' INSTITUTE FOR RACIAL EQUALITY ET AL. *v.* CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 220 F. 3d 898.

No. 00–1166. TOWNSEND *v.* KNIGHT-RIDDER, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 235 F. 3d 1346.

No. 00–1169. BOYKIN *v.* ENTERGY OPERATIONS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1339.

No. 00–1172. HASKOURI *v.* UNIVERSITY OF TEXAS AT BROWNSVILLE. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 706.

No. 00–1176. OBERMEYER *v.* ALASKA BAR ASSN. Sup. Ct. Alaska. Certiorari denied.

No. 00–1177. BEIERLE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–1184. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–1189. MCKEITHEN, LOUISIANA SECRETARY OF STATE, ET AL. *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 226 F. 3d 412.

No. 00–1190. KNEZEVICH *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 165 Ore. App. 315, 995 P. 2d 598.

No. 00–1191. SWARTZ *v.* DICKINSON, COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 243 F. 3d 566.

No. 00–1201. TOTH ET AL. *v.* SOUTH BEND COMMUNITY SCHOOL CORPORATION. Ct. App. Ind. Certiorari denied. Reported below: 732 N. E. 2d 252.

No. 00–1204. THERESA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–1211. WOJCIECHOWSKI *v.* WALT DISNEY CONCERT HALL NO. 1 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 221 F. 3d 1350.

No. 00–1216. VENEZIA *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 230 F. 3d 1350.

No. 00–1217. DIXON *v.* REGENTS OF THE UNIVERSITY OF NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 388.

No. 00–1218. MCCARTHY *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 221 F. 3d 1119.

No. 00–1219. WEBB *v.* A B CHANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 706.

No. 00–1224. GRACE, EXECUTRIX OF THE ESTATE OF GRACE, ET AL. *v.* GENSER. C. A. 2d Cir. Certiorari denied. Reported below: 228 F. 3d 40.

No. 00–1226. GILBERT *v.* BALTIMORE COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 887.

No. 00–1229. SAFFOLD *v.* HILLSIDE REHABILITATION HOSPITAL ET AL. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 00–1230. SLOAN *v.* CHRISTY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–1235. GIULIANI, MAYOR OF CITY OF NEW YORK, ET AL. *v.* YOURMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 229 F. 3d 124.

No. 00–1237. GRAVES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 415.

No. 00–1238. BOISE CASCADE CORP. *v.* OREGON, BY AND THROUGH THE OREGON STATE BOARD OF FORESTRY. Ct. App. Ore. Certiorari denied. Reported below: 164 Ore. App. 114, 991 P. 2d 563.

No. 00–1252. MEEK *v.* BISHOP ET AL. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 00–1266. FOGH *v.* LANE COUNTY CIRCUIT COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 428.

No. 00–1271. TAYLOR *v.* HENDERSON, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 221 F. 3d 1336.

No. 00–1278. FARRELL-FRANCIS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 54 M. J. 364.

No. 00–1280. SNELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 221 F. 3d 1336.

No. 00–1282. TARSNEY ET AL. *v.* O'KEEFE, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 225 F. 3d 929.

No. 00–1285. PHILIP *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 414.

No. 00–1288. YONG HO AHN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 231 F. 3d 26.

No. 00–6700. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 228 F. 3d 409.

No. 00–6740. SUSTACHE-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 221 F. 3d 8.

No. 00–6782. MAUK *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 242 Ga. App. 191, 529 S. E. 2d 197.

No. 00–6806. WADDELL *v.* UNIVERSITY OF MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 221 F. 3d 1346.

No. 00–6831. FISH *v.* GAINESVILLE CITY SCHOOL DISTRICT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 194 F. 3d 1324.

No. 00–6887. VALDEZ ET UX. *v.* PROPERTY RESERVE, INC., ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 93 Haw. 313, 2 P. 3d 143.

No. 00–7006. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 220 F. 3d 592.

No. 00–7011. HAMEEN, AKA FERGUSON *v.* DELAWARE. C. A. 3d Cir. Certiorari denied. Reported below: 212 F. 3d 226.

No. 00–7031. KAFKA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 222 F. 3d 1129.

No. 00–7040. WOOD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–7063. SPREITZER *v.* SCHOMIG, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 219 F. 3d 639.

No. 00–7159. TROBAUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–7191. RAUCH *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7245. ABDULLAH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 226 F. 3d 646.

No. 00–7449. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 194 F. 3d 1322.

No. 00–7472. BROWN *v.* DELANEY, ACTING SECRETARY OF THE AIR FORCE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 217 F. 3d 837.

No. 00–7489. EVANS *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 220 F. 3d 306.

No. 00–7807. REED *v.* BOOKER, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–7812. SHELTON *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–7814. ROBINSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 779 So. 2d 273.

No. 00–7822. CHALMERS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 28 S. W. 3d 913.

No. 00–7829. VEALE ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 230 F. 3d 1347.

No. 00–7830. LOZANO *v.* OHLRICH ET AL. Sup. Ct. Cal. Certiorari denied.

No. 00–7835. JASON ET AL. *v.* JAMES BYRD, JR., FOUNDATION FOR RACIAL HEALING. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 00–7837. ROYBAL *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 00–7839. SWINFORD *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7841. BAYON *v.* STATE UNIVERSITY OF NEW YORK AT BUFFALO ET AL. C. A. 2d Cir. Certiorari denied.

No. 00–7842. BROWN *v.* HODGES, GOVERNOR OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 410.

No. 00–7848. NICKERSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7849. SMITH *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–7851. COLEMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7855. SIGSBEY *v.* WOLFORD ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 00–7856. PHIPPS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 00–7858. MURRAY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–7862. BROWN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–7864. MCCOY *v.* PINCHAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–7873. MINCEY *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 206 F. 3d 1106.

No. 00–7877. DALLAS *v.* BEECHER ET AL. C. A. 7th Cir. Certiorari denied.

No. 00–7878. CARTER *v.* PURYEAR. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 00–7881. BOGLE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ARIZONA (STEWART, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 00–7885. GONZALEZ *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7887. CRUZ *v.* DEEDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 211 F. 3d 1264.

No. 00–7892. BRUNS *v.* STEWART. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 1276.

No. 00–7898. REAVES *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 213 F. 3d 626.

No. 00–7899. SULLIVAN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 00–7902. RAFAEL AVILES *v.* SMALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 893.

No. 00–7903. BEAVER *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 00–7905. SPEER *v.* DELOACH, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 709.

No. 00–7907. ROBINSON *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–7909. CONLEY *v.* GHEE. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1151.

No. 00–7912. DANIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–7913. DICKENS-LAWRENCE *v.* KLOSTER CRUISE LTD. C. A. 11th Cir. Certiorari denied. Reported below: 211 F. 3d 597.

No. 00–7914. COLLINS ET AL. *v.* FCC CARD NATIONAL BANK. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–7915. DAWSON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 301 Mont. 135, 10 P. 3d 49.

No. 00–7916. DUNN *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–7918. SPEARMAN *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–7920. SPENCER *v.* ROBINSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 889.

No. 00–7923. MARKSBERRY *v.* CONLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–7924. BAMBURG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–7925. PHU XUAN BUI *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 00–7928. THOMPSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–7934. CLEWIS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7935. ESTRADA *v.* BUREAU OF WORKERS' COMPENSATION ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–7937. ARMIJO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7938. BROWN *v.* OKLAHOMA JUVENILE DISTRICT COURT ET AL. Sup. Ct. Okla. Certiorari denied.

No. 00–7939. CHURCHWELL *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 221 F. 3d 1351.

No. 00–7941. COSTLEY *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1142.

No. 00–7943. BANTAM *v.* CURRAN, ATTORNEY GENERAL OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1141.

No. 00–7945. ANDERSON *v.* KRAFT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 886.

No. 00–7946. BRANDON *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1150.

No. 00–7948. CROSKEY *v.* RICE, SHERIFF, PINELLAS COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–7949. EDWARDS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7950. DORTCH ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 312 Ill. App. 3d 1202, 769 N. E. 2d 570.

No. 00–7951. HOSKINS *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1273.

No. 00–7952. FRANZA *v.* STINSON, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–7960. SHARKEY *v.* MOYA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 29.

No. 00–7970. RIDGLEY *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7971. RENTERIA *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–7972. PRINCE *v.* NEW MEXICO EX REL. CHILDREN, YOUTH AND FAMILIES DEPARTMENT. Ct. App. N. M. Certiorari denied.

No. 00–7978. FANTAYE *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 412.

No. 00–7979. GARNER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 116 Nev. 770, 6 P. 3d 1013.

No. 00–7980. FILIPOS *v.* SEARS, ROEBUCK & CO. Super. Ct. Pa. Certiorari denied. Reported below: 760 A. 2d 436.

No. 00–7983. STEELE *v.* HAMILTON COUNTY COMMUNITY HEALTH BOARD. Sup. Ct. Ohio. Certiorari denied. Reported below: 90 Ohio St. 3d 176, 736 N. E. 2d 10.

No. 00–7985. SANDERS *v.* PATRICK, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–7993. CRANE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 269 Kan. 578, 7 P. 3d 285.

No. 00–7996. MINNIECHESKE *v.* FARREY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 00–7998. LESTER YOUNG *v.* G. E. CAPITAL MORTGAGE SERVICES, INC. Ct. App. Tenn. Certiorari denied.

No. 00–8001. SAFOUANE ET UX. *v.* WASHINGTON ET AL. Ct. App. Wash. Certiorari denied. Reported below: 101 Wash. App. 60, 6 P. 3d 11.

No. 00–8004. MASSEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 29.

No. 00–8005. KARLS *v.* WISCONSIN ET AL. Ct. App. Wis. Certiorari denied.

No. 00–8006. BANNISTER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–8007. CARTER *v.* TESSMER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 00–8010. JOHNSON *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 768 So. 2d 934.

No. 00–8012. TREVINO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8013. JONES *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 217 F. 3d 839.

No. 00–8015. ARNOLD *v.* WOLFE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8017. MCLEOD *v.* BOOKER, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8019. MURRAY *v.* GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 270 App. Div. 2d 974, 706 N. Y. S. 2d 298.

No. 00–8022. NEGRON *v.* RAY ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8026. CARDENAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8036. ILLIG *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8037. CHAVEZ *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8044. SIMS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8050. WILLIAMS *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8051. GOLPHIN *v.* NORTH CAROLINA; and
No. 00–8052. GOLPHIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 352 N. C. 364, 533 S. E. 2d 168.

No. 00–8056. BEACH *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 900.

No. 00–8060. SCHAFFER *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 216 F. 3d 1076.

No. 00–8062. REEVES *v.* WHIDDON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–8063. MORTON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 155 N. J. 383, 715 A. 2d 228, and 165 N. J. 235, 757 A. 2d 184.

No. 00–8069. DANIEL *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. Mo. Certiorari denied.

No. 00–8076. KENNEY, FKA FEASTER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 156 N. J. 1, 716 A. 2d 395, and 165 N. J. 388, 757 A. 2d 266.

No. 00–8078. LAWRENCE *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–8084. RAKHSHAN *v.* NORTON, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied.

No. 00–8094. CARTER *v.* DUNCAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 382.

No. 00–8095. CHAPMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 897.

No. 00–8098. OCKENHOUSE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 562 Pa. 481, 756 A. 2d 1130.

No. 00–8108. RINGO *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 30 S. W. 3d 811.

No. 00–8112. SPOTZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 562 Pa. 498, 756 A. 2d 1139.

No. 00–8117. PETRICK *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 767 So. 2d 1210.

No. 00–8119. REGISTER *v.* UNITED STATES; and
No. 00–8411. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–8127. BAILEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8128. HAKIM, FKA QUINCE *v.* HICKS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 223 F. 3d 1244.

No. 00–8142. DOOLEY *v.* STUBBLEFIELD, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–8144. CONLEY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 270 Kan. 18, 11 P. 3d 1147.

No. 00–8146. DORCH *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 779 So. 2d 270.

No. 00–8151. INCIARRANO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 763 So. 2d 339.

No. 00–8159. RADOVICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1160.

No. 00–8169. DECK *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8192. GOMEZ *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–8196. HUTTON *v.* GROOSE. C. A. 8th Cir. Certiorari denied.

No. 00–8200. HILLIARD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 759 So. 2d 82.

No. 00–8216. RICE *v.* KUHLMANN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8232. FORDJOUR *v.* SONCHIK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 215 F. 3d 1332.

No. 00–8245. HINTON *v.* GAMBLE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 215 F. 3d 1330.

No. 00–8251. BRITO *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 427.

No. 00–8269. GASHO *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–8286. HASSON *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–8293. TOLBERT *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8317. CHOICE *v.* BROGTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 411.

No. 00–8337. JOHNSON *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8345. BORGE *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied.

No. 00–8347. CAMARENA *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8351. WERMERS *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 378.

No. 00–8353. ROGERS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 776 So. 2d 276.

No. 00–8368. SCHAPIRO *v.* SCHAPIRO. Super. Ct. Pa. Certiorari denied. Reported below: 757 A. 2d 1005.

No. 00–8373. HEINEMANN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 12 P. 3d 692.

No. 00–8385. WATSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 771 So. 2d 1177.

No. 00–8389. DAMMERAU *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–8390. WAGNER *v.* SHORTRIDGE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 00–8397. HOUSTON *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8402. DAY *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 00–8408. FUGETT *v.* MACK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8440. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 791 So. 2d 979.

No. 00–8442. COLE *v.* MERKLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 673.

No. 00–8456. FERRIN NAVARRETE *v.* UNITED STATES; and
No. 00–8463. FERRIN NAVARRETE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 709.

No. 00–8457. BILAL *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1351.

No. 00–8468. BURR *v.* GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 276 App. Div. 2d 947, 715 N. Y. S. 2d 921.

No. 00–8470. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 426.

No. 00–8477. QUINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8479. HAYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 231 F. 3d 663.

No. 00–8481. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 370.

No. 00–8486. ALLSTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 254 F. 3d 1079.

No. 00–8491. LINTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 232 F. 3d 536.

No. 00–8494. COLEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1160.

No. 00–8495. ELLIS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 232 F. 3d 619.

No. 00–8496. GARCIA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 217.

No. 00–8497. HANDLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 221 F. 3d 1344.

No. 00–8498. HARVEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 232 F. 3d 585.

No. 00–8508. ANTONIO MEJIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 230 F. 3d 1368.

No. 00–8514. ROBERTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 00–8523. ODOM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1153.

No. 00–8529. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 418.

No. 00–8530. ZAPATA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 369.

No. 00–8534. COLEMAN *v.* STATE FARM FIRE & CASUALTY CO. C. A. 4th Cir. Certiorari denied.

No. 00–8535. HETHERINGTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8541. DE LA FUENTE-RAMOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–8543. ALMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–8544. BRAMWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–8548. MANGONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 00–8550. POWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 3d 1131.

No. 00–8556. BEASLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1160.

No. 00–8559. CHAVEZ-LOPEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–8560. SABUR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–8562. DUNCAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1354.

No. 00–8564. KIMBERLIN *v.* DEWALT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 538.

No. 00–8565. MARTIN *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1152.

No. 00–8569. BAILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–8571. CHAKLADER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 232 F. 3d 343.

No. 00–8574. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 463.

No. 00–8577. LILLIE *v.* EGELHOFF ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–8589. SANDOVAL ROCCA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–8591. KINTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 235 F. 3d 192.

No. 00–8599. VICUNA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–789. ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND ET AL. *v.* RUBINSTEIN; and

No. 00–996. RUBINSTEIN *v.* ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of these petitions. Reported below: 218 F. 3d 392.

No. 00–1200. BINNS *v.* WAL-MART STORES, INC. Sup. Ct. Ark. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 00–7911. DEWBERRY *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 00–1263. BALLS *v.* AT&T CORP. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 229 F. 3d 1137.

Rehearing Denied

No. 99–9869. ACIERTO *v.* MERIT SYSTEMS PROTECTION BOARD, 531 U. S. 848;

No. 00–833. LEHTO *v.* TEXAS, 531 U. S. 1126;

No. 00–6224. SIMPSON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 531 U. S. 1017;

No. 00–6582. ROSE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1041;

No. 00–6659. STEELE *v.* BEARY ET AL., 531 U. S. 1084;

No. 00–6728. KILLICK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 531 U. S. 1085;

No. 00–7056. PARROTT *v.* CALIFORNIA, 531 U. S. 1115;

No. 00–7131. IN RE UFOM, 531 U. S. 1068;

No. 00–7225. IN RE RICH, 531 U. S. 1068;

No. 00–7329. SEDGWICK *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL., 531 U. S. 1159;

No. 00–7366. GECE *v.* ATLANTIC CITY MEDICAL CENTER, 531 U. S. 1160;

No. 00–7500. NYHUIS *v.* UNITED STATES, 531 U. S. 1131; and

No. 00–7565. LAVENTURE *v.* FLORIDA, 531 U. S. 1132. Petitions for rehearing denied.

No. 00–893. MILTON *v.* JACKSON PUBLIC SCHOOLS, 531 U. S. 1127. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 26, 2001

Certiorari Granted—Vacated and Remanded

No. 99–1378. CIRCUIT CITY STORES, INC. *v.* AHMED. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Circuit City Stores, Inc.* v. *Adams*, *ante*, p. 105. Reported below: 195 F. 3d 1131.

No. 99–1648. CIRCUIT CITY STORES, INC. *v.* INGLE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Circuit City Stores, Inc.* v. *Adams*, *ante*, p. 105.

No. 00–426. CIRCUIT CITY STORES, INC. *v.* AL-SAFIN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case re-

manded for further consideration in light of *Circuit City Stores, Inc.* v. *Adams, ante,* p. 105.

Certiorari Dismissed

No. 00–8155. HAWKINS *v.* MORSE ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 194 F. 3d 1312.

No. 00–8504. SYVERTSON *v.* NORTH DAKOTA; and

No. 00–8522. SYVERTSON *v.* SCHUETZLE, WARDEN. Sup. Ct. N. D. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein. Reported below: No. 00–8504, 620 N. W. 2d 362.

Miscellaneous Orders

No. 00A833. MASSIE, BY AND THROUGH KROLL, NEXT FRIEND *v.* WOODFORD, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, dismissed.

No. 00A834. WOODFORD, WARDEN, ET AL. *v.* CALIFORNIA FIRST AMENDMENT COALITION ET AL. C. A. 9th Cir. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–2233. IN RE DISBARMENT OF MANDEL. Disbarment entered. [For earlier order herein, see 531 U. S. 1122.]

No. 00M74. DOOLITTLE *v.* BAUGH ET AL.; and

No. 00M75. CITY COLLEGES OF CHICAGO ET AL. *v.* WESTCAP ENTERPRISES, INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00–492. ALABAMA *v.* BOZEMAN. Sup. Ct. Ala. [Certiorari granted, 531 U. S. 1051.] Motion of the Acting Solicitor Gen-

eral for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–549. CEDRIC KUSHNER PROMOTIONS, LTD. *v.* KING ET AL. C. A. 2d Cir. [Certiorari granted, 531 U. S. 1050.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–5961. TYLER *v.* CAIN, WARDEN. C. A. 5th Cir. [Certiorari granted, 531 U. S. 1051.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–1021. RUSH PRUDENTIAL HMO, INC. *v.* MORAN ET AL. C. A. 7th Cir.; and

No. 00–1072. EDELMAN *v.* LYNCHBURG COLLEGE. C. A. 4th Cir. The Acting Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 00–6567. DUSENBERY *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 531 U. S. 1189.] Motion for appointment of counsel granted, and it is ordered that Allison M. Zieve, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 00–7570. PARKER *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [531 U. S. 1136] denied.

No. 00–8777. IN RE CANNON; and

No. 00–8780. IN RE MCMINN. Petitions for writs of habeas corpus denied.

No. 00–1223. IN RE BRAUN;

No. 00–8124. IN RE BOONE;

No. 00–8221. IN RE FISH; and

No. 00–8531. IN RE WILLIAMS. Petitions for writs of mandamus denied.

No. 00–8223. IN RE FOSTER. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 99–1823. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* WAFFLE HOUSE, INC. C. A. 4th Cir. Certiorari granted. Reported below: 193 F. 3d 805.

No. 00–730. ADARAND CONSTRUCTORS, INC. *v.* MINETA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari granted.* Reported below: 228 F. 3d 1147.

No. 00–8727. MCCARVER *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 353 N. C. 366, 548 S. E. 2d 522.

Certiorari Denied

No. 00–265. MANNING, EXECUTOR OF THE ESTATE OF WEST *v.* HAYES. C. A. 5th Cir. Certiorari denied. Reported below: 212 F. 3d 866.

No. 00–745. HOLLINGSWORTH ET AL. *v.* LANE COMMUNITY COLLEGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 173 F. 3d 860.

No. 00–1012. KARUK TRIBE OF CALIFORNIA ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 209 F. 3d 1366.

No. 00–1031. LADY *v.* OUTBOARD MARINE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 228 F. 3d 598.

No. 00–1134. PRIMETIME 24 JOINT VENTURE *v.* NATIONAL FOOTBALL LEAGUE. C. A. 2d Cir. Certiorari denied. Reported below: 211 F. 3d 10.

No. 00–1147. ROGERS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1168. ROYAL DUTCH PETROLEUM CO. ET AL. *v.* WIWA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 226 F. 3d 88.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 967.]

No. 00–1174. FULTON COUNTY, GEORGIA, ET AL. *v.* WEBSTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 218 F. 3d 1267.

No. 00–1178. FINE ET AL. *v.* AMERICA ONLINE, INC. Ct. App. Ohio, Lorain County. Certiorari denied. Reported below: 139 Ohio App. 3d 133, 743 N. E. 2d 416.

No. 00–1179. HARRISON *v.* KAINRAD, JUDGE, COURT OF COMMON PLEAS OF OHIO, PORTAGE COUNTY. C. A. 6th Cir. Certiorari denied.

No. 00–1197. M. S., ON BEHALF OF S. S., HIS MINOR CHILD *v.* BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF YONKERS. C. A. 2d Cir. Certiorari denied. Reported below: 231 F. 3d 96.

No. 00–1198. CAYETANO, GOVERNOR OF HAWAII, ET AL. *v.* CHEVRON U. S. A. INC. C. A. 9th Cir. Certiorari denied. Reported below: 224 F. 3d 1030.

No. 00–1202. CITY OF TALLAHASSEE *v.* EDWARDS. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 636.

No. 00–1205. WEBB ET AL. *v.* BOARD OF TRUSTEES OF BALL STATE UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1275.

No. 00–1207. ANTONIO C. (ANONYMOUS) *v.* DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, COUNTY OF NASSAU, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 273 App. Div. 2d 304, 710 N. Y. S. 2d 530.

No. 00–1208. NELSON, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, NELSON *v.* NOTTO & HILLIARD CONTRACTING SERVICES, INC., ET AL. Ct. App. La., 1st Cir. Certiorari denied.

No. 00–1215. LUTTRELL *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1361.

No. 00–1222. JONES *v.* PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 229 F. 3d 1138.

No. 00–1236. GREENE ET UX. *v.* FIRST BANK ET AL. Ct. App. N. C. Certiorari denied. Reported below: 136 N. C. App. 670, 531 S. E. 2d 506.

No. 00–1248. LURIE *v.* WITTNER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 228 F. 3d 113.

No. 00–1253. BOONE ET AL. *v.* FISHER ET AL. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 00–1265. MORETTI *v.* UNITED WATER RESOURCES, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–1289. MACKEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 226 F. 3d 773.

No. 00–1292. BARRETT *v.* BOROUGH OF CARLISLE. Commw. Ct. Pa. Certiorari denied. Reported below: 758 A. 2d 774.

No. 00–1299. HENLEY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 53 M. J. 488.

No. 00–1303. PAGAN *v.* UNITED STATES;
No. 00–8539. GONZALEZ *v.* UNITED STATES; and
No. 00–8665. FELICIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 223 F. 3d 102.

No. 00–1308. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. *v.* REIMER EXPRESS WORLD CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 230 F. 3d 934.

No. 00–1320. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 757 A. 2d 87.

No. 00–1348. MIZELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1078.

No. 00–1352. KENNEDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 225 F. 3d 1187.

No. 00–1354. STEIN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 233 F. 3d 6.

No. 00–6619. DEAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 215 F. 3d 820.

No. 00–6949. ALVAREZ-MELGOZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 417.

No. 00–7177. FOSTER *v.* NEAL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 223 F. 3d 626.

No. 00–7189. CURRY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 228 F. 3d 408.

No. 00–7280. MURPHY *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–7587. WESBROOK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 29 S. W. 3d 103.

No. 00–7605. HUTZELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 217 F. 3d 966.

No. 00–7642. BOWENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 224 F. 3d 302.

No. 00–7649. MORROW *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 272 Ga. 691, 532 S. E. 2d 78.

No. 00–7657. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 1276.

No. 00–7692. JOHNSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 342 Ark. 186, 27 S. W. 3d 405.

No. 00–7863. WALKER *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8033. GLADSTONE *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. C. A. 11th Cir. Certiorari denied.

No. 00–8038. DAVIS *v.* KAISER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 216 F. 3d 1086.

No. 00–8039. CLARDY *v.* MCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8041. BATTIE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 766 So. 2d 1053.

No. 00–8043. DRINKARD *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1352.

No. 00–8045. REFFUSE *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 00–8048. JOHNSON *v.* GIBSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–8049. ZENTHOFER *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 00–8055. DESMOND *v.* SNYDER ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–8057. PELLEGRINO *v.* FITZGERALD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 221 F. 3d 1343.

No. 00–8059. BROUSSARD *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8065. CHURCHWELL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–8067. DAVIES *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 730 N. E. 2d 726.

No. 00–8068. CASPER *v.* GUNITE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 221 F. 3d 1338.

No. 00–8075. RAMIREZ *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 00–8080. BANCROFT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 30.

No. 00–8091. GARCIA ESPINOZA *v.* RUIZ ET UX. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 00–8096. CARLSON *v.* BUSH, GOVERNOR OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 578.

No. 00–8104. KEARSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 770 So. 2d 1119.

No. 00–8106. JEFFERSON *v.* ROCKETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 136.

No. 00–8111. BLOUNT *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8113. POSADA *v.* NEAL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1273.

No. 00–8118. PHILLIPS *v.* GARRETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 237 F. 3d 630.

No. 00–8120. BAKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8121. BROWN *v.* MITCHEM. C. A. 11th Cir. Certiorari denied.

No. 00–8125. PALADIN *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8133. HOLDER *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied.

No. 00–8140. CASEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 00–8141. EDWARDS *v.* BELL. C. A. 6th Cir. Certiorari denied.

No. 00–8147. HAMILTON *v.* HONSTED, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8149. HENNIGAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–8150. HELWIG *v.* RAYCROFT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 211 F. 3d 1269.

No. 00–8152. GONCALVES *v.* RYDER, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied.

No. 00–8153. HARRIS *v.* NEELY. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1342.

No. 00–8154. FARRIS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 224 F. 3d 764.

No. 00–8156. HINOJOSA *v.* WACHOVIA BANK OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 00–8161. SANTOS *v.* ADIRONDACK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8162. SYVERTSON *v.* MALAKTARIS ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 622 N. W. 2d 432.

No. 00–8167. TRAN *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8170. CONTRERAS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8171. DUNCAN *v.* BOOKER, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8177. TIMMONS *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 655.

No. 00–8178. WALTON *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8179. COLEMAN *v.* CHILDS, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8183. GARATE *v.* HOOD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8184. HICKEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8185. HARRIS *v.* STOVALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 212 F. 3d 940.

No. 00–8187. LOGAN *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8188. HAYDEN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8191. GRAY *v.* ZAVARAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 901.

No. 00–8193. BELLAH *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 00–8194. BOLES *v.* EMSA CORRECTIONAL CARE, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 230 F. 3d 1362.

No. 00–8197. HINES *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8199. GRAVES *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–8201. GROSS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 765 So. 2d 39.

No. 00–8202. IRVING *v.* BRAXTON, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 00–8203. FLOYD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8205. DIXON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8207. CAMPBELL *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8210. DAVIS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 388.

No. 00–8214. JOHNSON *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8215. MATHISON *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8218. ALI *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 228 F. 3d 408.

No. 00–8219. BORRERO BEJERANO *v.* GILLIS. C. A. 3d Cir. Certiorari denied.

No. 00–8234. HOWARD *v.* DOUGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 221 F. 3d 1334.

No. 00–8241. HALL *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8260. GARNER *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–8261. HOBBS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8268. FRAZIER *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8271. GALLEGOS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8272. GARCIA *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8277. FORD *v.* BRESLIN, SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8278. FLOREZ *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8281. GUILLERMO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8282. GONZALES *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8294. CULLEN *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8296. MCGUIRE *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 00–8305. FRANCIS *v.* CHEMICAL BANKING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 213 F. 3d 626.

No. 00–8318. SMITH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 352 N. C. 531, 532 S. E. 2d 773.

No. 00–8325. SCOTT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 561 Pa. 617, 752 A. 2d 871.

No. 00–8329. MOORE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 225 F. 3d 495.

No. 00–8332. BACON *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 470.

No. 00–8339. MATHIS *v.* SHAVERS CHEVROLET ET AL. C. A. 7th Cir. Certiorari denied.

No. 00–8371. GONZALEZ *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8398. EPPS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 00–8434. PAYMENT *v.* BUREAU OF PRISONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 390.

No. 00–8436. POWELL *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8439. KING *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 82 Cal. App. 4th 1363, 99 Cal. Rptr. 2d 220.

No. 00–8492. MASON *v.* HARVEST FOODS. C. A. 8th Cir. Certiorari denied.

No. 00–8493. MANNING *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8499. GUTIERREZ *v.* SCHOMIG, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 233 F. 3d 490.

No. 00–8515. STEVENS *v.* RURAL DEVELOPMENT AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 3d 1131.

No. 00–8518. POOLE *v.* BRILEY, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 00–8538. FIELDS *v.* DALKON SHIELD CLAIMANTS TRUST. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 410.

No. 00–8540. HERNANDEZ-DOMINGUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–8547. LOPEZ-REVI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8551. DANIELS *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 250 F. 3d 758.

No. 00–8552. CARBIN *v.* PIRIE, ACTING SECRETARY OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 251 F. 3d 171.

No. 00–8570. DAWSON *v.* SNYDER, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 1264.

No. 00–8572. COCKBURN *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 637.

No. 00–8578. COWAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–8586. EPPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8588. MORGAN *v.* KRENKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 232 F. 3d 562.

No. 00–8592. CRYAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 1318.

No. 00–8593. CAMACHO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 1308.

No. 00–8595. TOBIAS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8604. MACARUBBO *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1381.

No. 00–8605. PATTERSON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8610. GARCIA-AYALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 216 F. 3d 1084.

No. 00–8619. BACULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–8625. BROOKS-BEY *v.* KUPEC, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 410.

No. 00–8630. COFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 233 F. 3d 405.

No. 00–8633. MCSHEFFREY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1353.

No. 00–8636. ZEIDELL *v.* PLANTIER, ADMINISTRATOR, NEW JERSEY ADULT DIAGNOSTIC AND TREATMENT CENTER. C. A. 3d Cir. Certiorari denied.

No. 00–8647. BATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1073.

No. 00–8654. MCKENNA *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 675.

No. 00–8656. ROJAS-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–8658. SEARCY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 00–8659. BOYLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 235 F. 3d 1057.

No. 00–8660. CHIRINOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 412.

No. 00–8661. TUCKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 229 F. 3d 1140.

No. 00–8668. HUSBANDS, AKA LNU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–8674. MORENO-ZAMARRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1174.

No. 00–8682. LOWNSBERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 00–8685. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 00–8692. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1355.

No. 00–8694. MORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 00–8700. ROLLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8701. QUINTANA-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 F. 3d 1197.

No. 00–8706. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8708. MASVIDAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1076.

No. 00–8712. WALTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8715. LEYVA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 577.

No. 00–8716. FREENEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 00–1196. WAL-MART STORES, INC. *v.* ROGERS; and

No. 00–1206. ROGERS *v.* WAL-MART STORES, INC. C. A. 6th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 230 F. 3d 868.

No. 00–1212. ALABAMA *v.* GRIFFIN. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 790 So. 2d 351.

Rehearing Denied

No. 99–10101. CHANG *v.* UNITED STATES, 531 U. S. 860;

No. 00–5782. DONTIGNEY *v.* ARMSTRONG, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION, 531 U. S. 961;

No. 00–6347. SIMPSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1082;

No. 00–6429. KALASHO *v.* CITY OF EASTPOINTE ET AL., 531 U. S. 1039;

No. 00–6589. MENSAH *v.* WORKERS' COMPENSATION APPEAL BOARD OF PENNSYLVANIA (NORRELL TEMP AGENCY), 531 U. S. 1083;

No. 00–7171. LEWIS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1129;

No. 00–7250. HARVEY *v.* UNITED STATES, 531 U. S. 1101;

No. 00–7286. GALL *v.* UNITED STATES, 531 U. S. 1101;

No. 00–7414. HENSON *v.* BROMFIELD ET AL., 531 U. S. 1117; and

No. 00–8270. HOLMES *v.* CONROY, WARDEN, ET AL., 531 U. S. 1202. Petitions for rehearing denied.

MARCH 27, 2001

Certiorari Denied

No. 00–9152 (00A835). ERVIN *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MARCH 29, 2001

Miscellaneous Order

No. 00–9199 (00A850). IN RE WORKMAN. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Statement of JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, respecting the denial of the petition for writ of habeas corpus.

As Judge Merritt pointed out in his opinion dissenting from the Court of Appeals' denial of relief last September, see *Workman* v. *Bell*, 227 F. 3d 331, 332 (CA6 2000), this petitioner has raised serious questions concerning his eligibility for the death penalty. When this Court reviewed petitioner's applications for relief in February, I was persuaded that those claims were sufficiently serious to require a full evidentiary hearing before a factfinder. The majority of the Court, however, did not share that opinion. *Workman* v. *Bell*, 531 U. S. 1193. I remain of the view that such

a hearing should be held, but acknowledge that the issue is effectively foreclosed by the action that the Court took in February.

Certiorari Denied

No. 00–9173 (00A843). WORKMAN *v.* BELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 245 F. 3d 849.

No. 00–9198 (00A849). WORKMAN *v.* SUMMERS ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 8 Fed. Appx. 371.

APRIL 2, 2001

Certiorari Granted—Vacated and Remanded

No. 00–965. RAVELO *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000). Reported below: 229 F. 3d 1166.

Certiorari Dismissed

No. 00–8349. DELESPINE *v.* RODRIGUEZ ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.,* at 4, and cases cited therein. Reported below: 232 F. 3d 210.

No. 00–8501. BAKER *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 234 F. 3d 1267.

Miscellaneous Orders

No. 00M76. DOUGHTIE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION;

No. 00M77. CHUNG *v.* BOARD OF PATENT APPEALS AND INTERFERENCES; and

No. 00M79. WEBER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00M78. MELEK *v.* STATE BAR OF CALIFORNIA ET AL. Motion to dispense with printing petition for writ of certiorari in compliance with this Court's Rule 33.1 denied.

No. 00–189. IDAHO *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 531 U. S. 1050.] Motion of respondent Coeur D'Alene Tribe for divided argument granted.

No. 00–391. FLORIDA *v.* THOMAS. Sup. Ct. Fla. [Certiorari granted, 531 U. S. 1069.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–596. LORILLARD TOBACCO CO. ET AL. *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.; and

No. 00–597. ALTADIS U. S. A. INC., AS SUCCESSOR TO CONSOLIDATED CIGAR CORP. AND HAVATAMPA, INC., ET AL. *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. C. A. 1st Cir. [Certiorari granted, 531 U. S. 1068.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–763. POLLARD *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 6th Cir. [Certiorari granted, 531 U. S. 1069.] Motion of Equal Employment Advisory Council et al. for leave to file a brief as *amici curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 00–6933. LEE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. [Certiorari granted, 531 U. S. 1189.] Motion for appointment of counsel granted, and it is ordered that Bonnie I. Robin-Vergeer, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 00–8860. IN RE CARTER; and

No. 00–8910. IN RE BURNS. Petitions for writs of habeas corpus denied.

No. 00–8341. IN RE CLEATON. Petition for writ of mandamus denied.

Certiorari Granted

No. 00–957. KANSAS *v.* CRANE. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 269 Kan. 578, 7 P. 3d 285.

Certiorari Denied

No. 00–914. CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., ET AL. *v.* MCMULLAN, ACTING DEPUTY ADMINISTRATOR, HEALTH CARE FINANCE ADMINISTRATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 212 F. 3d 1084.

No. 00–1065. MILES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 231 F. 3d 889.

No. 00–1066. WILLOUGHBY ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 228 F. 3d 1360.

No. 00–1067. PATIN *v.* MUNSTER ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 760 So. 2d 447.

No. 00–1150. HERMES *v.* NEBRASKA. C. A. 8th Cir. Certiorari denied. Reported below: 230 F. 3d 1363.

No. 00–1220. NEVADACARE, INC. *v.* SIMKINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 729.

No. 00–1221. MARTINI *v.* BOEING CO. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 429.

No. 00–1225. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 224 F. 3d 766.

No. 00–1227. GREENSPRING RACQUET CLUB, INC., ET AL. *v.* BALTIMORE COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 887.

No. 00–1228. GRAVATT ET UX. *v.* SIMPSON & BROWN, INC. C. A. 2d Cir. Certiorari denied. Reported below: 226 F. 3d 108.

No. 00–1233. HARDIN ET AL. *v.* AGUA CALIENTE BAND OF CAHUILLA INDIANS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 223 F. 3d 1041.

No. 00–1239. MILLS *v.* HOME DEPOT, U. S. A., INC. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 34.

No. 00–1257. HENRY *v.* LEAVENWORTH COUNTY BOARD OF COUNTY COMMISSIONERS. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–1258. THOUSAND *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 241 Mich. App. 102, 614 N. W. 2d 674.

No. 00–1276. PHILADELPHIA CHURCH OF GOD, INC. *v.* WORLDWIDE CHURCH OF GOD. C. A. 9th Cir. Certiorari denied. Reported below: 227 F. 3d 1110.

No. 00–1283. MAJOR ET AL. *v.* PORT TOWNSEND POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–1287. BRUMFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 232 F. 3d 376.

No. 00–1306. LEE *v.* GTE FLORIDA, INC. C. A. 11th Cir. Certiorari denied. Reported below: 226 F. 3d 1249.

No. 00–1309. ALLEYNE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 82 Cal. App. 4th 1256, 98 Cal. Rptr. 2d 737.

No. 00–1351. KELLY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 00–1371. MCMEANS *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 228 F. 3d 674.

No. 00–1401. HARRIS, SECRETARY OF STATE OF FLORIDA, ET AL. *v.* ARMSTRONG ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 773 So. 2d 7.

No. 00–6610. BANNISTER *v.* UNITED STATES; and
No. 00–6977. MASKO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1145.

No. 00–6686. HU *v.* LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES ET AL. C. A. 7th Cir. Certiorari denied.

No. 00–6912. HENRY *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 223 F. 3d 477.

No. 00–7186. DODD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 225 F. 3d 340.

No. 00–7256. TILLEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 767 So. 2d 6.

No. 00–7324. HAMMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 226 F. 3d 229.

No. 00–7342. WISE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 221 F. 3d 140.

No. 00–7513. DOWNEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 753 So. 2d 225.

No. 00–7699. LOWERY *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 225 F. 3d 833.

No. 00–7894. HARRIS ET AL. *v.* JOHNSON. Sup. Ct. Miss. Certiorari denied. Reported below: 767 So. 2d 181.

No. 00–8206. DARNELL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8224. GLASS *v.* COWLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 00–8228. HENDERSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8231. GARRISON *v.* BRADDOCK. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1151.

No. 00–8239. HEBRARD *v.* DAY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 232 F. 3d 208.

No. 00–8240. GADSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 761 So. 2d 1116.

No. 00–8242. HENSLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8243. HAYGOOD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8246. GUESS *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 00–8248. HESS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 00–8250. LAVERY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 100 Wash. App. 1068.

No. 00–8254. HEILMANN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 764 So. 2d 599.

No. 00–8255. HOLIDAY *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 14 S. W. 3d 784.

No. 00–8264. HUNTLEY *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8265. FREEMAN *v.* BOONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–8267. FLIAM *v.* TESSMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8273. GUILLORY *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 214 F. 3d 1349.

No. 00–8276. FULLER *v.* WELTON. C. A. 11th Cir. Certiorari denied.

No. 00–8280. FIELDS *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8285. GUILLORY *v.* COREIL. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1340.

No. 00–8287. WIDMER *v.* TULARE COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 552.

No. 00–8288. WISHMAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8297. MORELAND *v.* MADRID, ATTORNEY GENERAL OF NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 902.

No. 00–8301. POZO *v.* BERTRAND, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–8302. HALSTEAD *v.* HOYT, SUPERINTENDENT, OREGON WOMEN'S CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 381.

No. 00–8306. HARPER *v.* TOMPKINS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–8307. FORDJOUR *v.* SCHNEIDER, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY. C. A. 9th Cir. Certiorari denied.

No. 00–8310. STUCK *v.* MARTIN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1270.

No. 00–8312. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1074.

No. 00–8314. THOMPSON *v.* PRESTERA CENTER FOR MENTAL HEALTH SERVICES ET AL. Cir. Ct. Cabell County, W. Va. Certiorari denied.

No. 00–8316. THOMAS *v.* LOVELL, WARDEN, ET AL.; and GUY *v.* LOVELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8319. DANSBY *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8321. BAILEY *v.* BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 00–8323. PRESTON *v.* CARUSO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 423.

No. 00–8326. BAXTER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 00–8331. PAZO-MORE *v.* LITSCHER, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 00–8340. OKEN *v.* MERRILL, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 233 F. 3d 86.

No. 00–8344. CUMMINS *v.* SUPERIOR COURT OF ARIZONA, YUMA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 381.

No. 00–8346. DOBELLE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8358. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 810 So. 2d 810.

No. 00–8361. WARREN W. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8363. PENNINGTON *v.* EVANS, WARDEN, ET AL.; PENNINGTON *v.* HANCOCK ET AL.; PENNINGTON *v.* DIXON ET AL.; and PENNINGTON *v.* BAYONI ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–8367. BENJAMIN *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8369. GILSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 8 P. 3d 883.

No. 00–8375. D'AMBROSIO *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 245 Ga. App. 12, 536 S. E. 2d 218.

No. 00–8377. DE MEDEIROS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8378. ASHANTI *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8382. LAVEARN *v.* JONES. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1152.

No. 00–8383. BOWMAN *v.* CORTELLESSA. Ct. App. Ky. Certiorari denied.

No. 00–8392. CARAWAY *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 00–8393. DRIVER *v.* CORNELL, SUPERINTENDENT, WOMEN'S EASTERN RECEPTION, DIAGNOSTIC AND CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8400. TULLOCH *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8404. GOLLEHON *v.* MONTANA ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 303 Mont. 54, 18 P. 3d 1033.

No. 00–8407. ARVISO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8413. GRISSO *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 219 F. 3d 791.

No. 00–8420. HILL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8432. PERELES *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8451. BOX *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 23 Cal. 4th 1153, 5 P. 3d 130.

No. 00–8500. HARRIS *v.* COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 00–8516. SOSA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8526. JAMAL *v.* CUOMO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1273.

No. 00–8536. GLENN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8555. SCOTT *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 227 F. 3d 260.

No. 00–8580. POGUE *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 1278.

No. 00–8594. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 1279.

No. 00–8598. TUCKER *v.* MOSSING, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 368.

No. 00–8606. SNYDER ET AL. *v.* RYAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 221 F. 3d 1339.

No. 00–8609. GODLEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 00–8642. STIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 216 F. 3d 1080.

No. 00–8644. ROBINSON *v.* HUNT, SUPERINTENDENT, COLUMBUS CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 889.

No. 00–8649. OWEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 773 So. 2d 510.

No. 00–8663. GOMEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 542.

No. 00–8664. HOOVER *v.* HICKMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 382.

No. 00–8666. FILBIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 550.

No. 00–8667. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1274.

No. 00–8672. GUINTO *v.* PHILIP MORRIS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 229 F. 3d 1133.

No. 00–8677. MORENO-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 135.

No. 00–8688. WOODEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 678.

No. 00–8713. VIVONE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8723. SOLIS PERALES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 376.

No. 00–8736. BASS-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 22 Fed. Appx. 81.

No. 00–8738. MIRANDA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–8744. MORRISON *v.* CLEMONS, SUPERINTENDENT, MAINE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 00–8746. DAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–8747. LUIS CASTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 181 F. 3d 1129.

No. 00–8748. CASTILLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 424.

No. 00–8749. COX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 368.

No. 00–8751. MARTINEZ RODRIQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–8753. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 369.

No. 00–8764. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–8765. LACY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–8772. VON BRESSENSDORF ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–8784. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1145.

No. 00–8789. MACIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–8792. RIVERA-BECERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–8814. PACHECO-ZEPEDA *v.* UNITED STATES (Reported below: 234 F. 3d 411); FRESNARES-TORRES *v.* UNITED STATES (235 F. 3d 481); ALVARADO *v.* UNITED STATES (4 Fed. Appx. 508); ALVARADO-GONGORA *v.* UNITED STATES (4 Fed. Appx. 485); AREVALOS-BARRIOS *v.* UNITED STATES (4 Fed. Appx. 503); BECERRA-SANDOVAL *v.* UNITED STATES (2 Fed. Appx. 721); BONILLA-GUZMAN *v.* UNITED STATES (4 Fed. Appx. 483); CURIEL-TORRES *v.* UNITED STATES (238 F. 3d 432); DABBAS *v.* UNITED STATES (4 Fed. Appx. 519); DIAZ *v.* UNITED STATES (243 F. 3d 550); ENCISO-ACEVES *v.* UNITED STATES (4 Fed. Appx. 449); ESPONDA-VENTURA *v.* UNITED STATES (246 F. 3d 677); FUERTES-RAMOS *v.* UNITED STATES (11 Fed. Appx. 713); GARCIA-CONTRERAS *v.* UNITED STATES (2 Fed. Appx. 755); GOMEZ-PINEDA *v.* UNITED STATES (4 Fed. Appx. 514); GOMEZ-VALDOVINOS *v.* UNITED STATES (246 F. 3d 677); HERNANDEZ-GOMARA *v.* UNITED STATES; HERRERA-HERRERA *v.* UNITED STATES; HERRERA-RAMIREZ *v.* UNITED STATES (2 Fed. Appx. 836); LOZANO-HERNANDEZ *v.* UNITED STATES (4 Fed. Appx. 450); MAGANA-URBANES *v.* UNITED STATES (2 Fed. Appx. 828); MARTINEZ-LOMELI *v.* UNITED STATES (2 Fed. Appx. 842); NARVAEZ *v.* UNITED STATES (4 Fed. Appx. 516); ORTEGA-RAMIREZ *v.* UNITED STATES (3 Fed. Appx. 648); PATINO-SALAZAR *v.* UNITED STATES (2 Fed. Appx. 748); RAMIREZ-VARGAS *v.* UNITED STATES (4 Fed. Appx. 482); ROBLES-FRIAS *v.* UNITED STATES (11 Fed. Appx. 713); ROBLES-MACIAS *v.* UNITED STATES (4 Fed. Appx. 510); SALDANA-MENDOZA *v.* UNITED STATES (2 Fed. Appx. 504); SANCHEZ-SANCHEZ *v.* UNITED STATES (4 Fed. Appx. 477); TORRES-CASTILLO *v.* UNITED STATES (2 Fed. Appx. 882); and TOVAR-TORRES *v.* UNITED STATES (2 Fed. Appx. 853). C. A. 9th Cir. Certiorari denied.

No. 00–8818. ROSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1361.

No. 00–886. MANYBEADS ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of Hopi Tribe for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 209 F. 3d 1164.

No. 00–1234. GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN ET AL. *v.* LYONS. C. A. 11th Cir. Motions of Unifi Network et al. and National Association of Manufacturers et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 221 F. 3d 1235.

No. 00–1264. WEST *v.* AMERICAN TELEPHONE & TELEGRAPH TECHNICAL SERVICES, INC. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 225 F. 3d 656.

No. 00–8292. BEAVER *v.* WEST VIRGINIA ET AL. Cir. Ct. Kanawha County, W. Va. Motion of petitioner for leave to file appendices A and B under seal granted. Certiorari denied.

No. 00–8379. ASHANTI *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS; and ASHANTI *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (TERHUNE, REAL PARTY IN INTEREST). C. A. 9th Cir. Motion of petitioner to consolidate this case with No. 00–8982, *Ashanti* v. *Lockyer, Attorney General of California*, denied. Certiorari denied.

Rehearing Denied

No. 00–5090. CLEM *v.* UNITED STATES, 531 U. S. 1154;

No. 00–7283. CHILDS *v.* DANZIG, SECRETARY OF THE NAVY, 531 U. S. 1117;

No. 00–7295. JACKSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 531 U. S. 1158;

No. 00–7441. HILTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1163;

No. 00–7493. ELLIS *v.* CARLTON, WARDEN, ET AL., 531 U. S. 1166;

No. 00–7496. NUBINE *v.* STRINGFELLOW ET AL., 531 U. S. 1166; and

No. 00–7666. OLIVER *v.* UNITED STATES, 531 U. S. 1172. Petitions for rehearing denied.

APRIL 13, 2001

Miscellaneous Order

No. 00–730. ADARAND CONSTRUCTORS, INC. *v.* MINETA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. [Certio-

rari granted, *ante*, p. 941.] The order granting the petition for writ of certiorari is amended to read as follows: Certiorari granted limited to the following questions: "1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination? 2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest?"

April 16, 2001

Dismissal Under Rule 46

No. 00–8399. Overton *v.* Virginia. Sup. Ct. Va. Certiorari dismissed under this Court's Rule 46. Reported below: 260 Va. 599, 539 S. E. 2d 421.

Certiorari Granted—Vacated and Remanded

No. 00–7712. Brown *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Artuz* v. *Bennett*, 531 U. S. 4 (2000).

No. 00–7767. Ford, aka Green *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). Reported below: 228 F. 3d 417.

Certiorari Dismissed

No. 00–8421. Hill *v.* Pennsylvania. C. A. 3d Cir.; and

No. 00–8422. Hill *v.* Pennsylvania. C. A. 3d Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1

(1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 00–8429. SHABAZZ *v.* KEATING, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 242 F. 3d 390.

No. 00–8721. GYADU *v.* FRANKL ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 00M80. PIERCE *v.* UNITED STATES;

No. 00M81. DAVENPORT *v.* NORTHEAST GEORGIA MEDICAL CENTER, INC.;

No. 00M82. RYAN ET AL. *v.* BROWN ET AL.; and

No. 00M83. OWENS *v.* ALLEN CORRECTIONAL CENTER ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 129, Orig. VIRGINIA *v.* MARYLAND. Motion of Maryland for leave to file an amendment to its answer and counterclaim granted, and the amendment is referred to the Special Master. [For earlier order herein, see, *e. g.*, 531 U. S. 1140.]

No. 00–8455. ESTES *v.* SUPREME COURT OF UTAH ET AL. C. A. 10th Cir.;

No. 00–8554. BROWN *v.* CHICAGO TRANSIT AUTHORITY. C. A. 7th Cir.;

No. 00–8776. DALTON *v.* SCHOOL BOARD OF THE CITY OF NORFOLK ET AL. C. A. 4th Cir.; and

No. 00–8825. SMITH *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 7, 2001, within which to pay the docketing fees required by

Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 00–8953. IN RE DECARO;
No. 00–8986. IN RE NANCE; and
No. 00–9066. IN RE MCCOWIN. Petitions for writs of habeas corpus denied.

No. 00–8454. IN RE LUNDAHL;
No. 00–8561. IN RE STEVENS; and
No. 00–8812. IN RE WHITE. Petitions for writs of mandamus denied.

No. 00–8714. IN RE JEFFS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 00–1089. TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. *v.* WILLIAMS. C. A. 6th Cir. Motion of National Association of Manufacturers for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 224 F. 3d 840.

No. 00–1250. US AIRWAYS, INC. *v.* BARNETT. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 228 F. 3d 1105.

No. 00–9285. MICKENS *v.* TAYLOR, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?" The stay shall terminate upon the sending down of the judgment of this Court. Reported below: 240 F. 3d 348.

Certiorari Denied

No. 00–746. MICHIGAN ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 211 F. 3d 1280.

No. 00–938. GRUMHAUS ET AL. *v.* COMERICA SECURITIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 223 F. 3d 648.

No. 00–939. GREGG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 226 F. 3d 253.

No. 00–967. BIGELOW *v.* DEPARTMENT OF DEFENSE. C. A. D. C. Cir. Certiorari denied. Reported below: 217 F. 3d 875.

No. 00–969. SQUILLACOTE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 221 F. 3d 542.

No. 00–1054. RANDELL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 227 F. 3d 300.

No. 00–1080. BRITTON *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 216 F. 3d 1071.

No. 00–1086. LOPEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 222 F. 3d 428.

No. 00–1131. SMURFIT-STONE CONTAINER CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 229 F. 3d 1345.

No. 00–1251. PERRONE ET AL. *v.* GENERAL MOTORS ACCEPTANCE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 232 F. 3d 433.

No. 00–1261. HOOKS ET UX., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF HOOKS, A MINOR *v.* CLARK COUNTY SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 228 F. 3d 1036.

No. 00–1268. RANEY *v.* AWARE WOMAN CENTER FOR CHOICE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 224 F. 3d 1266.

No. 00–1270. BERKLEY *v.* H&R BLOCK EASTERN TAX SERVICES, INC. Ct. App. Tenn. Certiorari denied. Reported below: 30 S. W. 3d 341.

No. 00–1274. CAMPBELL ET AL. *v.* NATIONAL EDUCATION ASSN. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 315.

No. 00–1275. PLUMMER *v.* ABB INDUSTRIAL SYSTEMS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 423.

No. 00–1281. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS ET AL. *v.* O'CONNOR, EXECUTIVE DIRECTOR, CALIFORNIA BOARD OF PSYCHOLOGY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 228 F. 3d 1043.

No. 00–1294. BEKKER *v.* HUMANA HEALTH PLAN, INC. C. A. 7th Cir. Certiorari denied. Reported below: 229 F. 3d 662.

No. 00–1296. HUNT MANUFACTURING CO. *v.* FISKARS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 221 F. 3d 1318.

No. 00–1298. GILCHRIST, DBA CONCAN CABLE TV *v.* BANDERA ELECTRIC COOPERATIVE, INC. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 00–1310. BRIAN B., BY AND THROUGH HIS MOTHER, LOIS B., ET AL. *v.* HICKOK, SECRETARY, PENNSYLVANIA DEPARTMENT OF EDUCATION. C. A. 3d Cir. Certiorari denied. Reported below: 230 F. 3d 582.

No. 00–1315. LEBLANC *v.* MIGUEZ ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 771 So. 2d 326.

No. 00–1316. RODRIGUEZ DELGADO ET AL. *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 231 F. 3d 165.

No. 00–1319. ENDSLEY ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 230 F. 3d 276.

No. 00–1324. AMERICAN GENERAL FINANCE, INC. *v.* DICKERSON ET UX. C. A. 11th Cir. Certiorari denied. Reported below: 222 F. 3d 924.

No. 00–1325. BHATTI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 239 F. 3d 366.

No. 00–1326. COADY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 213 F. 3d 1187.

No. 00–1344. WHEELER *v.* THOMAS F. WHITE & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1161.

No. 00–1347. JONAS *v.* UNISUN INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1352.

No. 00–1355. GANULIN *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 420.

No. 00–1357. BUCHBINDER ET UX. *v.* FRANCHISE TAX BOARD OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 380.

No. 00–1358. DAVIDSON, COLORADO SECRETARY OF STATE *v.* CAMPBELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 233 F. 3d 1229.

No. 00–1362. MATCZAK ET AL. *v.* DAHL ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1364. NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 234 F. 3d 682.

No. 00–1367. ABIDEKUN *v.* NEW YORK CITY TRANSIT AUTHORITY. C. A. 2d Cir. Certiorari denied.

No. 00–1368. BRAZAS *v.* BRAZAS ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 00–1369. BARRETT *v.* BOROUGH OF CARLISLE. Commw. Ct. Pa. Certiorari denied. Reported below: 758 A. 2d 773.

No. 00–1384. BOYNE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1387. WHITLOCK CORP., FKA APEX AUTOMOTIVE WAREHOUSE, L. P. *v.* DELOITTE & TOUCHE, L. L. P. C. A. 7th Cir. Certiorari denied. Reported below: 233 F. 3d 1063.

No. 00–1389. JAMES *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 230 F. 3d 315.

No. 00–1394. ZACHARIAH *v.* COMMISSIONER OF PATENTS AND TRADEMARKS ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 243 F. 3d 555.

No. 00–1399. GRAY *v.* STEWART ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 229 F. 3d 1168.

No. 00–1408. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 892.

No. 00–1409. MAY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 54 M. J. 318.

No. 00–1410. CARMICHAEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 232 F. 3d 510.

No. 00–1415. SMARTT *v.* O'NEILL, SECRETARY OF THE TREASURY. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–1416. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 244 F. 3d 141.

No. 00–1426. SOUTHERN CALIFORNIA EDISON CO. *v.* ECOLOCHEM, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 227 F. 3d 1361.

No. 00–1434. CUNNINGHAM *v.* NAZARIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 229 F. 3d 1137.

No. 00–1436. MANN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1270.

No. 00–1448. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 890.

No. 00–1458. SAFFO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 227 F. 3d 1260.

No. 00–1465. PROVEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 368.

No. 00–1466. OATMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 425.

No. 00–1468. RAHSEPARIAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 231 F. 3d 1267.

No. 00–6859. Amavisca *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 00–6862. Snapp *v.* Unlimited Concepts, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 208 F. 3d 928.

No. 00–7101. Ramos *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 00–7132. Wright *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 00–7142. Salgado Soto *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–7317. Ferreira *v.* Holt, Warden. C. A. 10th Cir. Certiorari denied.

No. 00–7424. Massey *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 229 F. 3d 1139.

No. 00–7483. Montgomery *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 00–7511. Dillon *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1354.

No. 00–7538. Shull *v.* Bexar County et al. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 00–7550. Johnson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 00–7558. Knox *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 224 F. 3d 470.

No. 00–7569. Szerlip *v.* City of Mount Vernon, Ohio. Ct. App. Ohio, Knox County. Certiorari denied.

No. 00–7592. Murillo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 28.

No. 00–7635. Parks *v.* United States; and

No. 00–7977. HOLLOWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1270.

No. 00–7639. PHILLIPS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 00–7831. LIGHTFOOT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 224 F. 3d 586.

No. 00–7955. MORROW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1270.

No. 00–8058. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 223 F. 3d 85.

No. 00–8327. MCWHORTER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 781 So. 2d 330.

No. 00–8348. DIZELOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 217 F. 3d 841.

No. 00–8409. HERBIN *v.* HOEFFEL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 1 Fed. Appx. 2.

No. 00–8410. HOLLOWAY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8414. FRYE *v.* MANTELLO, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8416. GANDY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8417. FAILS *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 999 S. W. 2d 144.

No. 00–8418. HEMBRY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 00–8419. HODSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8423. FARRIS *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. (two judgments). Ct. Crim. App. Okla. Certiorari denied.

No. 00–8424. GRAY *v.* TURNER, SUPERINTENDENT, SOUTHERN MISSISSIPPI CORRECTIONAL INSTITUTION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 237 F. 3d 632.

No. 00–8425. TONEY *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8430. SIMMONS *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 229 F. 3d 1136.

No. 00–8443. STURGILL *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 34 S. W. 3d 484.

No. 00–8444. FIELDS *v.* CLARK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–8448. SIMPLICIO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8450. LANG *v.* WOODFORD, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 230 F. 3d 1367.

No. 00–8459. WOODCOX *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 00–8460. KEMP *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 273 App. Div. 2d 806, 708 N. Y. S. 2d 542.

No. 00–8461. PAPACHRISTOU *v.* UNIVERSITY OF TENNESSEE. Ct. App. Tenn. Certiorari denied. Reported below: 29 S. W. 3d 487.

No. 00–8462. BULL *v.* GALAZA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8465. RANGEL *v.* PRUNTY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8466. KREBS *v.* SUPERIOR COURT OF CALIFORNIA, SAN LUIS OBISPO COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8469. BELL *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8474. LAWSON *v.* MISSISSIPPI DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Miss. Certiorari denied.

No. 00–8476. MAYFIELD *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8482. BRADLEY *v.* BLANCO ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8484. MUHAMMAD *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied.

No. 00–8487. PITT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 260 Va. 692, 539 S. E. 2d 77.

No. 00–8488. JONES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 197 Ariz. 290, 4 P. 3d 345.

No. 00–8489. TURNBOE *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1270.

No. 00–8490. JOEL *v.* CITY OF ORLANDO. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 1353.

No. 00–8502. WELLS *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8503. BOWENS *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8506. BALLEJOS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8509. POWELL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8510. COLLMAN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 116 Nev. 687, 7 P. 3d 426.

No. 00–8511. BOGANY *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 00–8517. LUCERO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8519. HARLAN *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 8 P. 3d 448.

No. 00–8524. PELLEGRINO *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 221 F. 3d 1343.

No. 00–8528. VALDEZ *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 219 F. 3d 1222.

No. 00–8533. VIGIL *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8537. FRANCO *v.* TULARE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 83 Cal. App. 4th 583, 99 Cal. Rptr. 2d 859.

No. 00–8542. BALL *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 00–8549. MASIAS *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 00–8553. CALDWELL *v.* TAYLOR, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8557. BELLINGER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8558. MORENO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 00–8563. COLEMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8566. DETEMPLE *v.* HEDRICK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1326.

No. 00–8567. DETEMPLE *v.* ALLSTATE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 213 F. 3d 631.

No. 00–8568. BROWN *v.* KASHYAP ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1267.

No. 00–8573. COLTIN *v.* TOWN OF LONDONDERRY, NEW HAMPSHIRE, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 229 F. 3d 1133.

No. 00–8576. JOHNSON *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 230 F. 3d 1348.

No. 00–8579. OZERSON *v.* POOLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8582. ROBINSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 11 P. 3d 361.

No. 00–8590. MILLER *v.* RALPH WILSON PLASTICS CO. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 416.

No. 00–8596. THOMAS *v.* EARLEY, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 890.

No. 00–8600. WERTS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 228 F. 3d 178.

No. 00–8607. GONZALES *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 233 F. 3d 348.

No. 00–8612. ROBINSON *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied.

No. 00–8613. GARDNER *v.* GREEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8637. SHOLLEY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 432 Mass. 721, 739 N. E. 2d 236.

No. 00–8640. EDWARDS *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8645. SCOTT *v.* NUNN, ADMINISTRATOR, SOUTH WOODS STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–8651. JOHNSON *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 421.

No. 00–8653. SMITH *v.* WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 00–8657. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 F. 3d 1321.

No. 00–8669. FORD *v.* ROCKFORD BOARD OF EDUCATION, SCHOOL DISTRICT NO. 205, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 210 F. 3d 374.

No. 00–8680. JEFFERS *v.* JAMES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 888.

No. 00–8684. LAND *v.* FRANK ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–8695. TARLEY *v.* CRAWFORD-THG, INC. C. A. 5th Cir. Certiorari denied.

No. 00–8699. VALERIO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 95 N. Y. 2d 924, 744 N. E. 2d 136.

No. 00–8726. NEMANI *v.* ST. LOUIS UNIVERSITY. Sup. Ct. Mo. Certiorari denied. Reported below: 33 S. W. 3d 184.

No. 00–8731. PETROVICH *v.* LEONARDO, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 229 F. 3d 384.

No. 00–8740. ADKINS *v.* EASLEY, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 410.

No. 00–8742. DAVILA-ORTEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 138.

No. 00–8752. LYNCH *v.* HENDERSON, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1150.

No. 00–8755. ROSARIO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 00–8757. JOELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 217 F. 3d 847.

No. 00–8759. POLK *v.* LINDSEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 549.

No. 00–8762. STEWART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8768. COLVIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 676.

No. 00–8778. DELGADO *v.* NEW YORK CITY BOARD OF EDUCATION, OFFICE OF SCHOOL FOOD AND NUTRITION SERVICES. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 272 App. Div. 2d 207, 708 N. Y. S. 2d 292.

No. 00–8781. TREVINO MUNGIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1074.

No. 00–8782. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 192 F. 3d 127.

No. 00–8785. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 1266.

No. 00–8787. LOEBLEIN *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 229 F. 3d 724.

No. 00–8793. PITTMAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 247 F. 3d 241.

No. 00–8795. BURNES *v.* CLINTON, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 419.

No. 00–8796. MCCALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1269.

No. 00–8797. MULDROW *v.* LAKE CITY POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 413.

No. 00–8802. WARE *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8803. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–8813. JACKSON *v.* MARLIN YACHT MANUFACTURING, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 369.

No. 00–8815. RICHARDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 230 F. 3d 1297.

No. 00–8817. STEVENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8819. WASHLEFSKE *v.* WINSTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 234 F. 3d 179.

No. 00–8821. WAGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 418.

No. 00–8823. PAUL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 32.

No. 00–8828. CARLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 F. 3d 466.

No. 00–8831. VELASQUEZ-RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 133.

No. 00–8832. LOGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 368.

No. 00–8833. STAMPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 244 F. 3d 141.

No. 00–8835. SHOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–8836. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–8838. CHUKWUEZI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–8839. DAVILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8840. MARTINEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–8842. HOLLAND ET AL. *v.* JUSTAK. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1273.

No. 00–8844. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 368.

No. 00–8845. HIDER *v.* SHERIFF, CUMBERLAND COUNTY. C. A. 1st Cir. Certiorari denied.

No. 00–8846. HERNANDEZ-RODRIGUEZ *v.* UNITED STATES; and HERNANDEZ-CASTANON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1074.

No. 00–8847. GOMEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 237 F. 3d 238.

No. 00–8848. GARCIA-GUIZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 483.

No. 00–8850. DEVEAUX *v.* SCHRIVER, SUPERINTENDENT, WALLKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8851. STEPHENS *v.* GOMEZ, JUDGE, CIRCUIT COURT, 13TH JUDICIAL CIRCUIT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1185.

No. 00–8855. POWELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 710.

No. 00–8857. TEMPLETON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 425.

No. 00–8864. DRAYDEN *v.* WHITE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 704.

No. 00–8868. RANKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1154.

No. 00–8874. BANUELOS-CAMPOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1074.

No. 00–8875. NAHA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 677.

No. 00–8876. POUNDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 230 F. 3d 1317.

No. 00–8879. SCHILLING *v.* FRANKLIN COUNTY ADULT PROBATION. C. A. 6th Cir. Certiorari denied.

No. 00–8881. REYNA-MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–8882. NOBLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1274.

No. 00–8883. OCAMPO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8884. PROCTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–8886. HOBBY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 761 So. 2d 1234.

No. 00–8887. HOOPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 215 F. 3d 1326.

No. 00–8892. GEIDEL *v.* HORN, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 3d 1129.

No. 00–8895. SMITH *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 889.

No. 00–8900. NICHOLS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–8902. CASAREZ-HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–8905. JAVIER NARVAEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8906. BALTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 00–8908. OLANIYI-OKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 136.

No. 00–8909. ANDREWSKI *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 00–8916. WILLIAMS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8917. WILLIAMSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8918. GARAY, aka FOSKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 230.

No. 00–8919. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 241 F. 3d 638.

No. 00–8923. KEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–8925. MAGLIOCCA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 425.

No. 00–8926. LYCKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 234.

No. 00–8927. LESLIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–8929. STULL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1361.

No. 00–8933. QUIRINO-LANDEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–8936. HINDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1153.

No. 00–8937. DORRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 236 F. 3d 582.

No. 00–8938. MICHEL-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 136.

No. 00–8939. CHACON-ARVIZO *v.* UNITED STATES; and RUIZ-CISNEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 138.

No. 00–8941. SOLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8946. BASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 233 F. 3d 536.

No. 00–8947. OROZCO-MOTA, aka LOPEZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–8948. DIAZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–8949. DEMBOWSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 237 F. 3d 631.

No. 00–8950. AMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1354.

No. 00–8952. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 135.

No. 00–8955. HARROD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 760 A. 2d 164.

No. 00–8959. METTETAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 00–8961. CHRISTENSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 550.

No. 00–8962. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 237 F. 3d 1258.

No. 00–8965. ZEBROWSKI, AKA VILLANUEVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 229 F. 3d 1136.

No. 00–8966. SCOTT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 00–8968. MARTINEZ-CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 138.

No. 00–8970. WISE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1154.

No. 00–8971. VELASCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 229 F. 3d 1169.

No. 00–8974. SOLIS-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–8976. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 424.

No. 00–8977. ACOSTA-FUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–8978. KEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 891.

No. 00–8983. CHRISTIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 541.

No. 00–8999. DUNKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9000. MARTINEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9001. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 426.

No. 00–9002. SYRAX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 235 F. 3d 422.

No. 00–9003. SALDIVAR-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9004. SAGASTUME-PORTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 136.

No. 00–9006. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 220 F. 3d 635.

No. 00–9009. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 230 F. 3d 1054.

No. 00–9010. FAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 135.

No. 00–9011. GARCIA-CAVAZOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9012. HUGGINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–9013. HARROD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 5 Fed. Appx. 2.

No. 00–9014. LAZARO FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 1345.

No. 00–9015. IRBY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 240 F. 3d 597.

No. 00–9016. GOMEZ-INFANTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9017. HANCOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 231 F. 3d 557.

No. 00–9019. CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9021. LAREINAGA-DE LA GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9022. MAYNARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 236 F. 3d 601.

No. 00–9023. DIXSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 245 F. 3d 795.

No. 00–9031. TRIVEDI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 252 F. 3d 434.

No. 00–9036. BAILEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9042. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9050. ADAME-SILVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 208 F. 3d 222.

No. 00–9052. ALLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 235 F. 3d 482.

No. 00–9058. ZAMBRANO-GAVIDIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 412.

No. 00–9061. PACHECO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 678.

No. 00–9062. OROZCO-RANGEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 677.

No. 00–9063. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 369.

No. 00–9069. SEYMOUR *v.* WALKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 224 F. 3d 542.

No. 00–9074. BROWN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1272. DELAWARE COUNTY HOUSING AUTHORITY *v.* BISHOP. Comm. Ct. Pa. Motion of Housing Development Law Institute et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 749 A. 2d 997.

No. 00–1286. KANSAS CITY SOUTHERN RAILWAY CO. *v.* GIDDENS. Sup. Ct. Mo. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 29 S. W. 3d 813.

No. 00–1301. ROE *v.* AWARE WOMAN CENTER FOR CHOICE, INC., ET AL. C. A. 11th Cir. Certiorari before judgment denied.

No. 00–1304. KROGER CO. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. C. A. 7th Cir. Motion of American Bakers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 226 F. 3d 903.

No. 00–1312. CALIFORNIA *v.* ALVARADO ET AL. Sup. Ct. Cal. Motions of respondents Joaquin Alvarado and Jorge Lopez for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 23 Cal. 4th 1121, 5 P. 3d 203.

No. 00–8816. CEMINCHUK *v.* TENET, DIRECTOR OF CENTRAL INTELLIGENCE, ET AL.; and CEMINCHUK *v.* REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Rehearing Denied

No. 00–925. BARTH *v.* KAYE, CHIEF JUDGE, COURT OF APPEALS OF NEW YORK, ET AL., 531 U. S. 1147;

No. 00–955. HURLEY ET UX. *v.* MOTOR COACH INDUSTRIES, INC., 531 U. S. 1148;

No. 00–980. THOMPSON *v.* MENGEL, CLERK, SUPREME COURT OF OHIO, 531 U. S. 1149;

No. 00–1042. TONN *v.* UNITED STATES, 531 U. S. 1151;

No. 00–1120. KOUKIOS *v.* GANSON ET AL., 531 U. S. 1153;

No. 00–6001. MCDONALD *v.* UNITED STATES, 531 U. S. 1154;

No. 00–6288. ORTIZ *v.* PITCHER, WARDEN, 531 U. S. 1019;

No. 00–6432. WILSON *v.* UNITED STATES, 531 U. S. 1154;

No. 00–6555. HESSE *v.* DEPARTMENT OF STATE, 531 U. S. 1154;

No. 00–6735. REYNOSO *v.* MCGINNIS, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY, 531 U. S. 1086;

No. 00–7157. TWILLIE *v.* BRENNAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 531 U. S. 1129;

No. 00–7202. SACCO *v.* COOKSEY, WARDEN, ET AL., 531 U. S. 1156;

No. 00–7247. PAUL *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1157;

No. 00–7420. GUNDY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 531 U. S. 1162;

No. 00–7436. ZISKIS *v.* UNITED STATES, 531 U. S. 1163;

No. 00–7528. BOULINEAU *v.* TRIPP ET AL., 531 U. S. 1167;

No. 00–7549. JARRETT *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1168;

No. 00–7554. RASTEN *v.* NORTHEASTERN UNIVERSITY, 531 U. S. 1168;

No. 00–7577. SIEGEL *v.* COLUMBIA/PENTAGON CITY NATIONAL ORTHOPEDIC HOSPITAL ET AL., 531 U. S. 1169;

No. 00–7578. SIEGEL *v.* COLUMBIA/HCA HEALTHCARE CORP. ET AL., 531 U. S. 1169;

No. 00–7653. SALINAS MESTIZA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 531 U. S. 1194;

No. 00–7693. LABLANCHE *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, 531 U. S. 1173;

No. 00–7748. TIPP *v.* AMSOUTH BANK, N. A., 531 U. S. 1196;

No. 00–7817. JEFFERSON *v.* CAMBRA, WARDEN, 531 U. S. 1197;

No. 00–7818. LUCEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1197;

No. 00–7840. BRAMSON *v.* UNITED STATES, 531 U. S. 1177;

No. 00–7842. BROWN *v.* HODGES, GOVERNOR OF SOUTH CAROLINA, ET AL., *ante,* p. 926;

No. 00–7847. PAGE-BEY *v.* UNITED STATES, 531 U. S. 1177;

No. 00–7859. LAMPKIN *v.* UNITED STATES, 531 U. S. 1178;

No. 00–7965. WOLFRAM *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, ET AL., 531 U. S. 1180;

No. 00–8027. IN RE CUMMINGS, 531 U. S. 1142;

No. 00–8209. DUNMON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 911; and

No. 00–8396. STEELE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1203. Petitions for rehearing denied.

APRIL 17, 2001

Dismissal Under Rule 46

No. 00–1396. DUNCAN ET AL. *v.* KANSAS CITY SOUTHERN RAILWAY CO. ET AL. Sup. Ct. La. Certiorari dismissed under this Court's Rule 46.1. Reported below: 773 So. 2d 670.

APRIL 23, 2001

Certiorari Granted—Reversed and Remanded. (See No. 00–866, *ante*, p. 268.)

Certiorari Granted—Vacated and Remanded

No. 00–222. CITY OF BELLINGHAM ET AL. *v.* DEBOER ET UX. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lujan* v. *G & G Fire Sprinklers, Inc.*, *ante*, p. 189. Reported below: 206 F. 3d 857.

*Miscellaneous Orders**

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Motion of the Special Master for allowance of fee and disbursements granted, and the Special Master is awarded a total of $152,563.19 for the period August 1, 2000, through February 28, 2001, to be paid evenly by Kansas, Nebraska, and Colorado. [For earlier order herein, see, *e. g.*, 531 U. S. 806.]

No. 00–7929. WATKIS *v.* AMERICAN NATIONAL INSURANCE CO. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [531 U. S. 1187] denied.

No. 00–8670. HEAD *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir.;

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*For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1079; and amendments to the Federal Rules of Civil Procedure, see *post*, p. 1087.

No. 00–8805. CZEPIEL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir.; and

No. 00–8829. TIFFANY *v.* UNITED STATES. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 14, 2001, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 00–8727. MCCARVER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, *ante*, p. 941.] Motion for appointment of counsel granted, and it is ordered that Seth R. Cohen, Esq., of Greensboro, N. C., be appointed to serve as counsel for petitioner in this case.

No. 00–1508. IN RE VEY. Petition for writ of habeas corpus denied.

No. 00–9166. IN RE MCDANIEL. Motion of petitioner to defer consideration of petition for writ of habeas corpus denied. Petition for writ of habeas corpus denied.

No. 00–9215. IN RE HILL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Certiorari Granted

No. 00–1307. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY *v.* SIGMON COAL CO., INC., ET AL. C. A. 4th Cir. Motion of Trustees of UMWA Combined Benefit Fund for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 226 F. 3d 291.

Certiorari Denied

No. 00–1025. TOWN OF NORWOOD, MASSACHUSETTS *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 217 F. 3d 24.

No. 00–1030. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1355.

No. 00–1146. STEEL CO., AKA CHICAGO STEEL & PICKLING CO. *v.* CITIZENS FOR A BETTER ENVIRONMENT. C. A. 7th Cir. Certiorari denied. Reported below: 230 F. 3d 923.

No. 00–1155. BUTCHER ET VIR, CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF BUTCHER, DECEASED, ET AL. *v.* BLACHY ET AL.; and

No. 00–1345. BLACHY ET AL. *v.* BUTCHER ET VIR, CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF BUTCHER, DECEASED, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 221 F. 3d 896.

No. 00–1159. DOWNS *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 228 F. 3d 1003.

No. 00–1170. HORNKOHL, DIRECTOR OF PUBLIC SAFETY FOR CITY OF MANISTEE, ET AL. *v.* BECK, PERSONAL REPRESENTATIVE OF THE ESTATE OF BECK, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1267.

No. 00–1180. GARRISON, PERSONAL REPRESENTATIVE OF THE ESTATES OF GARRISON ET AL. *v.* POLISAR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 229 F. 3d 1163.

No. 00–1181. ARIZONA *v.* HOWELL. Ct. App. Ariz. Certiorari denied.

No. 00–1240. TRI-STATE COACH LINES, INC., ET AL. *v.* METROPOLITAN PIER AND EXPOSITION AUTHORITY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 315 Ill. App. 3d 179, 732 N. E. 2d 1137.

No. 00–1330. FRIEDEMANN *v.* MCCORMICK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1157.

No. 00–1333. MOORE ET AL. *v.* LYNAUGH, FORMER DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1339.

No. 00–1336. KING *v.* OHIO. Ct. App. Ohio, Medina County. Certiorari denied.

No. 00–1337. Upper Arlington City School District et al. *v.* James et al. C. A. 6th Cir. Certiorari denied. Reported below: 228 F. 3d 764.

No. 00–1339. Brown et al. *v.* Minnesota. Ct. App. Minn. Certiorari denied. Reported below: 617 N. W. 2d 421.

No. 00–1343. Cesario Rodriguez *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 21 S. W. 3d 562.

No. 00–1361. Kevorkian *v.* American Medical Assn. et al. Ct. App. Mich. Certiorari denied. Reported below: 237 Mich. App. 1, 602 N. W. 2d 233.

No. 00–1363. Miller, Administrator of the Estate of Fincher, Deceased *v.* Amerada Hess Corp. et al. Sup. Ct. Ala. Certiorari denied. Reported below: 786 So. 2d 1106.

No. 00–1366. Olson *v.* Duffy, Judge, Minnesota District Court, 4th Judicial District, et al. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 376.

No. 00–1370. Baker et ux. *v.* Coxe et al. C. A. 1st Cir. Certiorari denied. Reported below: 230 F. 3d 470.

No. 00–1377. Spearman *v.* Ford Motor Co. C. A. 7th Cir. Certiorari denied. Reported below: 231 F. 3d 1080.

No. 00–1395. AEC Corp. *v.* Pirie, Acting Secretary of the Navy. C. A. Fed. Cir. Certiorari denied. Reported below: 224 F. 3d 1333.

No. 00–1400. Hampton *v.* DeTella, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 221 F. 3d 1338.

No. 00–1452. Olup *v.* County of Allegheny Department of Aviation et al. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 1265.

No. 00–1477. Hall *v.* Clinton et al. C. A. 4th Cir. Certiorari denied. Reported below: 235 F. 3d 202.

No. 00–1480. Smith *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–1481. Powers, fka Studinger *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1269.

No. 00–7257. VALDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 225 F. 3d 1137.

No. 00–7533. LINVILLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 1330.

No. 00–7608. HOLLINS *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 32.

No. 00–7719. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 193 Ill. 2d 1, 737 N. E. 2d 230.

No. 00–8136. GRANDISON *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 654.

No. 00–8138. MCFARLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8158. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 215 F. 3d 110.

No. 00–8174. MORRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 1338.

No. 00–8313. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 210 F. 3d 855.

No. 00–8527. VANDERPOOL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 244 Ga. App. 804, 536 S. E. 2d 821.

No. 00–8581. SMITH *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8585. SIMPKINS *v.* FANNIE MAE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 00–8602. LASTER *v.* GEARIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8603. JOHNSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 761 A. 2d 1235.

No. 00–8614. COURTNEY *v.* ROBINSON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 00–8615. HOLGUIN CARAVEO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8616. HALL *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8618. CUMMINGS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 352 N. C. 600, 536 S. E. 2d 36.

No. 00–8620. SMITH *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 00–8621. RODDY *v.* NESBITT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 376.

No. 00–8622. SPICE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 00–8623. CELESTINE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–8626. VASQUEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8627. SHEARIN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 765 A. 2d 953.

No. 00–8629. CLAYBURN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8632. KELLY *v.* CITY OF MEMPHIS. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1358.

No. 00–8638. LOYD *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–8639. BANNING *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8643. ROCHA *v.* SPARR, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8648. BOND *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 535.

No. 00–8650. PHILPOT *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 33.

No. 00–8652. JAMES *v.* SCAVONI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1152.

No. 00–8662. ETTER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8671. HESSLER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 90 Ohio St. 3d 108, 734 N. E. 2d 1237.

No. 00–8675. PEARSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 271 App. Div. 2d 203, 706 N. Y. S. 2d 37.

No. 00–8679. PARSONS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 275 App. Div. 2d 933, 714 N. Y. S. 2d 182.

No. 00–8693. PALMER *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8728. SAVAGE *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–8760. SNOW *v.* AULT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 238 F. 3d 1033.

No. 00–8786. MANSFIELD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 758 So. 2d 636.

No. 00–8807. REED *v.* COOK, DIRECTOR, OREGON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 00–8808. SCHAEFER *v.* DESTEFANO ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 556 Pa. 102, 727 A. 2d 113.

No. 00–8827. NULL *v.* PENNSYLVANIA ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 760 A. 2d 430.

No. 00–8853. EVANS *v.* CITY OF BISHOP. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 00–8858. VARGAS-LOPEZ *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 00–8885. HEISS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 781 So. 2d 367.

No. 00–8891. HOWARD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 267 App. Div. 2d 1006, 700 N. Y. S. 2d 899.

No. 00–8894. HAZEL *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1352.

No. 00–8896. SANDERS *v.* COWAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–8913. WESLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8931. ROSE *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8969. STEVENSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8979. DOWNS *v.* HOYT, SUPERINTENDENT, OREGON WOMEN'S CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 1031.

No. 00–8980. DAVIS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8988. SECOR *v.* INDIANA DEPARTMENT OF REVENUE. Tax Ct. Ind. Certiorari denied. Reported below: 734 N. E. 2d 1142.

No. 00–9038. EDWARDS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9045. KOKOSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–9056. ATKINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 00–9059. WAILEHUA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–9060. BECKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 230 F. 3d 1224.

No. 00–9068. SEVILLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1271.

No. 00–9077. CUEVAS-MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 550.

No. 00–9079. KOPP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 378.

No. 00–9081. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 425.

No. 00–9082. SANFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–9083. SANDERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 237 F. 3d 184 and 242 F. 3d 367.

No. 00–9084. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 552.

No. 00–9086. THOMPSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 234 F. 3d 725.

No. 00–9087. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 578.

No. 00–9096. FLORES-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 550.

No. 00–9097. FAIRCHILD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 368.

No. 00–9098. FRANCIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 239 F. 3d 120.

No. 00–9100. HUGGINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–9104. PIMENTEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 234 F. 3d 1263.

No. 00–9105. HARBIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 634.

No. 00–9106. ALMENDAREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 541.

No. 00–9107. ABARCA-VENEGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9108. SATHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–9109. SIMPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 634.

No. 00–9110. BELTRAN-CASARES *v.* UNITED STATES; FLORES-GARCIA *v.* UNITED STATES; GUTIERREZ-MARTINEZ *v.* UNITED STATES; HERRERA-PENA, AKA HERRERA *v.* UNITED STATES; LOZANO-GUTIERREZ, AKA LOZANO, AKA GUTIERREZ *v.* UNITED STATES; and MARTINEZ-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 138 (first, second, third, fourth, and sixth judgments) and 136 (fifth judgment).

No. 00–9111. JACOBSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 377.

No. 00–9112. PENIERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9115. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 790 So. 2d 423.

No. 00–9119. STEPHENS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9124. BRATER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 369.

No. 00–9127. COWLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 251 F. 3d 154.

No. 00–9130. ORNS, AKA OLLIS, AKA OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 213.

No. 00–9132. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 226 F. 3d 1042.

No. 00–9136. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–9144. WILLIAMS *v.* JUSINO, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 254 F. 3d 1079.

No. 00–9149. PALACIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 678.

No. 00–9155. GLINSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9156. BOWERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 251 F. 3d 154.

No. 00–9158. BROADIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9159. AGU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 791.

No. 00–9161. LA GATTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9168. WOMACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 1279.

No. 00–9176. HOBBS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 772 So. 2d 23.

No. 00–9195. BOLTON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–1323. BRIDENBAUGH ET AL. *v.* CARTER, ATTORNEY GENERAL OF INDIANA, ET AL. C. A. 7th Cir. Motions of David Lucas et al. and Coalition for Free Trade for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 227 F. 3d 848.

No. 00–1329. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46 *v.* TRIG ELECTRIC CONSTRUCTION CO. ET AL. Sup. Ct. Wash. Motions of Trustees of Southern California IBEW–NECA Pension Trust and Multi-Employer Trust Funds for leave to file briefs as *amici curiae* granted.

Certiorari denied. Reported below: 142 Wash. 2d 431, 13 P. 3d 622.

No. 00–1331. GADSON ET AL. *v.* WALKER ET AL. C. A. 7th Cir. Motion of respondent Baxter Healthcare for leave to file Rule 29.6 corporate disclosure statement under seal granted. Motion of respondents Armour Pharmaceutical Co. et al. for leave to lodge Court of Appeals appendix under seal granted. Certiorari denied. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of these motions and this petition. Reported below: 234 F. 3d 1273.

No. 00–1334. KENNEDY ET AL. *v.* FRIGIDAIRE, INC., ET AL. Ct. Civ. App. Ala. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 795 So. 2d 854.

No. 00–1446. INWOOD INTERNATIONAL CO. *v.* WAL-MART STORES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 243 F. 3d 567.

No. 00–8584. RASTEN *v.* WELLS FARGO SECURITY. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 00–907. FOSTER *v.* UNITED STATES, *ante,* p. 904;

No. 00–6982. JACKSON *v.* UNITED STATES, 531 U. S. 1155;

No. 00–7267. JACKSON *v.* CADDO CORRECTIONAL CENTER, 531 U. S. 1157;

No. 00–7275. MINGO *v.* RATHMAN ET AL., 531 U. S. 1158;

No. 00–7624. WOODSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 531 U. S. 1171;

No. 00–7634. MCKIBBEN *v.* HEAD, WARDEN, 531 U. S. 1194;

No. 00–7662. SONTAG *v.* MECHLING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYNESBURG, 531 U. S. 1195;

No. 00–7694. SMITH *v.* MISSOURI, 531 U. S. 1196;

No. 00–7764. GISSENDANER *v.* GEORGIA, 531 U. S. 1196;

No. 00–7878. CARTER *v.* PURYEAR, *ante,* p. 927;

No. 00–8275. PINNAVAIA *v.* UNITED STATES, *ante,* p. 911;

No. 00–8289. DOLENZ *v.* UNITED STATES, 531 U. S. 1202; and

No. 00–8427. IN RE METTETAL, *ante,* p. 918. Petitions for rehearing denied.

No. 99–348. KIEL *v.* SCOTT, WARDEN, 528 U. S. 1115; and

No. 00–1132. MORICE *v.* EG&G FLORIDA, INC., ET AL., *ante,* p. 906. Motions of petitioners for leave to proceed further herein *in forma pauperis* granted. Petitions for rehearing denied.

APRIL 25, 2001

Miscellaneous Order

No. 00–9605 (00A935). IN RE GOFF. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 00–9599 (00A932). DAWSON *v.* DELAWARE. Sup. Ct. Del. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied. Reported below: 769 A. 2d 69.

No. 00–9606 (00A936). GOFF *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

APRIL 26, 2001

Miscellaneous Order

No. 00A943. HALEY, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* ARTHUR. Application to vacate stay of execution of sentence of death entered by the United States District Court for the Northern District of Alabama on April 25, 2001, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

APRIL 27, 2001

Dismissal Under Rule 46

No. 00–8880. SHELLMON *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 4 Fed. Appx. 322.

Miscellaneous Order

No. 00A945 (00–1210). MAJOR LEAGUE BASEBALL PLAYERS ASSN. *v.* GARVEY. C. A. 9th Cir. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that further proceedings in this case are stayed pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, this stay shall terminate upon the sending down of the judgment of this Court. JUSTICE SCALIA took no part in the consideration or decision of this application.

APRIL 30, 2001

Certiorari Granted—Vacated and Remanded

No. 00–122. UNITED STATES *v.* CLARK. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Daniels* v. *United States*, *ante*, p. 374. Reported below: 203 F. 3d 358.

No. 00–8446. BANES *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Artuz* v. *Bennett*, 531 U. S. 4 (2000). Reported below: 237 F. 3d 634.

Certiorari Dismissed

No. 00–8722. KIMBERLIN *v.* DEWALT, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 243 F. 3d 538.

No. 00–8745. BALAWAJDER *v.* JACOBS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and

certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 220 F. 3d 586.

Miscellaneous Orders

No. 00M84. TRUDEL *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 128, Orig. ALASKA *v.* UNITED STATES. Motion of Franklin H. James et al. for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 902.]

No. 00–152. LUJAN, LABOR COMMISSIONER OF CALIFORNIA, ET AL. *v.* G & G FIRE SPRINKLERS, INC., *ante*, p. 189. Motion of AFL–CIO for leave to file a brief as *amicus curiae* granted *nunc pro tunc.*

No. 00–795. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Holder* v. *Free Speech Coalition*, 531 U. S. 1124.] Motions of National Center for Missing & Exploited Children and National Law Center for Children and Families et al. for leave to file briefs as *amici curiae* granted.

No. 00–7963. STONE *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 901] denied.

No. 00–8504. SYVERTSON *v.* NORTH DAKOTA; and
No. 00–8522. SYVERTSON *v.* SCHUETZLE, WARDEN. Sup. Ct. N. D. Motions of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 939] denied.

No. 00–9268. IN RE WILLIAMS;
No. 00–9326. IN RE RAULERSON; and

No. 00–9338. IN RE PARDUE. Petitions for writs of habeas corpus denied.

No. 00–8691. IN RE SHERRILLS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Denied

No. 00–1032. CONNECTICUT EX REL. BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT, ET AL. *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 228 F. 3d 82.

No. 00–1039. SPITALIERI *v.* UNIVERSAL MARITIME SERVICE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 226 F. 3d 167.

No. 00–1056. SOUTHWEST MARINE, INC. *v.* PIRIE, ACTING SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 217 F. 3d 1128.

No. 00–1057. BEST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 219 F. 3d 192.

No. 00–1188. MITCHELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 225 F. 3d 361.

No. 00–1244. NADER ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. 1st Cir. Certiorari denied. Reported below: 230 F. 3d 381.

No. 00–1254. LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL. *v.* PUSEY. Sup. Ct. Va. Certiorari denied.

No. 00–1273. SOUTH DAKOTA *v.* SDDS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 225 F. 3d 970.

No. 00–1311. BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA *v.* BROWN. C. A. 5th Cir. Certiorari denied. Reported below: 219 F. 3d 450.

No. 00–1328. HERMAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–1340. CITY OF ELDON ET AL. *v.* BELK. C. A. 8th Cir. Certiorari denied. Reported below: 228 F. 3d 872.

No. 00–1346. MOORE NORTH AMERICA, INC., FKA MOORE U. S. A., INC. *v.* STANDARD REGISTER CO. C. A. Fed. Cir. Certiorari denied. Reported below: 229 F. 3d 1091.

No. 00–1349. ROGERS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 235 F. 3d 1343.

No. 00–1350. RANEY *v.* CITY OF MELBOURNE, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 370.

No. 00–1353. NIXON ET UX. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 563 Pa. 425, 761 A. 2d 1151.

No. 00–1356. HAYHURST ET UX. *v.* AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS. C. A. 9th Cir. Certiorari denied. Reported below: 227 F. 3d 1104.

No. 00–1365. SIENKIEWICZ *v.* MCDOUGALL ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1373. CLAVETTE *v.* MAINE DEPARTMENT OF DEFENSE AND VETERANS SERVICES. Sup. Jud. Ct. Me. Certiorari denied.

No. 00–1374. EAST BAY ASIAN LOCAL DEVELOPMENT CORP. ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 24 Cal. 4th 693, 13 P. 3d 1122.

No. 00–1380. LOUISIANA SEAFOOD MANAGEMENT COUNCIL ET AL. *v.* FOSTER, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–1381. MAXFIELD *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 00–1388. TELEPO *v.* PALMER TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 242 F. 3d 371.

No. 00–1390. CATERINA ET AL. *v.* UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 251 F. 3d 153.

No. 00–1391. SANTORELLI *v.* COWHEY, JUSTICE, SUPREME COURT OF NEW YORK, NINTH JUDICIAL DISTRICT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 4 Fed. Appx. 78.

No. 00–1403. GURLEY *v.* MILLS, TRUSTEE. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 33.

No. 00–1422. KROGER CO. *v.* KANSAS DEPARTMENT OF REVENUE. Sup. Ct. Kan. Certiorari denied. Reported below: 270 Kan. 148, 12 P. 3d 889.

No. 00–1425. CAMBIANO *v.* LIGON, EXECUTIVE DIRECTOR, ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT. Sup. Ct. Ark. Certiorari denied. Reported below: 343 Ark. 691, 35 S. W. 3d 792.

No. 00–1439. WILLIS *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO., AKA BURLINGTON NORTHERN SANTA FE. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 138.

No. 00–1450. JON-NWAKALO *v.* DORMITORY AUTHORITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 234 F. 3d 1262.

No. 00–1451. PEIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 675.

No. 00–1493. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 228 F. 3d 637.

No. 00–1501. MANNA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 00–1533. SALERNO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–5522. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–6026. ALLEN *v.* CRABTREE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1156.

No. 00–6033. ALLEN *v.* CRABTREE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1156.

No. 00–6034. ALLEN *v.* CRABTREE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1156.

No. 00–6333. FRANKLIN *v.* HIGHTOWER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 215 F. 3d 1196.

No. 00–6554. RYAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 214 F. 3d 877.

No. 00–7323. GALVAN-ZAPATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 233 F. 3d 574.

No. 00–7676. CAMPA-FABELA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 210 F. 3d 837.

No. 00–7798. BATTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 634.

No. 00–7872. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 226 F. 3d 641.

No. 00–7959. LINDSEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 770 So. 2d 339.

No. 00–8328. NELLER *v.* UNITED STATES; and
No. 00–8330. PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1154.

No. 00–8532. PALMIERI *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1158.

No. 00–8678. MUNSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 00–8683. LACOSS *v.* CROWLEY ET AL. (two judgments). C. A. 6th Cir. Certiorari denied.

No. 00–8696. TORREZ *v.* DICKINSON. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 388.

No. 00–8698. WHITE *v.* GUNN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 433.

No. 00–8703. JACKSON *v.* HOPKINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 237 F. 3d 630.

No. 00–8704. LOPER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8705. WILLIAMS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1356.

No. 00–8709. SWEED *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8711. TONEY *v.* STUBBLEFIELD, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–8717. GUY *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 00–8718. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–8720. BLANK *v.* COX ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1357.

No. 00–8724. MCINTOSH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8730. QUINN *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–8732. BAUMER *v.* LASATER ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8733. CHAKY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8737. ZIMMERMAN *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 00–8741. SKOLNICK ET AL. *v.* ILLINOIS ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 00–8743. FADAEL, AKA BARTH *v.* CAPE SAVINGS BANK ET AL. Sup. Ct. N. J. Certiorari denied.

No. 00–8756. KNIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 770 So. 2d 663.

No. 00–8763. JUARBE *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–8766. PATTERSON *v.* MURPHY ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–8767. McCloud *v.* Jackson et al. C. A. 2d Cir. Certiorari denied. Reported below: 4 Fed. Appx. 7.

No. 00–8771. Lim *v.* Thomas & Betts Corp. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–8773. Dae Hee Lee *v.* Hubbard, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 00–8856. Williams *v.* Hayes, Sheriff, Itawamba County, Mississippi, et al. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–8893. Gilchrist *v.* Weldon, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 208 F. 3d 209.

No. 00–8903. Boyd *v.* Dormire, Superintendent, Jefferson City Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 00–8922. Brown *v.* O'Dea, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 227 F. 3d 642.

No. 00–8943. Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 00–8958. Moore *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 273 Ga. 11, 537 S. E. 2d 334.

No. 00–8993. Coley *v.* Garraghty, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 887.

No. 00–9005. Jacobs *v.* North Carolina. Sup. Ct. N. C. Certiorari denied.

No. 00–9024. Purcell *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 139 N. C. App. 636, 537 S. E. 2d 861.

No. 00–9037. Eickleberry *v.* Keohane, Warden, et al. C. A. 7th Cir. Certiorari denied.

No. 00–9064. Chambers *v.* Adams. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1357.

No. 00–9102. Johns *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 34 S. W. 3d 93.

No. 00–9122. D'Arcangelo *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 00–9133. Johnson *v.* Department of the Army et al. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 791.

No. 00–9139. White *v.* Angelone, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 545.

No. 00–9140. Willing *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 00–9151. McKinney *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 221 F. 3d 1343.

No. 00–9167. Tomlinson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 369.

No. 00–9182. Hurley *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 1295.

No. 00–9186. Moss *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 245.

No. 00–9188. Levine *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 221 F. 3d 941.

No. 00–9189. DeSantis *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 424.

No. 00–9200. Lujan-Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 791.

No. 00–9204. Boone *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1231.

No. 00–9205. Mueller *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 00–9209. Glover *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 771 So. 2d 1226.

No. 00–9210. HAWTHORNE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 772 So. 2d 19.

No. 00–9231. KEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9240. AIKENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9252. ROLLOCK *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 242 F. 3d 371.

No. 00–9255. VALENTINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 232 F. 3d 350.

No. 00–9263. LUVIANO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 669.

No. 00–9269. CUEVAS-ANDRADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 232 F. 3d 440.

No. 00–1109. OKLAHOMA *v.* WOOD. Ct. Crim. App. Okla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 11 P. 3d 1249.

Rehearing Denied

No. 00–7406. INGRAM *v.* SOUTH CAROLINA ET AL., 531 U. S. 1162;

No. 00–7543. MACON *v.* CALIFORNIA, 531 U. S. 1168;

No. 00–7674. TWEED *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 531 U. S. 1172;

No. 00–7711. POTEETE *v.* CAPITAL ENGINEERING, INC., ET AL., *ante*, p. 908;

No. 00–7851. COLEMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 926;

No. 00–7863. WALKER *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante*, p. 944;

No. 00–7901. BUTLER *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY, ET AL., *ante*, p. 910;

No. 00–7909. CONLEY *v.* GHEE, *ante*, p. 927;

No. 00–7914. COLLINS ET AL. *v.* FCC CARD NATIONAL BANK, *ante*, p. 927;

No. 00–7940. CLIFFORD *v.* TICE ET AL., 531 U. S. 1198;

No. 00–8033. GLADSTONE *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC., *ante*, p. 944;

No. 00–8078. LAWRENCE *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL., *ante*, p. 932;

No. 00–8085. BROWN *v.* UNITED STATES, 531 U. S. 1182;

No. 00–8218. ALI *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., *ante*, p. 948;

No. 00–8221. IN RE FISH, *ante*, p. 940;

No. 00–8295. IN RE STERN, 531 U. S. 1142;

No. 00–8351. WERMERS *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 934;

No. 00–8538. FIELDS *v.* DALKON SHIELD CLAIMANTS TRUST, *ante*, p. 950; and

No. 00–8599. VICUNA *v.* UNITED STATES, *ante*, p. 937. Petitions for rehearing denied.

MAY 1, 2001

Certiorari Denied

No. 00–9601 (00A933). MILLS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 786 So. 2d 532.

MAY 14, 2001

Certiorari Granted—Reversed and Remanded. (See No. 00–1210, *ante*, p. 504.)

Certiorari Granted—Vacated and Remanded

No. 00–8283. HAYES *v.* MILLS, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Artuz* v. *Bennett*, 531 U. S. 4 (2000).

Certiorari Dismissed

No. 00–8898. STEELE *v.* ORANGE COUNTY ET AL. Dist. Ct. App. Fla., 5th Dist. Motion of petitioner for leave to proceed

in forma pauperis denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2212. IN RE DISBARMENT OF FENTON. Disbarment entered. [For earlier order herein, see 531 U. S. 1007.]

No. D–2218. IN RE DISBARMENT OF EZER. Disbarment entered. [For earlier order herein, see 531 U. S. 1008.]

No. D–2222. IN RE DISBARMENT OF VIEHE. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. D–2223. IN RE DISBARMENT OF BLEDSOE. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. D–2224. IN RE DISBARMENT OF COIA. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. D–2225. IN RE DISBARMENT OF CICCONE. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. D–2227. IN RE DISBARMENT OF ERION. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. D–2228. IN RE DISBARMENT OF SEGRAVES. Disbarment entered. [For earlier order herein, see 531 U. S. 1065.]

No. D–2229. IN RE DISBARMENT OF WALSH. Disbarment entered. [For earlier order herein, see 531 U. S. 1066.]

No. D–2231. IN RE DISBARMENT OF MCFLYNN. Disbarment entered. [For earlier order herein, see 531 U. S. 1110.]

No. D–2232. IN RE DISBARMENT OF ADAMS. Disbarment entered. [For earlier order herein, see 531 U. S. 1122.]

No. D–2236. IN RE DISBARMENT OF MUTTALIB. Disbarment entered. [For earlier order herein, see 531 U. S. 1138.]

No. D–2237. IN RE DISBARMENT OF SCHACHLEITER. Disbarment entered. [For earlier order herein, see 531 U. S. 1138.]

No. 00M85. BELASCO *v.* SNYDER, WARDEN;
No. 00M86. MCGEE ET AL. *v.* CRAIG ET AL.;
No. 00M87. ACOMB ET VIR *v.* UNITED STATES;
No. 00M88. SHELTON *v.* UNITED STATES; and

No. 00M89. VELAZQUEZ DE MEZA ET AL. *v.* DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00M90. BRINSON *v.* HALL, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 128, Orig. ALASKA *v.* UNITED STATES. Motion of the Special Master for fees and reimbursement of expenses granted, and the Special Master is awarded a total of $12,963.14 for the period October 16, 2000, through April 16, 2001, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 1006.]

No. 99–1786. GREAT-WEST LIFE & ANNUITY INSURANCE CO. ET AL. *v.* KNUDSON ET AL. C. A. 9th Cir. [Certiorari granted, 531 U. S. 1124.] Motions of Self-Insurance Institute of America, Inc. (SHA), National Association of Subrogation Professionals, Inc., AARP et al., American Association of Health Plans et al., and Central States, Southeast and Southwest Areas Health and Welfare Fund for leave to file briefs as *amici curiae* granted.

No. 00–795. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Holder* v. *Free Speech Coalition*, 531 U. S. 1124.] Motion of National Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 00–927. CHAO, SECRETARY OF LABOR *v.* MALLARD BAY DRILLING, INC. C. A. 5th Cir. [Certiorari granted, 531 U. S. 1143.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 00–1045. TRW INC. *v.* ANDREWS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 902.] Motion of petitioner for leave to file a supplemental joint appendix under seal granted.

No. 00–8349. DELESPINE *v.* RODRIGUEZ ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 955] denied.

No. 00–9169. SEATON ET UX. *v.* SCIENTIFIC HYGIENE, INC., ET AL. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 4,

2001, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 00–1461. IN RE THOMPSON. Cir. Ct. Ore., 12th Jud. Dist. Petition for writ of common-law certiorari denied.

No. 00–9418. IN RE COPELAND;
No. 00–9442. IN RE ALEXANDER; and
No. 00–9560. IN RE CHRONISTER. Petitions for writs of habeas corpus denied.

No. 00–9481. IN RE HAWKINS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 00–9251. IN RE ROATH; and
No. 00–9297. IN RE DOWDY. Petitions for writs of mandamus denied.

No. 00–8774. IN RE BEEDLE ET AL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 00–1187. MCKUNE, WARDEN, ET AL. *v.* LILE. C. A. 10th Cir. Certiorari granted. Reported below: 224 F. 3d 1175.

No. 00–1214. ALABAMA *v.* SHELTON. Sup. Ct. Ala. Certiorari granted.

No. 00–1260. UNITED STATES *v.* KNIGHTS. C. A. 9th Cir. Motion of Rutherford Institute for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 219 F. 3d 1138.

Certiorari Denied. (See also No. 00–1461, *supra.*)

No. 00–1107. GOLDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 222 F. 3d 1123.

No. 00–1125. ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 215 F. 3d 61.

No. 00–1142. ILLINOIS *v.* DELAWARE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 314 Ill. App. 3d 363, 731 N. E. 2d 904.

No. 00–1192. SMITH ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 231 F. 3d 800.

No. 00–1195. SUMMERVILLE *v.* TRANS WORLD AIRLINES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 219 F. 3d 855.

No. 00–1232. SANDOVAL *v.* O'NEILL, SECRETARY OF THE TREASURY. C. A. 9th Cir. Certiorari denied. Reported below: 18 Fed. Appx. 464.

No. 00–1245. ROSARIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 347.

No. 00–1246. REED *v.* DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT. C. A. 9th Cir. Certiorari denied. Reported below: 231 F. 3d 501.

No. 00–1259. NOLAND *v.* HENDERSON, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 413.

No. 00–1262. SHOSHONE-BANNOCK TRIBES *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1161.

No. 00–1284. HILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–1291. ARCHER-DANIELS-MIDLAND CO. *v.* AJINOMOTO CO., INC. C. A. Fed. Cir. Certiorari denied. Reported below: 228 F. 3d 1338.

No. 00–1302. NEBRASKA *v.* SHEETS. Sup. Ct. Neb. Certiorari denied. Reported below: 260 Neb. 325, 618 N. W. 2d 117.

No. 00–1317. CRITICAL-VAC FILTRATION CORP. *v.* MINUTEMAN INTERNATIONAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 233 F. 3d 697.

No. 00–1378. STEWART ET AL. *v.* BIRMINGHAM NEWS CO.; and HORN *v.* BIRMINGHAM NEWS CO. Sup. Ct. Ala. Certiorari denied. Reported below: 786 So. 2d 464 (first judgment); 790 So. 2d 939 (second judgment).

No. 00–1385. AIR LINE PILOTS ASSN., INTERNATIONAL, ET AL. *v.* DELTA AIR LINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 238 F. 3d 1300.

No. 00–1386. CLIFFS ON THE BAY CONDOMINIUM ASSN. *v.* SMITH ET UX. Sup. Ct. Mich. Certiorari denied. Reported below: 463 Mich. 420, 617 N. W. 2d 536.

No. 00–1398. JIMENEZ *v.* HIALEAH HOUSING AUTHORITY. C. A. 11th Cir. Certiorari denied.

No. 00–1402. INTERNATIONAL FIDELITY INSURANCE CO., INC. *v.* DRILL SOUTH, INC. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 1232.

No. 00–1404. GRANT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE CITY OF LYNCHBURG ELECTORAL BOARD, ET AL. *v.* SALES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 224 F. 3d 293.

No. 00–1405. BARNES *v.* BARNES. Ct. Sp. App. Md. Certiorari denied. Reported below: 133 Md. App. 700.

No. 00–1411. WILSON, INDIVIDUALLY AND THROUGH HIS GUARDIAN AD LITEM, DUNMORE *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 142 Wash. 2d 40, 10 P. 3d 1061.

No. 00–1414. SCHAEFER *v.* DENISON, DIRECTOR, NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY. Sup. Ct. Nev. Certiorari denied.

No. 00–1418. BARRINGER *v.* INDEPENDENT SCHOOL DISTRICT NO. I–89 OF OKLAHOMA COUNTY, OKLAHOMA BOARD OF EDUCATION. C. A. 10th Cir. Certiorari denied. Reported below: 230 F. 3d 1201.

No. 00–1419. SIENKIEWICZ *v.* HART ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1421. PHELAN *v.* LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 235 F. 3d 1243.

No. 00–1424. EVANS *v.* YARBROUGH, JUDGE, COURT OF COMMON PLEAS OF OHIO, FRANKLIN COUNTY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 420.

No. 00–1427. WEST VIRGINIA EX REL. WINCHESTER MEDICAL CENTER *v.* SANDERS, JUDGE, CIRCUIT COURT OF BERKELEY COUNTY, ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 00–1430. COSTNER *v.* ZMUDA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 225 F. 3d 661.

No. 00–1431. HUTCHINSON *v.* WEISS, PECK & GREER, L. L. C., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 365.

No. 00–1432. METRO COMMUNICATIONS CO. *v.* AMERITECH CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–1433. CERMAK ET AL. *v.* NORTON, SECRETARY OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 234 F. 3d 1356.

No. 00–1437. JONAS *v.* TALLEY. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 890.

No. 00–1440. WRIGHT *v.* REA, CHAIR, OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION. C. A. 9th Cir. Certiorari denied.

No. 00–1443. GONZALEZ DUARTE ET AL. *v.* APONTE FIGUEROA ET AL. Sup. Ct. P. R. Certiorari denied.

No. 00–1444. ABOU-SAKHER *v.* MCCOY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1267.

No. 00–1445. GRINE ET AL. *v.* COOMBS ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–1449. AG SERVICES OF AMERICA, INC. *v.* NIELSEN. C. A. 10th Cir. Certiorari denied. Reported below: 231 F. 3d 726.

No. 00–1453. DESAIGOUDAR, TRUSTEE OF THE CHAN DESAIGOUDAR FOUNDATION *v.* MEYERCORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 223 F. 3d 1020.

No. 00–1455. WOOD *v.* QUINN, SECRETARY OF THE VIRGINIA BOARD OF ELECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1356.

No. 00–1463. LIGON *v.* BARTIS. Ct. App. Ga. Certiorari denied. Reported below: 243 Ga. App. 328, 530 S. E. 2d 773.

No. 00–1474. ROBINSON *v.* ALBRIGHT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 414.

No. 00–1475. GLASS ENTERPRISES, INC. *v.* ARSENAL, INC. Super. Ct. Pa. Certiorari denied. Reported below: 759 A. 2d 15.

No. 00–1478. HARTER ET AL. *v.* VERNON ET AL. Ct. App. N. C. Certiorari denied. Reported below: 139 N. C. App. 85, 532 S. E. 2d 836.

No. 00–1485. SORTMAN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 1265.

No. 00–1490. BRUNDAGE *v.* UNITED STATES INFORMATION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1156.

No. 00–1495. ABOU-SAKHER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 34 S. W. 3d 878.

No. 00–1513. SCHULZE *v.* COURT OF COMMON PLEAS, ERIE COUNTY, PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 00–1515. BANKS ET UX. *v.* STONEYBROOK APARTMENTS. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 888.

No. 00–1516. ALLISON ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 427.

No. 00–1523. BABER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 775 So. 2d 258.

No. 00–1529. KONTNY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 238 F. 3d 815.

No. 00–1548. UNANUE ET AL. *v.* GOYA FOODS, INC.; and

No. 00–1549. UNANUE-CASAL, AKA UNANUE *v.* GOYA FOODS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 233 F. 3d 38.

No. 00–1551. MCINTOSH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 236 F. 3d 968.

No. 00–1565. NICHOLSON *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1353.

No. 00–1579. KOCH *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 1265.

No. 00–1587. TERRY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 240 F. 3d 65.

No. 00–1590. SPENCE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–7751. POWERS *v.* UNITED STATES; and
No. 00–8611. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 232 F. 3d 536.

No. 00–7790. BUCHANAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 228 F. 3d 792.

No. 00–7806. CHAKLOS *v.* REICH, FORMER SECRETARY OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1328.

No. 00–7973. RUBIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1339.

No. 00–8011. BLACKWELL *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 732 N. E. 2d 262.

No. 00–8021. MCQUIRTER *v.* BURKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–8073. ADAMS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 32.

No. 00–8426. FORT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–8435. SOLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 227 F. 3d 686.

No. 00–8447. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8449. LEVELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8472. BAZEMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–8485. POOLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 2 Fed. Appx. 433.

No. 00–8507. MURRAY, AKA TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 432.

No. 00–8513. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 227 F. 3d 807.

No. 00–8521. MELECIO-RODRIGUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 231 F. 3d 1091.

No. 00–8754. COPELAND *v.* WASHINGTON, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 232 F. 3d 969.

No. 00–8758. HARJO *v.* GIBSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 216 F. 3d 1087.

No. 00–8779. MILLER *v.* SOUTHWESTERN EXPOSITION & LIVE STOCK ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8788. LANGSTON *v.* LITTLEFIELD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 389.

No. 00–8790. MOTT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 00–8791. QUINN *v.* HAYNES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 234 F. 3d 837.

No. 00–8794. PITTS *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 00–8798. BARRON *v.* MARTIN CORRECTIONAL INSTITUTION. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 00–8799. BROWN *v.* MARTIN CORRECTIONAL INSTITUTION. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 00–8800. BROWN *v.* MARTIN CORRECTIONAL INSTITUTION. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 00–8801. VONSCHOUNMACHER *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 00–8806. DEBLASIO *v.* MORENO, MARSHAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 217 F. 3d 838.

No. 00–8811. TARKINGTON *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8820. WELCH *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8826. ROBINSON *v.* RIDGE, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1329.

No. 00–8830. BEDELL *v.* GORCZYK, COMMISSIONER, VERMONT DEPARTMENT OF CORRECTIONS. C. A. 2d Cir. Certiorari denied.

No. 00–8834. SMITH *v.* POLUNSKY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 233 F. 3d 575.

No. 00–8837. EMEAGWALI *v.* UNIVERSITY OF MICHIGAN BOARD OF REGENTS ET AL. Ct. App. Mich. Certiorari denied.

No. 00–8841. FRENCH ET VIR *v.* FAMILY INDEPENDENCE AGENCY. Ct. App. Mich. Certiorari denied.

No. 00–8843. HUNT *v.* REGISTER ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8849. HARRIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 13 P. 3d 489.

No. 00–8852. DECKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8854. DUPRE *v.* TOURO INFIRMARY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1340.

No. 00–8859. JORDAN *v.* BRAZIL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 901.

No. 00–8861. CROHAN *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8862. COUNTERMAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–8865. DOTSON *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8866. CASTILLO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8869. ADKINS *v.* SIEGELMAN, GOVERNOR OF ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8870. BARRIOS *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8871. BARNES *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 706.

No. 00–8872. BEST *v.* SAMJO REALTY CORP. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 272 App. Div. 2d 188, 709 N. Y. S. 2d 508.

No. 00–8873. LUCABAUGH *v.* REDEVELOPMENT AUTHORITY OF CITY OF READING. C. A. 3d Cir. Certiorari denied. Reported below: 242 F. 3d 371.

No. 00–8888. GILKEY *v.* DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES OF CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8889. GILKEY *v.* SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8890. FELIX *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8897. SCHOENFELD ET AL. *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8899. REID *v.* CITY OF FLINT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 221 F. 3d 1335.

No. 00–8904. NICOLAOU *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–8907. MOORE *v.* NEW YORK STATE BOARD OF PAROLE. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 274 App. Div. 2d 886, 712 N. Y. S. 2d 179.

No. 00–8912. WASHINGTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8914. TAMALE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–8915. VALDEZ *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–8921. ALEKSEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 343 S. C. 20, 538 S. E. 2d 248.

No. 00–8924. MADYUN *v.* CITY OF MEMPHIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–8928. MATHIS *v.* BAUER BUICK CO., INC. C. A. 7th Cir. Certiorari denied.

No. 00–8930. SULLIVAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–8932. ROGERS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8934. RANGEL *v.* RAMIREZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8935. JETT *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–8940. RHODES *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–8944. REED *v.* MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 00–8945. OLDHAM *v.* SNYDER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 00–8954. PERSAUD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–8956. BUTCHER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8957. BAYRAMOGLU *v.* MADDOCK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–8960. WACKERLY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 12 P. 3d 1.

No. 00–8963. ROGERS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–8964. BAYRAMOGLU *v.* MADDOCK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8990. SALAAM *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 390.

No. 00–9049. BOLIEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 539, 24 P. 3d 230.

No. 00–9057. ZILICH *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–9073. ARREOLA *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 900.

No. 00–9078. LANG *v.* ROGERSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 375.

No. 00–9089. VALLERY *v.* SMALLS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9094. GEORGIOU *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 374.

No. 00–9103. MERJIL *v.* CLARKE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9126. DILLARD *v.* BUMGARNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 411.

No. 00–9129. PARKER *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 889.

No. 00–9137. STONE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 00–9147. CORBITT *v.* O'SULLIVAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9150. AYALA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 24 Cal. 4th 243, 6 P. 3d 193.

No. 00–9162. KLEIN *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9164. MENDEZ *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9175. HUGHES *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 421.

No. 00–9190. LONG NGOC DIEP *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9193. MCDUFFIE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 772 So. 2d 24.

No. 00–9194. HEIDLER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 273 Ga. 54, 537 S. E. 2d 44.

No. 00–9203. JONES *v.* LEE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 412.

No. 00–9206. VESSEY *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 00–9207. TAYLOR *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9214. LEONIDES GUANIPA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 710.

No. 00–9218. FULLER *v.* SPRAGINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 226 F. 3d 642.

No. 00–9224. HENRY *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 315.

No. 00–9227. GREEN *v.* SCIBANA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9228. TIRADO GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 897.

No. 00–9233. DORET *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 765 A. 2d 47.

No. 00–9236. ROSELLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 746.

No. 00–9238. MATHIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 213.

No. 00–9239. BARRETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 890.

No. 00–9241. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 237 F. 3d 625.

No. 00–9248. PETRILLO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 50 Mass. App. 104, 735 N. E. 2d 395.

No. 00–9250. SILVERS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 260 Neb. 831, 620 N. W. 2d 73.

No. 00–9260. WALTERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9270. FOSTER *v.* SUPREME COURT OF OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 00–9283. GIBBONS *v.* MENIFEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 00–9286. NORRIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 00–9287. PRI-HAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9291. BALTAS, AKA DIPINTO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 236 F. 3d 27.

No. 00–9294. NAVARETTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 389.

No. 00–9300. NEWBY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 413.

No. 00–9307. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9308. BOONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 668.

No. 00–9309. BAILEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 00–9310. ALVAREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 235 F. 3d 1086.

No. 00–9315. SINDRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 892.

No. 00–9316. BARBER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9319. HAWKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 377.

No. 00–9320. MOODY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–9322. SASSER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9325. SMEKTALA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 683.

No. 00–9329. NELSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1158.

No. 00–9330. OKAFOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 369.

No. 00–9332. LOVE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9334. BOUZA SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 176 F. 3d 486.

No. 00–9335. SHINHOSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1177.

No. 00–9348. ULLOA-PORRAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 683.

No. 00–9351. VERGARA-SOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 678.

No. 00–9352. GARCIA-TORRES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 424.

No. 00–9353. LOPEZ-PERDOMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–9356. HERNANDEZ-VEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 235 F. 3d 705.

No. 00–9362. DAVAGE *v.* SCOTT, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9368. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 247 F. 3d 241.

No. 00–9369. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9372. GEOHAGEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 542.

No. 00–9380. ALEXIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 890.

No. 00–9382. RUX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9384. BUSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 221 F. 3d 1356.

No. 00–9386. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 242 F. 3d 372.

No. 00–9396. PARKER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 140 N. C. App. 169, 539 S. E. 2d 656.

No. 00–9398. TREVINO TUNCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 247 F. 3d 241.

No. 00–9402. MATA-BALDERAS, AKA SANCHEZ LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 248.

No. 00–9404. DORSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 245.

No. 00–9407. BLUNT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 245 F. 3d 794.

No. 00–9413. RICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1342.

No. 00–9415. PRESCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9416. MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9422. HUGHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 542.

No. 00–9432. CONNORS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1153.

No. 00–9434. PENN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 233 F. 3d 1111.

No. 00–9436. PINEDA-ESCOBEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 217 F. 3d 847.

No. 00–9456. MERRICK, AKA LOGAN *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 2 Fed. Appx. 770.

No. 00–1420. PINER ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 238 F. 3d 414.

No. 00–1429. KATZ ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 229 F. 3d 831.

No. 00–8769. BOOKER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE BREYER would grant certiorari. Reported below: 773 So. 2d 1079.

No. 00–8942. BRIDGERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

Statement of JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, respecting the denial of the petition for writ of certiorari.

After petitioner, Allen Bridgers, was arrested, and prior to his interrogation, two detectives from the Fort Lauderdale Police Department read him the following warnings:

> "'You have the right to remain silent. Do you understand? Anything you say can and will be used against you in a court of law. Do you understand? You have the right to the presence of an attorney/lawyer prior to any questioning. Do you understand? If you cannot afford an attorney/lawyer, one will be appointed for you before any questioning if you so desire. Do you understand?'" App. to Pet. for Cert. 3.

Bridgers replied that he understood his rights, and that he was not sure whether he wanted an attorney. Bridgers now argues that the warnings were inadequate under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), because they did not explain that he had a right to consult an attorney, not only prior to, but also *during*, questioning.

Although this Court has declined to demand "rigidity in the *form* of the required warnings," *California* v. *Prysock*, 453 U. S. 355, 359 (1981) *(per curiam)*, the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element. 384 U. S., at 470.

Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. And because the police apparently read the warnings from a standard-issue card, I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention.

No. 00–9957 (00A988). SCOTT *v.* OHIO. Sup. Ct. Ohio. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 92 Ohio St. 3d 1, 748 N. E. 2d 11.

Rehearing Denied

No. 00–607. GRAY *v.* UNITED STATES, *ante*, p. 919;

No. 00–1163. BASS *v.* BOARD OF MEDICAL EXAMINERS OF NEVADA, *ante*, p. 921;

No. 00–1223. IN RE BRAUN, *ante*, p. 940;

No. 00–1271. TAYLOR *v.* HENDERSON, POSTMASTER GENERAL, *ante*, p. 923;

No. 00–6686. HU *v.* LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES ET AL., *ante*, p. 959;

No. 00–7417. GASTON *v.* POWELL, WARDEN, 531 U. S. 1130;

No. 00–7444. GLAUNER *v.* GRIGAS, 531 U. S. 1163;

No. 00–7470. SWEED *v.* COUNTY OF EL PASO ET AL., 531 U. S. 1165;

No. 00–7615. RHODES *v.* NEWLAND, WARDEN, 531 U. S. 1171;

No. 00–7690. SAMUELSON *v.* IDAHO, 531 U. S. 1173;

No. 00–7753. WICKS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 909;

No. 00–7808. SWANN *v.* UNITED STATES, 531 U. S. 1176;

No. 00–7820. COOPER *v.* CALIFORNIA, *ante*, p. 910;

No. 00–7873. MINCEY *v.* HEAD, WARDEN, *ante*, p. 926;

No. 00–7952. FRANZA *v.* STINSON, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, *ante*, p. 929;

No. 00–7996. MINNIECHESKE *v.* FARREY, WARDEN, ET AL., *ante*, p. 930;

No. 00–8007. CARTER *v.* TESSMER, WARDEN, ET AL., *ante*, p. 930;

No. 00–8094. CARTER *v.* DUNCAN, WARDEN, ET AL., *ante*, p. 932;

No. 00–8095. CHAPMAN *v.* UNITED STATES, *ante*, p. 932;

No. 00–8117. PETRICK *v.* FLORIDA, *ante*, p. 932;

No. 00–8141. EDWARDS *v.* BELL, *ante*, p. 946;

No. 00–8173. IN RE DAVIS, 531 U. S. 1142;

No. 00–8186. HADDEN *v.* UNITED STATES, 531 U. S. 1201;

No. 00–8189. FEASTER *v.* BESHEARS, WARDEN, 531 U. S. 1201;

No. 00–8249. ASHWAY *v.* HATCHER, WARDEN, ET AL., *ante*, p. 911;

No. 00–8598. TUCKER *v.* MOSSING, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, ET AL., *ante*, p. 964;

No. 00–8713. VIVONE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, *ante*, p. 965; and

No. 00–8777. IN RE CANNON, *ante*, p. 940. Petitions for rehearing denied.

No. 00–7064. MCDOW *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, 531 U. S. 1095. Motion for leave to file petition for rehearing denied.

MAY 21, 2001

Certiorari Granted—Vacated and Remanded

No. 00–8391. COLLAZO-APONTE *v.* UNITED STATES. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). Reported below: 216 F. 3d 163.

Certiorari Dismissed

No. 00–9054. COREY *v.* MENDEL ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 221 F. 3d 195.

No. 00–9491. JOHNSON *v.* WYOMING. Dist. Ct. Wyo., Laramie County. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 00A801. NABATANZI *v.* IMMIGRATION AND NATURALIZATION SERVICE. Application for stay of deportation, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2246. IN RE DISBARMENT OF MAGUIRE. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. D–2250. IN RE DISBARMENT OF DEAN. Disbarment entered. [For earlier order herein, see 531 U. S. 1188.]

No. 00M91. MCMILLAN *v.* ROE, WARDEN;

No. 00M92. SARRACINO *v.* UNITED STATES; and

No. 00M93. COLEY *v.* SOCIAL SECURITY ADMINISTRATION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00–1555. IN RE RETTIG. C. A. 6th Cir. Petition for writ of common-law certiorari denied.

No. 00–9589. IN RE BERRY; and
No. 00–9617. IN RE ADKINS. Petitions for writs of habeas corpus denied.

No. 00–9346. IN RE WESTINE; and
No. 00–9509. IN RE GONZALEZ. Petitions for writs of mandamus denied.

Certiorari Granted

No. 00–1293. ASHCROFT, ATTORNEY GENERAL *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 217 F. 3d 162.

Certiorari Denied. (See also No. 00–1555, *supra.*)

No. 99–9611. O'NEAL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 87 Ohio St. 3d 402, 721 N. E. 2d 73.

No. 00–945. KAGAN *v.* UNITED STATES; and
No. 00–7360. RUMIGNANI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 219 F. 3d 145 and 225 F. 3d 647.

No. 00–1313. DREW, A MINOR UNDER AGE THIRTEEN, BY GUARDIAN AD LITEM, DREW, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 231 F. 3d 927.

No. 00–1321. BATH PETROLEUM STORAGE, INC. *v.* MARKET HUB PARTNERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 229 F. 3d 1135.

No. 00–1383. BRUNGART *v.* BELLSOUTH TELECOMMUNICATIONS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 231 F. 3d 791.

No. 00–1435. BITE, INC. *v.* FIRST NATIONAL BANK. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–1441. PENNINGTON *v.* TOWN OF FRONT ROYAL. Ct. App. Va. Certiorari denied.

No. 00–1460. BATTLE *v.* LEBLANC, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–1462. LEFKOWITZ *v.* BANK OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 265 App. Div. 2d 253, 697 N. Y. S. 2d 25.

No. 00–1467. POOLE *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 00–1476. GONZALES *v.* NATIONAL BOARD OF MEDICAL EXAMINERS. C. A. 6th Cir. Certiorari denied. Reported below: 225 F. 3d 620.

No. 00–1483. CRAMPTON ET AL. *v.* ERVIN, CHANCELLOR, LEE COUNTY CHANCERY COURT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 791.

No. 00–1486. POLITI *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–1487. LAWSON *v.* LAWSON. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 00–1492. ROSS *v.* UNIVERSITY OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 889.

No. 00–1494. BALTIMORE RAVENS, INC., ET AL. *v.* BOUCHAT. C. A. 4th Cir. Certiorari denied. Reported below: 241 F. 3d 350.

No. 00–1502. DOUG GRANT, INC., ET AL. *v.* GREATE BAY CASINO CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 232 F. 3d 173.

No. 00–1532. MCGLYNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–1538. MONTGOMERY, FOR HIMSELF AND FOR ALL OTHERS SIMILARLY SITUATED, FOR THEMSELVES AND FOR AETNA PLYWOOD, INC. PROFIT SHARING PLAN AS SUCCESSOR TO AETNA PLYWOOD, INC., EMPLOYEE STOCK OWNERSHIP PLAN *v.* AETNA PLYWOOD, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 231 F. 3d 399.

No. 00–1542. Clay *v.* Dormire, Superintendent, Jefferson City Correctional Center, et al. Sup. Ct. Mo. Certiorari denied. Reported below: 37 S. W. 3d 214.

No. 00–1557. Hale *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 343 Ark. 62, 31 S. W. 3d 850.

No. 00–1569. Dominguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 226 F. 3d 1235.

No. 00–1575. Ntreh *v.* University of Texas at Dallas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 00–1599. Marlin *v.* District of Columbia Board of Elections & Ethics. C. A. D. C. Cir. Certiorari denied. Reported below: 236 F. 3d 716.

No. 00–1600. Console *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 00–1625. Ida *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 647.

No. 00–5947. Hill *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 481.

No. 00–6525. Selsor *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2 P. 3d 344.

No. 00–6552. Fairchild *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 998 P. 2d 611.

No. 00–7169. Green *v.* Catoe, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 220 F. 3d 220.

No. 00–7603. Hannibal *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 562 Pa. 132, 753 A. 2d 1265.

No. 00–7828. Thompson *v.* Texas. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 00–8023. Rice *v.* City of Oakland et al. C. A. 9th Cir. Certiorari denied. Reported below: 234 F. 3d 1278.

No. 00–8545. DENNIS *v.* LOWE, ASSISTANT WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–8575. TYSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 784 So. 2d 357.

No. 00–8583. ROLLER *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 31 S. W. 3d 152.

No. 00–8967. MAGGIO *v.* NORM REEVES HONDA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 674.

No. 00–8972. WATERS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 165 Ore. App. 645, 997 P. 2d 279.

No. 00–8975. SCHRADER *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 00–8981. DUTTON *v.* MONTGOMERY COUNTY GOVERNMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 887.

No. 00–8982. ASHANTI *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 00–8985. MENDOZA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 24 Cal. 4th 130, 6 P. 3d 150.

No. 00–8989. SONHOUSE *v.* NYNEX CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 646.

No. 00–8991. RODRIGUEZ *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 244 F. 3d 142.

No. 00–8992. CADOREE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–8996. MILLER *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–8997. O'KEEFE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 00–9007. JAMES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 788 So. 2d 185.

No. 00–9008. STARR *v.* ROBINSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9018. GOTCHER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 99 Wash. App. 1032.

No. 00–9020. KULAS *v.* MACK ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 615 N. W. 2d 357.

No. 00–9025. PIERCE *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9027. OSBORNE *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9028. COMPEL *v.* RELIANCE STANDARD LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1142.

No. 00–9029. YONAMINE *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 234 F. 3d 1263.

No. 00–9030. WILLIAMS *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 00–9032. BIN YANG *v.* NEW PRIME, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–9033. VILLEGAS *v.* LINDSEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9034. BEHARRY *v.* M. T. A. NEW YORK CITY TRANSIT AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 364.

No. 00–9039. SIMMONS *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 00–9041. SHORTER *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 00–9043. KRAUSE *v.* OTTO NEMENZ INTERNATIONAL, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–9048. CLARKE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 707.

No. 00–9067. RUIZ *v.* WILLIAMS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 00–9070. SOLIZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9071. SCHEXNIDER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9121. CAUDILL *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9138. MCSHEFFREY *v.* EXECUTIVE OFFICE OF THE UNITED STATES ATTORNEYS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 00–9153. ROMERO *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9163. MARTIN *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 00–9180. HANKINS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9187. JACKSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9216. GUZMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–9221. HECKARD *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9222. GEARING *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9226. HUGHES *v.* DEEDS, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 00–9229. MANNING *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9254. WINSLOW *v.* O'NEILL, SECRETARY OF THE TREASURY. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 379.

No. 00–9266. MILLER *v.* COWAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9267. REGER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9271. BALDWIN *v.* PINCHAK, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–9274. MOCKLER *v.* MARITIME & NORTHEAST PIPELINE, L. L. C. C. A. 1st Cir. Certiorari denied. Reported below: 248 F. 3d 1127.

No. 00–9289. JONES *v.* BATTLE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 247.

No. 00–9313. THOMAS *v.* NEW YORK STATE EXECUTIVE DIVISION OF PAROLE. Ct. App. N. Y. Certiorari denied. Reported below: 95 N. Y. 2d 958, 745 N. E. 2d 394.

No. 00–9327. BECKER *v.* GHEE, CHAIR, OHIO ADULT PAROLE AUTHORITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 419.

No. 00–9333. GARY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9344. CLARK *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 621 N. W. 2d 576.

No. 00–9374. FAHLE *v.* CORNYN, ATTORNEY GENERAL OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 231 F. 3d 193.

No. 00–9393. SANDERS *v.* ALFORD, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 136.

No. 00–9394. PERROTTE *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 00–9400. OGUAJU *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1270.

No. 00–9405. CARRILLO-QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 734.

No. 00–9406. WINFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 545.

No. 00–9411. BIVENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9427. YOUNG *v.* FORD MOTOR CREDIT CO. C. A. 6th Cir. Certiorari denied.

No. 00–9445. PINQUE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 234 F. 3d 374.

No. 00–9447. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 247 F. 3d 242.

No. 00–9449. SAINT-BRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 544.

No. 00–9455. MCELROY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 378.

No. 00–9464. ROBERTS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 752 A. 2d 583.

No. 00–9465. MARTINEZ-GUEVARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 432.

No. 00–9468. SPENCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 245 and 246.

No. 00–9472. TUCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 418.

No. 00–9474. MURPHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 241 F. 3d 447.

No. 00–9478. HERNANDEZ-ALEJANDRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–9484. HINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 669.

No. 00–9488. LATORRE-BENAVIDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 241 F. 3d 262.

No. 00–9490. SHANU *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 00–9495. FARRISH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9500. IN RE PRATHER. Ct. App. Minn. Certiorari denied.

No. 00–9505. GREENE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 677.

No. 00–9511. IBRAHIM, AKA ANDERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 248 F. 3d 1126.

No. 00–9513. BOBO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1152.

No. 00–9514. OSUNA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–9516. RAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 238 F. 3d 828.

No. 00–9517. RANDLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–9519. SLAUGHTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 238 F. 3d 580.

No. 00–9527. HINTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1154.

No. 00–9529. FLOREZ-GRANADOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 248.

No. 00–9532. MACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 229 F. 3d 226.

No. 00–9548. BLANDON-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 740.

No. 00–9550. ARIAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 238 F. 3d 1.

No. 00–9553. SANTIAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 238 F. 3d 213 and 2 Fed. Appx. 129.

No. 00–9555. LIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 646.

No. 00–9556. OWEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 670.

No. 00–9557. URRABAZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 904.

No. 00–9559. CARRERA-REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1173.

No. 99–1946. CHEN ET AL. *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 206 F. 3d 502.

JUSTICE THOMAS, dissenting.

Petitioners, Houston residents, filed suit against the city of Houston and alleged that the city violated the Equal Protection Clause when it redrew its single-member city council districts in 1997. Petitioners argued that the city engaged in racial gerrymandering when it devised the 1997 plan and that the districts did not conform to the one-person, one-vote requirements articulated by this Court. The District Court granted summary judgment to the city, and the Court of Appeals affirmed. Because petitioners present an important legal question over which Courts of Appeals disagree, I would grant certiorari.

When drawing its 1997 districting plan, the city faced the challenge of where to place the newly annexed Kingwood suburb, an overwhelmingly white community located in the northeastern most point of Houston. Had the city added Kingwood to the adjacent District B, the city would have been forced to move a number of persons out of District B into neighboring districts to avoid making District B disproportionately large. This shifting of people from one district to another allegedly would have jeopardized the strength of several "minority" districts, those districts containing primarily voters who are black or Hispanic. Instead, at least in part to avoid disrupting these minority districts, the city made Kingwood a part of District E, a predominantly white community located in the southeastern corner of Houston. Petitioners argue that this placement evidenced racial gerrymander-

ing and that the city engaged in the systemic undersizing of "minority" districts. Simply put, petitioners contend that the city drew minority districts so that they would contain fewer people, and fewer voters, than would "majority" districts, comprising primarily voters who are white. According to petitioners, this undersizing was done directly, by making minority districts smaller in terms of total population, and indirectly, by roughly equalizing district populations without regard to the *citizen voting age* population. Because each district would have a single representative in the city council, the alleged effect of this undersizing was to dilute the value of votes in districts with larger total populations and citizen voting age populations, *i. e.*, districts that in this case comprised majority white populations.

I would grant certiorari on petitioners' one-person, one-vote claim, which asks what measure of population should be used for determining whether the population is equally distributed among the districts. In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*, at 577; see *Avery* v. *Midland County*, 390 U. S. 474 (1968) (applying *Reynolds'* one-person, one-vote holding to districting for the selection of local governmental representatives). Absolute parity of populations among districts has never been required. But "this Court has recognized that a state legislative apportionment scheme with a maximum population deviation exceeding 10% creates a prima facie case of discrimination." *Brown* v. *Thomson*, 462 U. S. 835, 850 (1983) (O'CONNOR, J., concurring); see *id.*, at 842–843 (opinion of the Court) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State" (citations omitted)). Having read the Equal Protection Clause to include a "one-person, one-vote" requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined. We have never determined the relevant "population" that States and localities must equally distribute among their districts.

Such a determination might be dispositive of whether the city has violated the Equal Protection Clause. If "population" means "total population," the districts in the city's 1997 plan had a less than 10% population variance. If, however, it means "citizen voting age population," the maximum deviation is allegedly anywhere from 20% to 32.5%. Pet. for Cert. 3, and n. 4. The Fifth Circuit in this case held that the decision as to which population figures to use was "a choice left to the political process." 206 F. 3d 502, 523 (2000). Likewise, the Fourth Circuit has held that the decision whether to use total population or voting age population is a political choice generally not reviewable by courts. *Daly* v. *Hunt*, 93 F. 3d 1212, 1227 (1996) ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment"). In contrast, the Ninth Circuit has held that districting based on voting populations instead of the total population would have been unconstitutional. *Garza* v. *County of Los Angeles*, 918 F. 2d 763, 773–776 (1991).

In other contexts, I might be inclined to wait for further conflict to develop among the courts of appeals. In this case, however, because every jurisdiction in the country will have to accommodate the 2000 census data in the near future, it behooves us to address this question as soon as possible. The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means.

No. 00–1454. TEXTRON FUNDING CORP. ET AL. *v.* BESSETTE. C. A. 1st Cir. Motions of American Financial Services Association and New England Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 230 F. 3d 439.

No. 00–1498. SIENKIEWICZ *v.* MCDOUGALL ET AL. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 00–1176. OBERMEYER *v.* ALASKA BAR ASSN., *ante*, p. 922;

No. 00–6741. MITCHELL *v.* MCDANIEL, WARDEN, ET AL., 531 U. S. 1086;

No. 00–6792. TOLLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 531 U. S. 1087;

No. 00–6977. MASKO *v.* UNITED STATES, *ante*, p. 958;

No. 00–7040. WOOD *v.* UNITED STATES, *ante*, p. 924;

No. 00–7740. CLARK *v.* WITEK, WARDEN, ET AL., 531 U. S. 1174;

No. 00–7829. VEALE ET AL. *v.* UNITED STATES ET AL., *ante*, p. 925;

No. 00–7887. CRUZ *v.* DEEDS, WARDEN, *ante*, p. 927;

No. 00–7980. FILIPOS *v.* SEARS, ROEBUCK & CO., *ante*, p. 929;

No. 00–8060. SCHAFFER *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL., *ante*, p. 931;

No. 00–8091. GARCIA ESPINOZA *v.* RUIZ ET UX., *ante*, p. 945;

No. 00–8121. BROWN *v.* MITCHEM, *ante*, p. 946;

No. 00–8314. THOMPSON *v.* PRESTERA CENTER FOR MENTAL HEALTH SERVICES ET AL., *ante*, p. 961;

No. 00–8572. COCKBURN *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY, *ante*, p. 951;

No. 00–8672. GUINTO *v.* PHILIP MORRIS, INC., *ante*, p. 964; and

No. 00–8910. IN RE BURNS, *ante*, p. 957. Petitions for rehearing denied.

No. 00–7649. MORROW *v.* GEORGIA, *ante*, p. 944. Motion for leave to file petition for rehearing denied.

MAY 22, 2001

Certiorari Denied

No. 00–10165 (00A1029). SMITH *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this application and this petition.

MAY 24, 2001

Dismissal Under Rule 46

No. 00–1572. SEABOARD SURETY CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF S & G EXCAVATING, INC. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 236 F. 3d 883.

MAY 25, 2001

Miscellaneous Order

No. 00–10210 (00A1031). IN RE JOHNSON. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 29, 2001

Certiorari Granted—Reversed and Remanded. (See No. 00–262, *ante*, p. 769.)

Certiorari Granted—Vacated and Remanded

No. 99–1709. MCDERMOTT *v.* BOEHNER ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bartnicki* v. *Vopper*, *ante*, p. 514. Reported below: 191 F. 3d 463.

No. 00–1457. SAN PAOLO U. S. HOLDING CO., INC. *v.* SIMON, DBA LIBERTY PAPER CO. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, *ante*, p. 424.

No. 00–8480. BOUFFORD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Artuz* v. *Bennett*, 531 U. S. 4 (2000).

Miscellaneous Orders

No. 00A960. EITEL *v.* WASHINGTON MUTUAL BANK. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2188. IN RE DISBARMENT OF TIDWELL. Disbarment entered. [For earlier order herein, see 530 U. S. 1294.]

No. 00–1491. JOHN DEERE INSURANCE CO. *v.* NUEVA ET AL. C. A. 9th Cir. Motions of National Association of Independent Insurers and Trucking Industry Defense Association for leave to file briefs as *amici curiae* granted. The Solicitor General is in-

vited to file a brief in this case expressing the views of the United States.

No. 00–8721. GYADU *v.* FRANKL ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 969] denied.

No. 00–9620. IN RE CARTER. Petition for writ of mandamus denied.

Certiorari Granted

No. 00–1249. THOMAS ET AL. *v.* CHICAGO PARK DISTRICT. C. A. 7th Cir. Certiorari granted. Reported below: 227 F. 3d 921.

Certiorari Denied

No. 00–455. ACKER ET AL. *v.* JEFFERSON COUNTY, ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 210 F. 3d 1317.

No. 00–691. WFAA–TV, INC., ET AL. *v.* PEAVY ET UX.; and No. 00–849. PEAVY ET UX. *v.* WFAA–TV, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 221 F. 3d 158.

No. 00–1103. STRICKLAND *v.* PIRIE, ACTING SECRETARY OF THE NAVY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1339.

No. 00–1182. GOTCHNIK ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 222 F. 3d 506.

No. 00–1314. RODRIGUEZ, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, KELLY *v.* MCLOUGHLIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 214 F. 3d 328.

No. 00–1335. TEXAS COMMITTEE ON NATURAL RESOURCES *v.* VENEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 228 F. 3d 559.

No. 00–1341. SMITH ET AL. *v.* UNIVERSITY OF WASHINGTON LAW SCHOOL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 233 F. 3d 1188.

No. 00–1342. RACAL NCS, INC., ET AL. *v.* TIDEWATER MARINE INTERNATIONAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 231 F. 3d 183.

No. 00–1359. NEW HORIZON OF NEW YORK LLC *v.* JACOBS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 231 F. 3d 143.

No. 00–1382. COOK ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 243 F. 3d 561.

No. 00–1392. SHIPP ET AL. *v.* MCMAHON, SHERIFF OF WEBSTER PARISH, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 907.

No. 00–1482. FRISBEY *v.* FREED. Ct. App. Mich. Certiorari denied. Reported below: 242 Mich. App. 188, 617 N. W. 2d 745.

No. 00–1504. HILGER ET UX. *v.* LAWRENCE ET AL. Ct. App. Mich. Certiorari denied.

No. 00–1512. WON HO SONG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–1525. DUNCAN *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–1559. HITTSON *v.* TURPIN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 00–1562. INTERNATIONAL FIDELITY INSURANCE CO. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 332 N. J. Super. 436, 753 A. 2d 1170.

No. 00–1574. WARTHEN ET AL. *v.* SMITH. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 540.

No. 00–1581. CLEMENS *v.* GAVIN DE BECKER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 547.

No. 00–1586. MEISTER *v.* TEXAS ADJUTANT GENERAL'S DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 233 F. 3d 332.

No. 00–1603. SCHLUND ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 676.

No. 00–1613. BEASLEY *v.* SODEXHO USA, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 410.

No. 00–1638. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 544.

No. 00–7542. JONES, AKA LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 468.

No. 00–8129. FOUNTAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 223 F. 3d 927.

No. 00–8290. ESCOBAR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 82 Cal. App. 4th 1085, 98 Cal. Rptr. 2d 696.

No. 00–8455. ESTES *v.* SUPREME COURT OF UTAH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 388.

No. 00–8587. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8601. LEYBINSKY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied.

No. 00–8673. ALANIZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–8687. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–8689. CHUONG DUONG TONG *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 25 S. W. 3d 707.

No. 00–8725. VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1161.

No. 00–8776. DALTON *v.* SCHOOL BOARD OF THE CITY OF NORFOLK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 653.

No. 00–9055. ARNOLD *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9065. OWENS *v.* SMILEY. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 413.

No. 00–9072. SHEA *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 00–9080. JONES *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 00–9088. WARD *v.* BROYLES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9090. LENG YU VANG *v.* KNOWLES, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9091. CALBERT *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 420.

No. 00–9092. GUZMAN *v.* WELBORN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9093. ST. HILARE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1078.

No. 00–9101. HENNESSEY *v.* HICKMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9113. CLARK *v.* KEOHANE, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–9114. CORONA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–9117. SEARS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 768 So. 2d 1085.

No. 00–9118. ROBBINS *v.* HARGETT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 682.

No. 00–9120. DUNDAS *v.* HUTCHINSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 537.

No. 00–9123. SAXTON *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–9125. REYNOLDS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 814 So. 2d 1023.

No. 00–9128. EPHRAIM *v.* NEAL, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9131. JACKSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9134. LOFTEN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9135. JETER *v.* WARDEN, WINN CORRECTIONAL CENTER. C. A. 5th Cir. Certiorari denied.

No. 00–9142. YOUNG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 12 P. 3d 20.

No. 00–9143. PRICE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 24 Cal. 4th 856, 15 P. 3d 234.

No. 00–9145. TAYLOR *v.* SUTTON. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1340.

No. 00–9146. WOJNICZ *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9148. ELHAJ-CHEHADE *v.* OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1339.

No. 00–9154. REESE *v.* DISTRICT OF COLUMBIA METROPOLITAN POLICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 00–9157. BARKSDALE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 788 So. 2d 898.

No. 00–9170. WEST *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 00–9171. ZOGLAUER *v.* CITY OF WHEATON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1275.

No. 00–9172. WALLACE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–9208. UNDERKOFLER *v.* COMMUNITY HEALTH CARE PLAN, INC. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 646.

No. 00–9278. THOMPSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 262 App. Div. 2d 666, 693 N. Y. S. 2d 614.

No. 00–9339. TARAN *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 549.

No. 00–9341. BANKS *v.* MID-STATES ELECTRIC. C. A. 6th Cir. Certiorari denied. Reported below: 221 F. 3d 1333.

No. 00–9343. SINGLETON *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied.

No. 00–9376. HALL *v.* CLINTON, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 428.

No. 00–9401. PAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 232 F. 3d 536.

No. 00–9412. SAMPSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 362 Md. 438, 765 A. 2d 629.

No. 00–9414. SAULSGIVER *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 540.

No. 00–9425. JONES *v.* THOMPSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–9435. PICKARD *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9453. DUNLAP *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9457. DIAZ *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9460. SMIALEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9477. HOOVER *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 71 Ark. App. xxi.

No. 00–9489. BUTLER *v.* CRAVEN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9499. BAPTISTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9503. GRUNDY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 00–9518. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 903.

No. 00–9533. KEITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9539. GRADY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 377.

No. 00–9549. HARRIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 156 N. J. 122, 716 A. 2d 458.

No. 00–9561. ARREDONDO-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 676.

No. 00–9563. MYRICK *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 316.

No. 00–9564. OWENS *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 621 N. W. 2d 566.

No. 00–9567. HERRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9580. MONTELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1174.

No. 00–9582. SNYDER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 235 F. 3d 42.

No. 00–9584. MARTINEZ-ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1174.

No. 00–9588. CHINO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 238 F. 3d 1242.

No. 00–9593. WASH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 231 F. 3d 366.

No. 00–9595. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1146.

No. 00–9604. RICHARDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 238 F. 3d 837.

No. 00–9607. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9608. MONZIONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9611. BOLTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9616. THOMPSON, AKA LNU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1177.

No. 00–9618. DAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1139.

No. 00–9655. BUHRMAN *v.* CARTER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9685. MATEJKA *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 241 Wis. 2d 52, 621 N. W. 2d 891.

No. 00–9687. MILLS *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 413.

No. 00–1255. CHAMBER OF COMMERCE OF THE UNITED STATES *v.* VOLLOR. Sup. Ct. Miss. Motion of Alliance for Democracy et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

No. 00–1407. CITY OF ELKHART *v.* BOOKS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 235 F. 3d 292.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

As I pointed out some years ago, one reason that dissents from the denial of certiorari should be disfavored is that they are seldom answered, and therefore may include a less than complete statement of the facts bearing on the question whether the case merits review.[1] The dissent in this case illustrates my

[1] "One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.

"Another attribute of these opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most

point because it omits one extremely significant fact and discounts another.

Even though the first two lines of the monument's text appear in significantly larger font than the remainder, they are ignored by the dissenters. Those lines read: "THE TEN COMMANDMENTS—I AM the LORD thy God." The graphic emphasis placed on those first lines is rather hard to square with the proposition that the monument expresses no particular religious preference—particularly when considered in conjunction with those facts that the dissent does acknowledge—namely, that the monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ.

Moreover, the dissent also gives short shrift to relevant details about the monument's origins. At the dedication ceremony, three of the principal speakers were a Catholic priest, a Protestant minister, and a Jewish rabbi.[2] 235 F. 3d 292, 303 (CA7 2000). All three spoke not of the "'"cross cultural . . . significance"'" of the Ten Commandments, *post*, at 1060 (opinion of REHNQUIST, C. J.), but of the need for every citizen to adopt their precepts so as to obtain "'redemption from today's strife and fear,'" 235 F. 3d, at 295. To dismiss that history in favor of a resolution issued by the Elkhart Common Council on the eve of litigation is puzzling indeed.

The reasons why this case is not one that merits certiorari are explained in detail in Judge Ripple's thoughtful opinion for the Court of Appeals.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Since 1958, a 6-foot granite monument inscribed with the Ten Commandments has stood in front of the city of Elkhart's Munici-

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other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference." *Singleton* v. *Commissioner*, 439 U. S. 940, 944–945 (1978) (STEVENS, J., opinion respecting denial of certiorari).

[2] In planning the monument, representatives of Judaism, Protestantism, and Catholicism developed a nonsectarian version of the Ten Commandments. Making a religious text nonsectarian, however, does not make it secular or strip it of its religious significance.

pal Building, on the northeast corner of a lawn shared with two commemorative structures. The specific text was developed by representatives of the Jewish, Catholic, and Protestant faiths who sought to create a nonsectarian version of the Commandments. In addition to the text, the monument depicts an eye within a pyramid similar to the one displayed on the one-dollar bill, an American eagle grasping the American flag, two small Stars of David, and a similarly sized symbol representing Christ: two Greek letters, Chi and Rho, superimposed on each other.

A juvenile court judge, seeking to provide troubled youth with a common code of conduct, was the original impetus behind the project. The Fraternal Order of Eagles, a service organization "dedicated to promoting liberty, truth, and justice," financed the monument, and although it stands on public property, the city contributes no time, effort, or money to its maintenance. 235 F. 3d 292, 294–295 (CA7 2000). In a recent resolution, responding to a request that the monument be removed and to threat of litigation, the Elkhart Common Council recognized that the Ten Commandments "'reflec[t] one of the earliest codes of human conduct.'" *Id.*, at 297. The resolution stated that the monument's symbols represent the "'cross cultural and historical significance'" of the Commandments, which have had a "'significant impact on the development of the fundamental legal principles of Western Civilization.'" *Id.*, at 312, n. 1 (opinion concurring in part and dissenting in part). It also noted that Elkhart's Municipal Building is home to numerous other historical and cultural objects. *Ibid.*

Nonetheless, in 1998, 40 years after the monument's erection, respondents, residents of Elkhart County, filed suit against the city under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that the monument's presence violated the Establishment Clause. The District Court granted summary judgment for the city, and a divided panel of the Court of Appeals for the Seventh Circuit reversed.

That court, applying the oft-criticized framework set out in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), first considered whether the city's display of the monument had a secular purpose. The court found that it did not. 235 F. 3d, at 301 (citing *Lemon*, *supra*, at 612–613). The court relied in part on *Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam)*, where we struck

down a state statute requiring the posting of the Ten Commandments in public schoolrooms, on the ground that the statute had no secular purpose. *Stone*'s finding of an impermissible purpose is hardly controlling here. In *Stone*, the posting effectively induced schoolchildren to meditate upon the Commandments during the schoolday. *Id.*, at 42. We have been "particularly vigilant" in monitoring compliance with the Establishment Clause in that context, where the State exerts "great authority and coercive power" over students through mandatory attendance requirements. *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584 (1987); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 620, n. 69 (1989). Those concerns are absent here, where the Ten Commandments monument stands outside the city's Municipal Building.

Stone's unique setting may explain our reluctance to accept in that case the State's view that its display of the Commandments had a secular purpose. But we have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application. To be sure, the Ten Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, "the religious duties of believers." 449 U. S., at 41–42. Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes. Even *Stone* noted that "integrated into the school curriculum" the Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics." *Id.*, at 42. And as the Court of Appeals recognized, "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." 235 F. 3d, at 302.

The council's resolution stated the city's intent to display the Commandments in precisely that way—to reflect their cultural, historical, and legal significance. We are "normally deferential" to "articulation[s] of a secular purpose," so long as they are "sincere and not a sham." *Aguillard*, *supra*, at 586–587. There is no evidence of insincerity here, and thus no justification for the Court of Appeals' refusal to credit the city's stated purpose. That the city only recently articulated its aims for displaying the monument is of no moment, for it is only recently in its

40-year history that the monument has come under attack. That the monument bears religious symbols as well as secular ones, and that speeches by religious leaders accompanied its dedication, do not alter the analysis. Even assuming that these aspects of the monument's appearance and history indicate that it has some religious meaning, the city is not bound to display only symbols that are wholly secular, or to convey solely secular messages. In determining whether a secular purpose exists, we have simply required that the displays not be "motivated wholly by religious considerations." *Lynch* v. *Donnelly*, 465 U. S. 668, 680 (1984). The fact that the monument conveys some religious meaning does not cast doubt on the city's valid secular purposes for its display.

Turning to the second prong of *Lemon*, the Court of Appeals concluded that "[e]ven if we were to ignore the primary purpose behind displaying the Ten Commandments monument, we would have to conclude that this particular display has the primary or principal effect of advancing religion." 235 F. 3d, at 304 (citing *Allegheny*, *supra*, at 592). In *Allegheny*, and in *Lynch*, we recognized the importance of context in evaluating whether displays of symbols with religious meaning send an "unmistakable message" of government support for, or endorsement of, religion. *Allegheny*, *supra*, at 598–600; *Lynch*, *supra*, at 680.

Considering the Ten Commandments monument in the context in which it appears, it sends no such message. The city has displayed the monument outside the Municipal Building, which houses the local courts and local prosecutor's office. This location emphasizes the foundational role of the Ten Commandments in secular, legal matters. Indeed, a carving of Moses holding the Ten Commandments, surrounded by representations of other historical legal figures, adorns the frieze on the south wall of our courtroom, and we have said that the carving "signals respect not for great proselytizers but for great lawgivers." *Allegheny*, *supra*, at 652–653 (STEVENS, J., concurring in part and dissenting in part). Similarly, the Ten Commandments monument and the surrounding structures convey that the monument is part of the city's celebration of its cultural and historical roots, not a promotion of religious faith. To that end, the monument shares the lawn outside the Municipal Building with the Revolutionary War Monument, which honors the Revolutionary War soldiers buried in Elkhart County, and a structure called

the "Freedom Monument." 235 F. 3d, at 296. Above the entrance to the building is a bas-relief of an Elk's head, and the words "DEDICATUM JUSTITIAM." *Id.*, at 295. Considered in that setting, the monument does not express the city's preference for particular religions or religious belief in general. It simply reflects the Ten Commandments' role in the development of our legal system, just as the war memorial and Freedom Monument reflect the history and culture of the city of Elkhart. Perhaps that is why, for four decades, no person has challenged the monument as an unconstitutional endorsement of religion.

I would grant certiorari to decide whether a monument which has stood for more than 40 years, and has at least as much civic significance as it does religious, must be physically removed from its place in front of the city's Municipal Building.

No. 00–1511. PERNA *v.* ARCO MARINE, INC. C. A. 3d Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. Reported below: 254 F. 3d 1078.

No. 00–1584. SEABOLD, WARDEN *v.* VINCENT. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 226 F. 3d 681.

Rehearing Denied

No. 00–1508. IN RE VEY, *ante*, p. 993;

No. 00–7216. WOODEN *v.* UNITED STATES, 531 U. S. 1099;

No. 00–7611. FINK *v.* CALIFORNIA ET AL., 531 U. S. 1171;

No. 00–7920. SPENCER *v.* ROBINSON, WARDEN, *ante*, p. 928;

No. 00–8266. FAIN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 911;

No. 00–8279. GANEY *v.* CHESTER, SUPERINTENDENT, CRAVEN CORRECTIONAL INSTITUTION, ET AL., 531 U. S. 1202;

No. 00–8377. DE MEDEIROS *v.* LEWIS, WARDEN, *ante*, p. 962;

No. 00–8416. GANDY *v.* TEXAS, *ante*, p. 976;

No. 00–8580. POGUE *v.* RATELLE, WARDEN, *ante*, p. 964; and

No. 00–8850. DEVEAUX *v.* SCHRIVER, SUPERINTENDENT, WALLKILL CORRECTIONAL FACILITY, *ante*, p. 984. Petitions for rehearing denied.

No. 98–9705. AVILES ET AL. *v.* UNITED STATES, 528 U. S. 848. Motion of Miguel Angel Barrenechea for leave to file petition for rehearing denied.

JUNE 4, 2001

Certiorari Granted—Vacated and Remanded

No. 00–434. OLINGER *v.* UNITED STATES GOLF ASSN. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *PGA TOUR, Inc.* v. *Martin, ante,* p. 661. Reported below: 205 F. 3d 1001.

No. 00–7917. SMITH *v.* WASHINGTON ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Becker* v. *Montgomery, ante,* p. 757.

Miscellaneous Orders

No. 00M94. BRIDGES *v.* BELL, CHIEF JUDGE, COURT OF APPEALS OF MARYLAND, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 00–8429. SHABAZZ *v.* KEATING, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 969] denied.

No. 00–8727. MCCARVER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, *ante,* p. 941.] Motion of respondent to supplement the record granted.

No. 00–8900. NICHOLS *v.* UNITED STATES, *ante,* p. 985. The Acting Solicitor General is invited to file a response to the petition for rehearing within 30 days.

No. 00–9852. IN RE JACKSON;
No. 00–9853. IN RE TERRAZAS;
No. 00–9915. IN RE GREENE;
No. 00–9919. IN RE GEE; and
No. 00–9947. IN RE MOORE. Petitions for writs of habeas corpus denied.

No. 00–9921. IN RE HAWKINS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 00–9622. IN RE OSER. Petition for writ of mandamus denied.

Certiorari Granted

No. 00–853. PORTER ET AL. *v.* NUSSLE. C. A. 2d Cir. Certiorari granted. Reported below: 224 F. 3d 95.

No. 00–1514. RAYGOR ET AL. *v.* REGENTS OF THE UNIVERSITY OF MINNESOTA ET AL. Sup. Ct. Minn. Certiorari granted. Reported below: 620 N. W. 2d 680.

No. 00–1519. UNITED STATES *v.* ARVIZU. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 232 F. 3d 1241.

Certiorari Denied

No. 99–1918. MASSEY ET AL. *v.* HELMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 196 F. 3d 727.

No. 00–75. WADE ET AL. *v.* COUGHLIN, DIRECTOR, MARYLAND DEVELOPMENTAL DISABILITIES ADMINISTRATION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 215 F. 3d 1323.

No. 00–360. UNITED STATES *v.* CYPRUS AMAX COAL CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 205 F. 3d 1369.

No. 00–484. HARRIS ET AL. *v.* GARNER, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 216 F. 3d 970.

No. 00–509. ARONS ET AL. *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 756 A. 2d 867.

No. 00–1241. LEWIS ET AL. *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 217 F. 3d 726.

No. 00–1242. UTILITY SOLID WASTE ACTIVITIES GROUP ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 220 F. 3d 683.

No. 00–1256. REYES-HERNANDEZ *v.* UNITED STATES;
No. 00–8464. MOJICA-BAEZ *v.* UNITED STATES; and

No. 00–8634. RAMOS-CARTAGENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 229 F. 3d 292.

No. 00–1376. COLLINS ET AL. *v.* MAC-MILLAN BLOEDEL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 233 F. 3d 809.

No. 00–1413. YSLETA DEL SUR PUEBLO ET AL. *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 237 F. 3d 631.

No. 00–1510. DUNCAN *v.* DELTA AIR LINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 637.

No. 00–1517. MORIARTY *v.* SVEC. C. A. 7th Cir. Certiorari denied. Reported below: 233 F. 3d 955.

No. 00–1520. MCKENZIE *v.* SETA CORP. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 413.

No. 00–1521. MCANDREW *v.* PENNSYLVANIA STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT). Commw. Ct. Pa. Certiorari denied. Reported below: 736 A. 2d 26.

No. 00–1522. SCOTT *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 00–1524. DAVIS, NEXT FRIEND OF DOE, ET AL. *v.* DEKALB COUNTY SCHOOL DISTRICT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 1367.

No. 00–1535. AMERICAN MEDICAL SECURITY, INC. *v.* AAA MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 743.

No. 00–1546. RODRIGUEZ ARBELAEZ ET AL. *v.* NEWCOMB, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 1 Fed. Appx. 1.

No. 00–1547. HUERTAS LABOY ET AL. *v.* PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied.

No. 00–1550. BIBBS ET AL. *v.* CITY OF LUBBOCK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1074.

No. 00–1576. CRUME, PERSONAL REPRESENTATIVE OF THE ESTATE OF HURLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 370.

No. 00–1591. RIDDLE *v.* LIZ CLAIBORNE ET AL. C. A. 2d Cir. Certiorari denied.

No. 00–1602. SCOTT *v.* STOUT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1151.

No. 00–1612. CARMELO TORRE *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 00–1633. CRAIN ET AL. *v.* UNAUTHORIZED PRACTICE OF LAW COMMITTEE FOR THE SUPREME COURT OF TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 11 S. W. 3d 328.

No. 00–1645. ROSENBLATT, AS APPLICANT FOR AVW, INC., DBA ADULT VIDEO MEGAPLEXXX *v.* CITY OF HOUSTON. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 31 S. W. 3d 399.

No. 00–1646. MACELVAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1185.

No. 00–1647. DAHMER ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–5263. NICHOLAS, BY HIS PARENTS, NICHOLAS ET UX., ET AL. *v.* TAYLOR COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 213 F. 3d 632.

No. 00–6212. WELLS *v.* TOWNSEND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 215 F. 3d 1323.

No. 00–6381. WILSON *v.* JAMROG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1343.

No. 00–7100. MCCLAIN *v.* HORN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 229 F. 3d 1138.

No. 00–7967. MONTOYA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 226 F. 3d 399.

No. 00–8374. HOUSTON *v.* SWANAGIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 229 F. 3d 1152.

No. 00–8381. HOLMES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 728 N. E. 2d 164.

No. 00–8641. SOLTERO *v.* INGLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–8655. WHEELER *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 226 F. 3d 656.

No. 00–8707. VASTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–8710. TUCKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 00–8739. PAGE *v.* SCHOMIG, WARDEN. Sup. Ct. Ill. Certiorari denied. Reported below: 193 Ill. 2d 120, 737 N. E. 2d 264.

No. 00–8770. CHILDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 760 A. 2d 614.

No. 00–8783. MONTGOMERY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 192 Ill. 2d 642, 736 N. E. 2d 1025.

No. 00–8829. TIFFANY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–8987. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 33 S. W. 3d 828.

No. 00–9099. FORD *v.* HEAD, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 00–9177. HUNTER *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 674.

No. 00–9178. HERNANDEZ *v.* PIERSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1158.

No. 00–9179. FUHR *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–9181. HALL *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 00–9183. HOLLEMAN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 00–9184. MAY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 139 N. C. App. 835, 538 S. E. 2d 244.

No. 00–9192. SLEDGE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 245 Ga. App. 488, 537 S. E. 2d 753.

No. 00–9196. WILLIAMS *v.* BOOKER, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–9197. WASH *v.* GILLESS, SHERIFF, SHELBY COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 00–9201. KEARNEY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9202. JOHNSON *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 00–9211. FRYER *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9212. FARRIS *v.* POPPELL, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 221 F. 3d 1351.

No. 00–9217. FULLER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9220. FOWLER *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9225. FRYER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9230. KASSEBAUM *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 95 N. Y. 2d 611, 744 N. E. 2d 694.

No. 00–9232. JAMES *v.* SMALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9235. JONES *v.* MCDOWELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1268.

No. 00–9237. LI AH *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 645.

No. 00–9242. BRIGHT *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 00–9244. BRIGHT *v.* WALTER, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied.

No. 00–9246. PENDLETON *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9247. MOBLEY *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 00–9249. SMITH *v.* SHOOK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 1322.

No. 00–9253. MONTGOMERY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 00–9258. ZHANG *v.* NEW YORK UNIVERSITY ET AL.; and No. 00–9259. ZHANG *v.* NEW YORK CITY COMMISSION ON HUMAN RIGHTS ET AL. C. A. 2d Cir. Certiorari denied.

No. 00–9261. MITCHELL *v.* ANDERSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 00–9264. LUA *v.* ALBRITTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 429.

No. 00–9265. PORTER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9272. LOMAX *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 422.

No. 00–9275. WHEAT *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 238 F. 3d 357.

No. 00–9276. WALLS *v.* BARGERY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 426.

No. 00–9277. TERRY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9312. VARONA *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9324. STILL *v.* BOONE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 244 F. 3d 140.

No. 00–9328. BEGAY *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9364. CALHOUN *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9379. BULLOCK *v.* TORPEY. Super. Ct. Pa. Certiorari denied. Reported below: 766 A. 2d 883.

No. 00–9387. BOWMAN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 760 So. 2d 1053.

No. 00–9395. SANCHEZ *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9439. RIVAS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9444. PADILLA *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 250.

No. 00–9461. SCOTT *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. C. A. 6th Cir. Certiorari denied.

No. 00–9467. RODRIGUEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 682.

No. 00–9486. DANIELS *v.* DEES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9493. HARRIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 353 N. C. 388, 546 S. E. 2d 611.

No. 00–9497. HADLEY *v.* RYAN, GOVERNOR OF ILLINOIS, ET AL. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 00–9501. BRODER *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1147.

No. 00–9510. FITTS *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9530. FULLER *v.* DILLON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 236 F. 3d 876.

No. 00–9577. BALDWIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–9587. GRAVES *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 421.

No. 00–9590. ADAMSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–9600. CAUSOR-SERRATO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 234 F. 3d 384.

No. 00–9609. BUSTILLO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 00–9610. BURKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 237 F. 3d 741.

No. 00–9623. JACOB *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 391.

No. 00–9630. WEEKS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9634. GARROTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 238 F. 3d 903.

No. 00–9637. POWELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 543.

No. 00–9640. DADI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 945.

No. 00–9641. CHARLESWORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 612.

No. 00–9643. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 445.

No. 00–9648. POTTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–9651. COOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 676.

No. 00–9658. RAINES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 243 F. 3d 419.

No. 00–9663. LATHON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 317 Ill. App. 3d 573, 740 N. E. 2d 377.

No. 00–9665. MELI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9667. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 238 F. 3d 871.

No. 00–9670. REYES-LUGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 238 F. 3d 305.

No. 00–9671. RAMOS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 318 Ill. App. 3d 181, 742 N. E. 2d 763.

No. 00–9674. MORALES-ESCOBEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1174.

No. 00–9684. LUNA-ALMARAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9688. QUINONES-MONDRAGON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9689. LOCASCIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 710.

No. 00–9692. PINA-CLIVILLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9694. ENCARNACION *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 239 F. 3d 395.

No. 00–9695. DUENAS-OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9696. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9700. CHAPMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–9701. MARTINEZ CAMPOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9705. HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 245 F. 3d 793.

No. 00–9709. HOULE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 237 F. 3d 71.

No. 00–9715. MELHEM *v.* PINCHAK, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–9716. FORBES, AKA GASKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9721. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 259.

No. 00–9724. WELLBAUM *v.* OHIO. Ct. App. Ohio, Champaign County. Certiorari denied.

No. 00–9725. VIRAMONTES-URGUIDI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9727. SAMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1175.

No. 00–9732. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 537.

No. 00–9735. MORENO-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9737. ANTONIO CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9739. NAGY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9740. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9750. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1182.

No. 00–9751. LAMBROS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 375.

No. 00–9752. THEOLOGIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1184.

No. 00–9753. VALLE-TOVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9760. DEUCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 683.

No. 00–9766. TUTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 740.

No. 00–9768. MORA-HINOJOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9771. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–9774. TOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 178 F. 3d 1302.

No. 00–9777. SAUNDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1079.

No. 00–9877. TAYLOR *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–1322. WOODFORD, WARDEN *v.* MORRIS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 229 F. 3d 775.

No. 00–1379. NGC SETTLEMENT TRUST ET AL. *v.* NATIONAL GYPSUM CO. C. A. 5th Cir. Motion of Legal Representative For Unknown Asbestos Disease Claimants et al. for leave to file a

brief as *amici curiae* granted. Certiorari denied. Reported below: 219 F. 3d 478.

No. 00–1589. SIENKIEWICZ *v.* HART ET AL. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 99–1864. EASLEY, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL., *ante*, p. 234;

No. 99–1865. SMALLWOOD ET AL. *v.* CROMARTIE ET AL., *ante*, p. 234;

No. 00–7280. MURPHY *v.* DUCKWORTH, WARDEN, *ante*, p. 944;

No. 00–7856. PHIPPS *v.* WASHINGTON, *ante*, p. 926;

No. 00–8547. LOPEZ-REVI *v.* UNITED STATES, *ante*, p. 950;

No. 00–8563. COLEMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 979;

No. 00–8653. SMITH *v.* WASHINGTON, *ante*, p. 981; and

No. 00–8796. MCCALL *v.* UNITED STATES, *ante*, p. 982. Petitions for rehearing denied.

No. 00–8633. MCSHEFFREY *v.* UNITED STATES, *ante*, p. 952. Motion for leave to file petition for rehearing denied.

JUNE 10, 2001

Miscellaneous Order

No. 00A1081. MINERD *v.* UNITED STATES. Application for stay of the writ of mandamus issued by the United States Court of Appeals for the Third Circuit, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 23, 2001, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1078. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, and 529 U. S. 1147.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2001

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2001

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022.

[See *infra*, pp. 1081–1084.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2001, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, schedules and statements; time limits.

. . . . .

(*m*) *Infants and incompetent persons.*—If the debtor knows that a person on the list of creditors or schedules is an infant or incompetent person, the debtor also shall include the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

. . . . .

(*c*) *Content of notice.*

. . . . .

(*3*) *Notice of hearing on confirmation when plan provides for an injunction.*—If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) shall:

(A) include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;

(B) describe briefly the nature of the injunction; and

(C) identify the entities that would be subject to the injunction.

. . . . .

(*g*) *Addressing notices.*

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent

has directed in its last request filed in the particular case. For the purposes of this subdivision—

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.

. . . . .

Rule 3016. Filing of plan and disclosure statement in a Chapter 9 municipality or Chapter 11 reorganization case.

. . . . .

(*c*) *Injunction under a plan.*—If a plan provides for an injunction against conduct not otherwise enjoined under the

Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction.

Rule 3017. Court consideration of disclosure statement in a Chapter 9 municipality or Chapter 11 reorganization case.

. . . . .

(*f*) *Notice and transmission of documents to entities subject to an injunction under a plan.*—If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

(1) at least 25 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and

(2) to the extent feasible, a copy of the plan and disclosure statement.

Rule 3020. Deposit; confirmation of plan in a Chapter 9 municipality or Chapter 11 reorganization case.

. . . . .

(*c*) *Order of confirmation.*

(1) The order of confirmation shall conform to the appropriate Official Form. If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.

(2) Notice of entry of the order of confirmation shall be mailed promptly to the debtor, the trustee, creditors, equity security holders, other parties in interest, and, if known, to any identified entity subject to an injunction

provided for in the plan against conduct not otherwise enjoined under the Code.

(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

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Rule 9006. Time.

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(*f*) *Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P.*—When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

. . . . .

Rule 9020. Contempt proceedings.

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.

Rule 9022. Notice of judgment or order.

(*a*) *Judgment or order of bankruptcy judge.*—Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) F. R. Civ. P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 23, 2001, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1086. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, and 529 U. S. 1155.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2001

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

The Supreme Court also approved the abrogation of the Rules for Practice and Procedure under section 25 of an Act to Amend and Consolidate the Acts Respecting Copyright promulgated by the Court on June 1, 1909.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2001

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 5, 6, 65, 77, 81, and 82.

[See *infra*, pp. 1089–1091.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2001, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

4. That the Rules for Practice and Procedure under section 25 of An Act To Amend and Consolidate the Acts Respecting Copyright, approved March 4, 1909, promulgated by this Court on June 1, 1909, effective July 1, 1909, as revised, be, and they hereby are, abrogated, effective December 1, 2001.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Service and filing of pleadings and other papers.

. . . . . .

(*b*) *Making service.*

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that

the attempted service did not reach the person to be served.

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Rule 6. Time.

. . . . .

(*e*) *Additional time after service under Rule 5(b)(2)(B), (C), or (D).*—Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Rule 65. Injunctions.

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(*f*) *Copyright impoundment.*—This rule applies to copyright impoundment proceedings.

Rule 77. District courts and clerks.

. . . . .

(*d*) *Notice of orders or judgments.*—Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 81. Applicability in general.

(*a*) *Proceedings to which the Rules apply.*

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U. S. C., §§ 7651–7681. They do apply to proceedings in bankruptcy to the

extent provided by the Federal Rules of Bankruptcy Procedure.

. . . . .

Rule 82. Jurisdiction and venue unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U. S. C., §§ 1391–1392.

INDEX

ADMINISTRATIVE REMEDY EXHAUSTION. See **Prisoners.**

ADMIRALTY.

Wrongful death—Negligent breach of maritime duty of care.—General maritime cause of action recognized in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 409, for death caused by violation of maritime duties is available for negligent breach of a maritime duty of care. Norfolk Shipbuilding & Drydock Corp. v. Garris, p. 811.

AMERICANS WITH DISABILITIES ACT OF 1990. See also **Attorney's Fees.**

Access to golf tour—Golf cart usage.—Title III of ADA prohibits petitioner from denying golfer Casey Martin equal access to its golf tours based on a disability preventing him from walking a golf course; allowing Martin to use a golf cart, despite petitioner's walking requirement, is not a modification that would "fundamentally alter the nature" of petitioner's tours. PGA TOUR, Inc. v. Martin, p. 661.

APPEALS.

Federal courts—Failure to sign notice—Dismissal.—A party's failure to sign a notice of appeal that is timely filed in federal district court does not require a court of appeals to dismiss appeal. Becker v. Montgomery, p. 757.

ARBITRATION. See also **Federal Arbitration Act.**

1. *Judicial review of labor-arbitration decision—Rejection of factual findings.*—Ninth Circuit committed reversible error when it rejected an arbitrator's factual findings and then resolved merits of parties' labor dispute instead of remanding case for further arbitration proceedings. Major League Baseball Players Assn. v. Garvey, p. 504.

2. *Tribal sovereign immunity—Enforcement of arbitral awards.*—Under an agreement it proposed and signed, respondent Tribe clearly consented to arbitration and to enforcement of arbitral awards in Oklahoma state court; Tribe thereby waived its sovereign immunity from petitioner contractor's state-court suit to enforce its arbitration award. C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., p. 411.

ARKANSAS. See **Constitutional Law,** VIII, 1.

ARRESTS WITHOUT WARRANTS. See **Constitutional Law,** VIII, 3.

ASSERTION OF INNOCENCE. See **Constitutional Law,** VI, 2.

ATTORNEY'S FEES.

Catalyst theory—Prevailing party.—"Catalyst theory," which posits that a plaintiff is a prevailing party if it achieves desired result because lawsuit brought about a voluntary change in defendant's conduct, is not a permissible basis for award of attorney's fees under Fair Housing Amendments Act of 1988 and Americans with Disabilities Act of 1990. Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, p. 598.

AUTOMOBILE SEARCHES. See **Constitutional Law,** VIII, 1.

BACK WAGES. See **Taxes,** 2.

BASEBALL. See **Arbitration,** 1.

BENEFICIARY DESIGNATION REVOCATION. See **Employee Retirement Income Security Act of 1974.**

BOUNDARIES.

New Hampshire-Maine boundary—Estoppel.—Because New Hampshire, in an earlier proceeding fixing its boundary with Maine, agreed that phrase "Middle of the River" in a 1740 decree means middle of Piscataqua River's main navigation channel, New Hampshire is estopped from asserting now that boundary runs along Maine shore. New Hampshire v. Maine, p. 742.

BREACH OF CONTRACT. See **Constitutional Law,** III, 3.

CALIFORNIA. See **Constitutional Law,** III, 3.

CANNABIS. See **Controlled Substances Act.**

CAPITAL MURDER. See **Constitutional Law,** II; III, 1; VI, 1.

CAR SEARCHES. See **Constitutional Law,** VIII, 1.

CATALYST THEORY. See **Attorney's Fees.**

CELLULAR TELEPHONES. See **Constitutional Law,** V, 1.

CERTIORARI. See **Jurisdiction.**

CIVIL RIGHTS ACT OF 1964. See also **Civil Rights Act of 1991.**

1. *Title VI—Disparate-impact regulations—Private right of action.*—There is no private right of action to enforce disparate-impact regulations promulgated under Title VI. Alexander v. Sandoval, p. 275.

CIVIL RIGHTS ACT OF 1964—Continued.

2. *Title VII—Retaliation for engaging in protected activities.*—Petitioner was entitled to summary judgment on respondent's claims that petitioner violated Title VII when it took adverse employment actions against her in response to protected activities in which she had engaged. Clark County School Dist. v. Breeden, p. 268.

CIVIL RIGHTS ACT OF 1991.

Front pay—Compensatory damages cap.—Front pay, a remedy authorized under Title VII of Civil Rights Act of 1964, is not an element of compensatory damages under Civil Rights Act of 1991 and thus is not subject to damages cap imposed by 42 U. S. C. § 1981a(b)(3). Pollard v. E. I. du Pont de Nemours & Co., p. 843.

COMPENSATION CLAUSE. See **Constitutional Law,** I.

COMPENSATORY DAMAGES CAP. See **Civil Rights Act of 1991.**

COMPULSORY SELF-INCRIMINATION. See **Constitutional Law,** VI.

CONGRESSIONAL REDISTRICTING. See **Constitutional Law,** IV.

CONSOLIDATED FEDERAL INCOME TAX RETURNS. See **Taxes,** 1.

CONSTITUTIONAL LAW. See also **Punitive Damages.**

I. Compensation Clause.

Federal judges' salaries—Withholding taxes.—Compensation Clause prevents Government from collecting Social Security, but not Medicare, taxes from federal judges who held office before Congress extended those taxes to federal employees; violation was not cured by a 1984 pay increase for federal judges. United States v. Hatter, p. 557.

II. Cruel and Unusual Punishment.

Death penalty—Jury instructions on mitigating evidence.—Jury instructions at Penry's resentencing for capital murder did not comply with Court's mandate in *Penry* v. *Lynaugh*, 492 U. S. 302. Penry v. Johnson, p. 782.

III. Due Process.

1. *Death penalty—Jury instructions.*—South Carolina Supreme Court incorrectly interpreted *Simmons* v. *South Carolina*, 512 U. S. 154—where this Court held that due process requires that a jury be informed of a capital defendant's parole ineligibility where such defendant's future dangerousness is at issue and only sentencing alternative to death is life imprisonment without parole—when it declared that case inapplicable to

CONSTITUTIONAL LAW—Continued.

South Carolina's current capital sentencing scheme. Shafer v. South Carolina, p. 36.

2. *Retroactive application of judicial decision—"Year and a day" rule.*—Tennessee Supreme Court's retroactive application to petitioner of its decision abolishing common-law "year and a day" rule—which provided that no defendant could be convicted of murder unless his victim died by defendant's act within a year and a day of such act—did not deny petitioner due process. Rogers v. Tennessee, p. 451.

3. *State labor law—Payments on public works project.*—Because California law affords respondent public works project subcontractor sufficient opportunity to pursue its claim for payment in state court, statutory scheme does not deprive respondent of due process when it authorizes State to order withholding of such payments from contractor if a subcontractor fails to comply with certain Labor Code requirements; permits contractor, in turn, to withhold similar sums from subcontractor; and permits contractor, or his assignee, to sue awarding body for alleged breach of contract. Lujan v. G & G Fire Sprinklers, Inc., p. 189.

IV. Equal Protection of the Laws.

Redistricting plan.—District Court's conclusion that North Carolina violated Equal Protection Clause by using race as predominant factor in drawing its 12th Congressional District's boundaries is based on clearly erroneous findings. Easley v. Cromartie, p. 234.

V. Freedom of Speech.

1. *Illegally intercepted communication—Disclosure of contents.*—Respondent news media's disclosure of contents of an illegally intercepted cell phone conversation about a public issue is protected by First Amendment. Bartnicki v. Vopper, p. 514.

2. *Inmate communication—Right to provide legal assistance to fellow inmates.*—Inmates do not have such a special First Amendment right that enhances protections otherwise available under *Turner* v. *Safley*, 482 U. S. 78, in which this Court held that restrictions on prisoners' communications to other inmates are constitutional if restrictions are reasonably related to legitimate penological interests. Shaw v. Murphy, p. 223.

VI. Privilege Against Self-Incrimination.

1. *Admission of psychiatric evidence—Uncounseled interview.*—Admission into evidence at Penry's capital sentencing hearing of statements from a psychiatric report based on an uncounseled interview with Penry did not run afoul of Fifth Amendment's privilege against self-incrimination. Penry v. Johnson, p. 782.

CONSTITUTIONAL LAW—Continued.

2. *Effect of innocence assertion.*—Ohio Supreme Court erred in holding that assertion of innocence deprived a witness of her Fifth Amendment privilege against self-incrimination. Ohio v. Reiner, p. 17.

VII. Right to Counsel.

Attachment of right—Factually related charges.—Because Sixth Amendment right to counsel is "offense specific," it does not necessarily extend to crimes that are "factually related" to those actually charged. Texas v. Cobb, p. 162.

VIII. Searches and Seizures.

1. *Inventory search incident to arrest—Officer's subjective motivation.*—Arkansas Supreme Court's ruling—that evidence obtained during an inventory search of respondent's car incident to respondent's arrest should be suppressed because police officer had an improper subjective motivation for stop—cannot be squared with holding in *Whren* v. *United States*, 517 U. S. 806, that subjective intentions play no role in Fourth Amendment analysis. Arkansas v. Sullivan, p. 769.

2. *State hospital—Maternity patients—Diagnostic tests as evidence for law enforcement purposes.*—A state hospital's performance of drug tests to obtain evidence of maternity patients' cocaine use for law enforcement purposes is an unreasonable search if patients have not consented to procedure; interest in using threat of criminal sanctions to deter such use cannot justify a departure from general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant. Ferguson v. Charleston, p. 67.

3. *Warrantless arrest—Minor criminal offense.*—Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. Atwater v. Lago Vista, p. 318.

CONTROLLED SUBSTANCES ACT.

Marijuana—Medical necessity exception.—There is no medical necessity exception to Act's prohibitions on manufacturing and distributing marijuana. United States v. Oakland Cannabis Buyers' Cooperative, p. 483.

CORPORATIONS. See **Taxes,** 1.

COURTS OF APPEALS. See **Appeals; Arbitration,** 1; **Punitive Damages; United States Sentencing Commission Guidelines.**

CRIMINAL LAW. See **Constitutional Law,** II; III, 1, 2; VI–VIII; **Habeas Corpus; United States Sentencing Commission Guidelines.**

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** II.

DEATH PENALTY. See **Constitutional Law,** II; III, 1.

DEFERENTIAL REVIEW STANDARD. See **Punitive Damages; United States Sentencing Commission Guidelines.**

***DE NOVO* REVIEW STANDARD.** See **Punitive Damages; United States Sentencing Commission Guidelines.**

DISABILITIES. See **Americans with Disabilities Act of 1990.**

DISCLOSURE OF ILLEGALLY INTERCEPTED COMMUNICATION. See **Constitutional Law,** V, 1.

DISCLOSURE OF INTER- OR INTRA-AGENCY DOCUMENTS. See **Freedom of Information Act.**

DISCRIMINATION BASED ON RACE, COLOR, OR NATIONAL ORIGIN. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** IV.

DISCRIMINATION BASED ON SEX. See **Civil Rights Act of 1964,** 2.

DISMISSAL OF APPEALS. See **Appeals.**

DISPARATE IMPACT REGULATIONS. See **Civil Rights Act of 1964,** 1.

DISTRICT COURTS. See **Appeals.**

DIVORCE. See **Employee Retirement Income Security Act of 1974.**

DRUGS. See **Constitutional Law,** VIII, 2; **Controlled Substances Act.**

DUE PROCESS. See **Constitutional Law,** III; **Punitive Damages.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Pre-emption of state law—Revocation of beneficiary designation upon divorce.—Washington statute providing that designation of a spouse as beneficiary of a nonprobate asset is revoked automatically upon divorce is expressly pre-empted by ERISA to extent it applies to ERISA plans. Egelhoff v. Egelhoff, p. 141.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964,** 2; **Civil Rights Act of 1991; Federal Arbitration Act; Labor.**

EMPLOYMENT CONTRACTS. See **Federal Arbitration Act.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964,** 2; **Civil Rights Act of 1991.**

ENHANCEMENT OF SENTENCES. See **Habeas Corpus.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV.

ESTOPPEL. See **Boundaries.**

EXHAUSTION OF ADMINISTRATIVE REMEDIES. See **Prisoners.**

FAIR HOUSING AMENDMENTS ACT OF 1988. See **Attorney's Fees.**

FEDERAL ARBITRATION ACT.

Exemption from coverage—Employment contracts.—Section 1 of FAA—which excludes from that Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—exempts employment contracts of transportation workers, but not other employment contracts. Circuit City Stores v. Adams, p. 105.

FEDERAL COURTS. See **Appeals; Arbitration,** 1; **Punitive Damages; United States Sentencing Commission Guidelines.**

FEDERAL INSURANCE CONTRIBUTION ACT. See **Constitutional Law,** I; **Taxes,** 2.

FEDERAL JUDGES. See **Constitutional Law,** I.

FEDERAL RULES OF BANKRUPTCY PROCEDURE.

Amendments to Rules, p. 1077.

FEDERAL RULES OF CIVIL PROCEDURE.

Amendments to Rules, p. 1085.

FEDERAL-STATE RELATIONS. See **Employee Retirement Income Security Act of 1974; Habeas Corpus.**

FEDERAL TAXES. See **Constitutional Law,** I; **Taxes.**

FEDERAL UNEMPLOYMENT TAX ACT. See **Taxes,** 2.

FIFTH AMENDMENT. See **Constitutional Law,** VI.

FINAL JUDGMENTS. See **Jurisdiction.**

FIRST AMENDMENT. See **Constitutional Law,** V.

FOURTEENTH AMENDMENT. See **Constitutional Law,** III; IV; VIII.

FOURTH AMENDMENT. See **Constitutional Law,** VIII.

FREEDOM OF INFORMATION ACT.

Exemption for inter- or intra-agency memorandums or letters—Documents addressing tribal interests.—Documents passing between Indian Tribes and Interior Department addressing tribal interests subject to state and federal water-allocation proceedings are not exempt from disclosure as "inter-agency or intra-agency memorandums or letters" under FOIA Exemption 5. Department of Interior v. Klamath Water Users Protective Assn., p. 1.

FREEDOM OF SPEECH. See **Constitutional Law,** V.

FRONT PAY. See **Civil Rights Act of 1991.**

FUTURE DANGEROUSNESS. See **Constitutional Law,** III, 1.

GOLF. See **Americans with Disabilities Act of 1990.**

HABEAS CORPUS.

1. *Sentence enhancements—Validity of prior convictions.*—Petitioner, having failed to pursue available remedies to challenge his prior state convictions while in custody on those convictions, may not now use a 28 U. S. C. § 2255 motion to vacate, set aside, or correct a federal sentence enhanced by those convictions to collaterally attack convictions. Daniels v. United States, p. 374.

2. *Sentence enhancements—Validity of prior convictions.*—Title 28 U. S. C. § 2254 does not provide a remedy when a state prisoner challenges a current sentence on ground that it was enhanced based on an allegedly unconstitutional prior conviction for which petitioner is no longer in custody. Lackawanna County District Attorney v. Coss, p. 394.

HIGHWAY SIGNS. See **Trademark Act of 1946.**

HOSPITAL PROCEDURES. See **Constitutional Law,** VIII, 2.

HOTEL OCCUPANCY TAXES. See **Taxes,** 3.

IMMUNITY FROM SUIT. See **Arbitration,** 2.

INCOME TAXES. See **Taxes,** 1.

INDEPENDENT JUDGMENT. See **Labor.**

INDIANS. See **Arbitration,** 2; **Taxes,** 3; **Freedom of Information Act.**

INMATES' RIGHT TO PROVIDE LEGAL ASSISTANCE TO FELLOW PRISONERS. See **Constitutional Law,** V, 2.

INNOCENCE ASSERTION. See **Constitutional Law,** VI, 2.

INTERCEPTION OF COMMUNICATION. See **Constitutional Law,** V, 1.

INVENTORY SEARCHES. See **Constitutional Law,** VIII, 1.

JURISDICTION.

Supreme Court—Final judgment.—Because judgment below was not "[f]inal" within meaning of 28 U. S. C. § 1257(a), this Court lacks jurisdiction to decide question on which certiorari was granted. Florida v. Thomas, p. 774.

JURY INSTRUCTIONS. See **Constitutional Law,** II; III, 1.

LABOR. See also **Arbitration,** 1.

National Labor Relations Act—Supervisory status.—Burden of proving supervisory status in a representation hearing and unfair-labor-practice proceeding falls on respondent employer, which is party asserting supervisory status; NLRB's test for determining supervisory status is inconsistent with Act. NLRB v. Kentucky River Community Care, Inc., p. 706.

LANHAM ACT. See **Trademark Act of 1946.**

LEGAL ASSISTANCE TO PRISON INMATES. See **Constitutional Law,** V, 2.

MAINE. See **Boundaries.**

MARIJUANA. See **Controlled Substances Act.**

MARITIME DUTY OF CARE. See **Admiralty.**

MEDICAL NECESSITY. See **Controlled Substances Act.**

MEDICARE. See **Constitutional Law,** I; **Taxes,** 2.

MITIGATING EVIDENCE. See **Constitutional Law,** II.

MURDER. See **Constitutional Law,** II; III, 1, 2; VI, 1.

NATIONAL LABOR RELATIONS ACT. See **Labor.**

NATIONAL ORIGIN DISCRIMINATION. See **Civil Rights Act of 1964,** 1.

NEW HAMPSHIRE. See **Boundaries.**

NORTH CAROLINA. See **Constitutional Law,** IV.

NOTICES OF APPEAL. See **Appeals.**

OHIO. See **Constitutional Law,** VI, 2.

OKLAHOMA. See **Arbitration,** 2.

PAROLE ELIGIBILITY. See **Constitutional Law,** III, 1.

PENOLOGICAL INTERESTS. See **Constitutional Law,** V, 2.

POLICE OFFICERS' SUBJECTIVE MOTIVATION. See **Constitutional Law,** VIII, 1.

PRE-EMPTION. See **Employee Retirement Income Security Act of 1974.**

PREVAILING PARTIES. See **Attorney's Fees.**

PRISONERS. See also **Constitutional Law,** V, 2.

Exhaustion of administrative remedies—Money damages.—Under 42 U. S. C. § 1997e(a), as amended by Prison Litigation Reform Act of 1995, an inmate seeking only money damages must complete any prison administrative process capable of addressing inmate's complaint and providing some form of relief, even if process does not make specific provision for monetary relief. Booth v. Churner, p. 731.

PRISON LITIGATION REFORM ACT OF 1995. See **Prisoners.**

PRIVATE RIGHT OF ACTION. See **Civil Rights Act of 1964,** 1.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** VI.

PRODUCT LOSS LIABILITY. See **Taxes,** 1.

PROFESSIONAL JUDGMENT. See **Labor.**

PUBLIC WORKS CONTRACTS. See **Constitutional Law,** III, 3.

PUNITIVE DAMAGES.

Courts of appeals—Standard of review.—Federal courts of appeals should apply a *de novo*, not abuse-of-discretion, standard when reviewing district-court determinations of constitutionality of punitive damages awards. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., p. 424.

RACE DISCRIMINATION. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** IV.

REDISTRICTING PLANS. See **Constitutional Law,** IV.

REPRESENTATION HEARINGS. See **Labor.**

RETROACTIVE APPLICATION OF LAWS. See **Constitutional Law,** III, 2.

REVOCATION OF BENEFICIARY DESIGNATION. See **Employee Retirement Income Security Act of 1974.**

RIGHT TO PROVIDE LEGAL ASSISTANCE TO FELLOW PRISON INMATES. See **Constitutional Law,** V, 2.

RIGHT TO REMAIN SILENT. See **Constitutional Law,** VI.

RIGHT TO VOTE. See **Constitutional Law,** IV.

ROAD SIGNS. See **Trademark Act of 1946.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VIII.

SEATBELT VIOLATIONS. See **Constitutional Law,** VIII, 3.

SECURITIES EXCHANGE ACT OF 1934.

Securities fraud—Stock option.—A company that sells a stock option while secretly intending never to honor that option violates § 10(b) of Act, which prohibits using "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security." Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., p. 588.

SELF-INCRIMINATION. See **Constitutional Law,** VI.

SENTENCING. See **Constitutional Law,** III, 1; **Habeas Corpus; United States Sentencing Commission Guidelines.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964,** 2.

SIGNS. See **Trademark Act of 1946.**

SIXTH AMENDMENT. See **Constitutional Law,** VII.

SOCIAL SECURITY. See **Constitutional Law,** I; **Taxes,** 2.

SOUTH CAROLINA. See **Constitutional Law,** III, 1.

SOVEREIGN IMMUNITY. See **Arbitration,** 2.

SPORTS. See **Americans with Disabilities Act of 1990.**

STATE BOUNDARIES. See **Boundaries.**

STOCK OPTIONS. See **Securities Exchange Act of 1934.**

SUBJECTIVE MOTIVATION OF POLICE OFFICERS. See **Constitutional Law,** VIII, 1.

SUPERVISORY STATUS. See **Labor.**

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** VIII, 1.

SUPREME COURT. See also **Jurisdiction.**

1. Amendments to Federal Rules of Bankruptcy Procedure, p. 1077.
2. Amendments to Federal Rules of Civil Procedure, p. 1085.

TAXES. See also **Constitutional Law,** I.

1. *Federal income tax—Affiliated corporations filing consolidated return—"Product liability loss."*—PLL of an affiliated group of corporations electing to file a consolidated federal income tax return must be figured on a consolidated, single-entity basis, not by aggregating PLLs separately determined company by company. United Dominion Industries, Inc. v. United States, p. 822.

2. *Federal Insurance Contribution Act—Federal Unemployment Tax Act—Back wages.*—Back wages are subject to FICA and FUTA taxes by reference to year wages are in fact paid. United States v. Cleveland Indians Baseball Co., p. 200.

3. *Tribal taxes—Nonmember activity.*—Navajo Nation's imposition of a hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation is invalid. Atkinson Trading Co. v. Shirley, p. 645.

TENNESSEE. See **Constitutional Law,** III, 2.

TEXAS. See **Constitutional Law,** II; VI, 1; VII.

TITLE VI. See **Civil Rights Act of 1964,** 1.

TITLE VII. See **Civil Rights Act of 1964,** 2; **Civil Rights Act of 1991.**

TRADEMARK ACT OF 1946.

Trade dress protection—Highway signs.—Because respondent MDI's dual-spring design mechanism for keeping road signs upright is a functional feature for which there is no trade dress protection, MDI's claim for such protection is barred. TrafFix Devices, Inc. v. Marketing Displays, Inc., p. 23.

TRANSPORTATION WORKERS. See **Federal Arbitration Act.**

TRIBAL SOVEREIGN IMMUNITY. See **Arbitration,** 2.

TRIBAL TAXES. See **Taxes,** 3.

UNFAIR-LABOR-PRACTICE PROCEEDINGS. See **Labor.**

UNITED STATES SENTENCING COMMISSION GUIDELINES.

Consolidation of prior convictions—Standard of review.—Deferential, not *de novo*, review is appropriate when an appeals court reviews a trial court's Sentencing Guideline determination as to whether an offender's prior convictions were consolidated for sentencing purposes. Buford v. United States, p. 59.

VALIDITY OF CONVICTIONS. See **Habeas Corpus.**

VOTING RIGHTS. See **Constitutional Law,** IV.

WARRANTLESS ARRESTS. See **Constitutional Law,** VIII, 3.

WASHINGTON. See **Employee Retirement Income Security Act of 1974.**

WATER ALLOCATION. See **Freedom of Information Act.**

WITHHOLDING TAXES. See **Constitutional Law,** I; **Taxes,** 2.

WORDS AND PHRASES.

1. *"Any manipulative or deceptive device or contrivance"* *"in connection with the purchase or sale of any security."* § 10(b), Securities Exchange Act of 1934, 15 U. S. C. § 78j(b). Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., p. 588.

2. *"Contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."* § 1, Federal Arbitration Act, 9 U. S. C. § 1. Circuit City Stores v. Adams, p. 105.

3. *"Fundamentally alter the nature of . . . accommodation."* Americans with Disabilities Act of 1990, 42 U. S. C. § 12182(b)(2)(A)(ii). PGA TOUR, Inc. v. Martin, p. 661.

4. *"Independent judgment."* § 2(11), National Labor Relations Act, 15 U. S. C. § 152(11). NLRB v. Kentucky River Community Care, Inc., p. 706.

WRONGFUL DEATH. See **Admiralty.**

"YEAR AND A DAY" RULE. See **Constitutional Law,** III, 2.